# PRIMARY CAREGIVING AND "MOTHERS WITH A DIFFERENCE": A FEMINIST ANALYSIS OF DEVELOPMENTS IN CUSTODY LAW

by

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A THESIS SUBMITTED IN PARTIAL FULFILMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming
to the required standard

UNIVERSITY OF BRITISH COLUMBIA

April, 1995

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Date April 25, 1995

DE-6 (2/88)

## ABSTRACT

The resolution of child custody disputes is a process fraught with controversy; this dissention has carried over into discussions regarding the perspectives to utilize when analyzing and resolving disputes. There is, however, virtually unanimous belief that the best interests of the child standard has failed to resolve the majority of issues raised in this context. One ground for this consensus is the lack of statutory guidance regarding the weight that should be accorded to the presence or absence of certain factors considered during custody disputes. Many feminist theorists suggest that this lack of guidance results in the operation of bias during the decision-making process. A central theme of this thesis is that societal expectations of a "good" mother operate within the custody realm. These expectations serve to disempower women whose lives are seen as deviating from the normative model.

This thesis reviews the historical background to the current best interests of the child standard. It is suggested that children, as well as their primary caregivers, will benefit from a custody standard which focuses on one essential aspect of continuity in a child's life, this being primary caregiving. Enactment of a strong primary caregiver presumption, with a clearly defined "unfitness" rebuttal, is the most effective way to address the concerns of indeterminacy and bias in the custody realm. With this presumption in place, judges, as well as those acting in the "shadow of the law", will be less likely to be governed by arbitrary factors because the permissible scope of inquiry will be drastically reduced.

In terms of specific groups of marginalized mothers, this thesis focuses first on the custody rights of lesbian mothers. The denial of custody rights to lesbian mothers may be viewed as one end of the spectrum in which deviations from the dominant ideology of motherhood are penalized. A solution may be found in enacting a primary caregiver presumption which curtails, as much as possible, the operation of this ideology. However, any endorsement of the presumption must entail a consideration of the implications it will have for women who are oppressed on more than gendered grounds, in particular First Nation and disabled mothers. Such implications suggest that any reform must be carefully drafted so as to provide for the many ways in which caregiving may be performed by women. Also integral to this discussion is a consideration of various reform alternatives.

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**ACKNOWLEDGEMENTS**

There are many individuals whose contributions were essential for the completion of this Thesis. It is from the work of my Supervisor, Susan Boyd, that I derived my own inspiration regarding custody issues from a feminist perspective. Through the contribution of Marlee Kline, my Second Reader, I began to question my own belief system, and now, I can truly appreciate the countless forums in which racism exists.

In terms of the spiritual completion of this Thesis, its perpetual resting place may well have been my computer if not for the unrelenting support of my mother, Yvonne Horwitz. As always, my family has stood behind me and continued to provide me with much "food for thought".

Words can not express my appreciation and gratitude to my husband and best friend, Erez Blumberger, for trusting that no matter what, this Thesis could, and would, eventually be complete.

My thanks to the many individuals at the Faculty of Law, University of British Columbia, for help in the library and in advice as to the many procedural issues involved in completing any academic work (especially Gillian Bryant and Pitman Potter).

Finally, I am indebted to Dean David Cohen of the University of Victoria Law School, who provided the means for the completion of this Thesis.

## CHAPTER ONE

## INTRODUCTION

Until the late 1970's and early 1980's, child custody laws in Canada were rooted in assumptions regarding gender. This was the result of 19th century statutes in which the paternal patriarch derived legal authority over children,[1] and later, from presumptions established at common law deeming a mother necessary to sustain children of tender years.[2] The late 1970's and early 1980's were accompanied by an alleged revolution in terms of a more tolerant public opinion regarding the role of women such that child custody determinations became grounded in formal gender equality.[3] This departure from gender-based stereotypes appears to parallel the emergence of more women from the private realm of the family into the public realm of the work force. As a result of this emergence, laws could no longer reflect women as the sole caretakers of children.[4] Yet, as studies repeatedly illustrate, even where *both* parents in heterosexual couples are employed outside of the home, *mothers* assume a disproportionate responsibility for childcare and household labour.[5] This tendency for women to assume more responsibility for childcare and household labour, even when both parents are working, reflects the operation of patriarchal dynamics the effects of which may be difficult to eliminate through legal reform. This

tendency therefore demonstrates the need to employ custody standards which are capable of recognizing the effects of patriarchal dynamics, as well, perhaps, of the need to look outside of law in order to find a solution to the problems currently faced by those engaged in a custody dispute.[6]

Analysis of reported case law during this period of reform demonstrates that in applying the current "best interests" custody standard, Canadian courts tend to penalize women, specifically those women who deviate from an idealized traditional primary caregiving role.[7] Courts continue to be oppressive to women in the custody realm because the current standard is both broad,[8] and discretionary, yet devoid of accompanying guidance as to how much value past caregiving warrants. However, given the statistical data documenting that mothers are responsible for the primary caregiving of children in most families, if the focus of a custody dispute was solely upon past caregiving, most fathers would be unable to establish their entitlement to custody as of right.[9] Liberal notions of individualism at the core of modern custody reform assume that men and women have equal capacities to parent. These notions are reflected in assumptions based upon "shared-parenting", and represent state attempts to modify families in a vacuum, for shared-parenting is an ideal which few families meet.[10]

Although arguably, laws governing family relations contribute substantively to women's oppression, the focus of feminism must not be limited to the legal realm, for this denies the importance of other barriers in perpetuating women's oppression. According to Susan Boyd:

> ...state and law are not the *only* sites to focus upon, as discourses on issues such as childcare arise from many sources. It is dangerous to focus excessively on any one source of oppression or power, such as law, just as it is dangerous to rely exclusively on an explanatory source of oppression such as 'capitalism' or 'patriarchy'.[11] (emphasis, the author's)

It is possible that some theorists accept defeat given that the influence of traditional gender norms may be ubiquitous so as to ensure any legal changes would be rendered futile.[12] Although the potency of law to influence gender norms and change the structure of the family is indeed questionable, a custody dispute may not be the most prudent time to choose to abstain from engaging with the legal system given what is at stake for the women and children involved in custody disputes. Even if it were the appropriate time for decentring law, any failure to challenge legal norms may have extreme ramifications for those mothers who deviate most radically from the traditional primary caregiver model the courts most willingly promote. Moreover, it is the experience of the mothers who are at the furthest end of the spectrum of the dominant ideology of motherhood that feminist theory must encompass in order for feminist custody reform to be effective.[13]

Many mothers face the threat of losing their children during a custody dispute, for few women fit the idealized characterization of the "mother" that decision-makers envision. The further a mother's experience is from this idealized characterization, the greater the threat she faces when engaging directly or indirectly with the legal system. Clearly, some deviations may be tolerated more than others: for example, a working mother married to her sexual partner may fare better than a

working mother living unmarried with her sexual partner. A heterosexual mother living with her sexual partner, may fare better than a lesbian mother not currently involved in a lesbian relationship. Furthermore, a lesbian mother not currently involved in a lesbian relationship may fare with more success than a lesbian mother living with her sexual partner. Although it is difficult to predict with accuracy how a mother will succeed in a custody dispute, there appears to be a positive correlation between the degree of deviation from motherhood norms and a limitation of custody rights.

The experience of mothers who diverge furthest from judicial norms -- that is, lesbian mothers -- will form the central focus in this thesis; for it is suggested that feminist theory will be best served by encompassing the experience of those mothers whose lifestyle poses the greatest threat to patriarchy.[14] However, in order for this to be feasible, feminist analyses of ideology and the public/private dichotomy must be used to consider the implications for women not sharing the attributes on which the dominant ideology of motherhood is based. Certainly, societal tolerance of lifestyle "choice" often fluctuates,[15] and the judiciary attempts to balance choice and popular opinion. Through creating inclusive theories, feminists remain able to facilitate this ever-evolving public tolerance as to acceptable lifestyle "choice".[16]

As well, regardless of a mother's lifestyle, the belief systems that ground sexism are the same beliefs that ground heterosexism, such that the experience of lesbian mothers in custody disputes is central to the study of sexism in custody disputes:

> The struggle for the rights of lesbian women is central to the women's movement. Feminists cannot hope to

> change sex roles, attitudes, behaviours, and opportunities for women as long as lesbian women continue to be feared, rejected, and punished - for homophobia is ultimately connected with the same stereotyped thinking that feminists are trying to change. *Sexism and heterosexism are so closely linked that women cannot free themselves from sexism without taking a critical look at heterosexism.*[17] (emphasis, my own).

Creating feminist theories that are more inclusive of all women's experiences is also crucial for the future of feminism itself. Feminist literature of the past decade has reflected a dialogue regarding the criticism that feminist theory is exclusionary of specific considerations of race, culture, disability and sexuality.[18] Typically, almost any individual woman can recall one experience in which she perceived herself to be oppressed due to her gender. The same cannot be said regarding oppression based, for example, upon sexual preference, race, religion, class, and/or disability. All women have some shared experience of gender-based oppression. Beyond gender however, shared experience in randomly selected women becomes more difficult to find. Moreover, the experience of gender-based oppression may vary depending, for example, on one's race, culture, disability and sexuality. This divergence forms part of the current debate regarding the failure of much feminist legal scholarship to recognize and address the impact of oppression based on more than sexist grounds.[19]

The child custody realm is by no means exempt from these criticisms, whether in examinations of the history of child custody, or in considering future custody reforms.[20] The significance of this tendency to discuss issues of custody

as if all mothers have had, and continue to have, similar experiences results in part, from utilizing a methodology which relies mainly upon case law.[21] Although case law accurately depicts the experiences of many women, within some cultures, or socio-economic groups, a courtroom is not the setting which would be utilized by a potential party to a custody dispute, due to reliance on other forms of dispute resolution, or due to a lack of financial resources.[22]

For myself, as for many, a realization of the implications of criticisms that feminist theory is exclusionary of specific considerations of race, culture, disability and sexuality involved both a re-examination and re-assessment of my own values, behaviour and upbringing. The defensiveness these criticisms often invoke was due, in part, to my own internalization of racism, homophobia and related forms of discrimination, and due in part, to my ignorance of people of other races, ethnicities and cultures.[23] Regardless of its roots, such internalized dominance can be detected in my previous studies, in that on both a theoretical and practical level, my reference point has typically been a women whose experience within the legal system mirrored what I perceived my own would be. As a result, I had not intended to consider the way in which custody reforms impacted differently upon women not as "privileged"[24] as that of the more traditional,[25] white, middle-class, and heterosexual mother. The decision to complicate my analysis in this thesis through the assumption of expanded reference points, was made with the knowledge that there are few resources available to do so.[26] In addition, it was made with the appreciation that this research must be approached carefully, for, in considering sexual orientation, we must take care not to

leave out other considerations, such as race, culture and/or religion.[27] While care must be taken regarding considerations of race, however, "...it is also important that white women take responsibility to identify our racism and help to eliminate it, rather than leaving all of the work to women of colour."[28] Examination of racism, though, can not be at the cost of silencing those women who experience oppression based upon their sexual preference. This does not, however, preclude consideration of the relationship which may exist between racism and homophobia, for clearly, there are common factors which allow for continuous social control in both of these realms.[29]

It would be impossible for any one feminist legal theorist to consider the specific concerns of every group of oppressed mothers during the analytical process. Collaborative work would more effectively lead to inclusive analysis. Such an approach has not been feasible in the case of my research. Nor have I had the resources to research and ascertain the specific concerns of all mothers facing oppression in the custody context. I have focused, instead, upon lesbian mothers, because I perceive the root of their oppression to be exactly the same as the root of gender-based oppression. Initially, this was going to be the ending point of my analysis; however, through further research and conversation, I became aware that ending my analysis here may result in depriving some mothers of custody rights. In fact, my research was confined to cultures within which mothers are expected to be the primary caretakers of children. In hindsight, I now appreciate that my research on childcare excluded consideration of mothers in other cultures, such as First Nations mothers, whose experience of caregiving may be substantially different.[30] A blanket-endorsement of

custody reforms without considering the potential impact on First Nation mothers would therefore be problematic.

Through my research I have developed a greater appreciation of the need for more inclusive analyses in developing feminist custody theories. This theme now provides the basis of my analysis and recommendations. Accordingly, in Chapter Two, this "inclusionary theme" will be considered by providing an overview of the current Canadian custody standard, that of "the best interests of the child". The legislative history of this scheme will be examined to provide background to the analysis which follows. It will be suggested that the current custody regime is oppressive to women and problematic for children because the current standard is highly discretionary, and neither the common law, nor legislation, provides direction as to the proper factors to consider such that in many cases a child is not placed with the most effective caregiver. Given the predominantly male, white, middle-class and heterosexual composition of the Canadian judiciary, and given that a party to a custody dispute may be more prone to raise questions about character or lifestyle that are largely irrelevant to good caregiving because of the emotional-laden context, this scope leads to decisions which are at best, inconsistent, and at worst, problematic for most women and many children. It is suggested that the only way custody law can be reformed in an even-handed manner is to create a standard which provides for continuity by ensuring that primary caregiving is performed or monitored by the same person before and after the breakdown of the parents' relationship. This type of reform may be seen as too extreme; however, as stated previously, without engaging

with and challenging the system, the pace of reform will certainly be too slow to assist many mothers and children currently in need.

Typically, in a custody dispute, the decision-maker hears a large quantity of evidence, some pertaining to which individual participated in the past primary caregiving of the child, and a decision is made. This decision may be in favour of the primary caregiver; however, no nexus has been legislatively established between past primary caregiving and a child's future interests. Even when continuity is mentioned, it is typically the continuity of the family unit, which assumes a Mother, Father and Child. This reference in and of itself, reinforces the gender-based oppression of women, in its assumptions regarding the familial roles which are expected to be assumed in the interests of children. The failure to establish any nexus between primary caregiving and a child's best interests is ironic for many reasons. One of the few areas of consensus in the child custody realm involves a belief that continuity is one essential factor in minimizing the disruption faced by children involved in custody disputes. Not disrupting the role of the child's primary caregiver is exactly the type of continuity courts should promote. Despite this emphasis on continuity, it will be shown how several discourses have been simultaneously applied in a way that results in the best interests standard being used in a manner which de-emphasizes and devalues past primary caregiving.

Chapter Two contains an analysis of the direction in which Canadian custody reform appears to be moving. Currently, concepts based upon shared parenting, in which both parents participate in children's lives, are becoming

entrenched in the custody realm. Because these reforms serve to undermine the reality of women as the primary caregivers of children, they undermine the value of primary caregiving. These reforms based on an ideal participatory father have been implemented in some areas of the United States of America (hereinafter the "United States") and are being considered by the federal Department of Justice in Canada. Integral to the notion of shared parenting is an increase in the reliance upon experts trained in the helping professions, such as social workers, psychiatrists and psychologists, in resolving disputes and in defining what is "best" for children. The increased use of expert testimony, the implementation of what is referred to as "Parenting Plans" and a revision of the language typically utilized during a custody disputes will be critically examined. It is suggested that these reforms are detrimental to both women and children because of their inability to reflect the reality of women's lives, and women's primary caregiving of children. As is argued throughout this thesis, reforms which reflect ideological images of family life cannot alleviate the daily oppression faced by many groups of women and children.

In Chapter Three Canadian cases involving custody disputes between lesbian mothers and litigants attempting to limit the custody rights of the mothers are reviewed. It will be argued that with the current custody standard for custody decision-making, cases within this context reflect a discourse in which lesbianism is characterized as only one factor warranting consideration in a custody dispute. In effect, however, the application of the best interests standard allows for sexual preference to be the determinative factor in custody denials to lesbian mothers,

without the decision-maker having to demonstrate a nexus between sexual preference and a detrimental effect on the child's best interests.

In Chapter Four, a custody standard built upon past primary caregiving will be developed. It will be argued that through limiting the scope of permissible judicial analyses to primary caregiving, unless the caregiver fits the definition of "unfit", it will no longer be permissible for sexual preference to act as a determinative factor in a custody dispute without establishing a nexus between sexual preference and the child's best interests. Furthermore, an ancillary result of this approach will be discussed, that being the confrontation of heterosexist beliefs. This confrontation is made possible because with the enactment of a strong primary caregiver presumption, decision-makers must express the reason for a custody denial where the primary caregiver is denied custody rights; whereas within the scope of the current best interests standard, decision-makers may point to one of numerous factors to justify a custody denial to the primary caregiver.

Chapter Four also analyzes the most recent United States Supreme Court decision involving a custody dispute.[31] In Palmore v. Sidoti, a Florida trial court denied a mother custody of her child because the mother was co-habiting with a black man. The only substantial difference found between the home offered by the father and mother was this racial factor.[32] According to the Trial Court (and affirmed by the Court of Appeal without reasons) a denial of custody was justified because the child could be harmed through operation of environmental pressures created from the mother's choice of co-habitant. The United States Supreme Court found that the

fourteenth amendment's equal protection clause prohibits speculating as to the potential future effect of racial bias when determining whether a custody order should be modified:[33]

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[34]
>
> Whatever problems racially-mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother it the mother is found to be an appropriate person to have such custody.[35]

It will be suggested that the reasoning invoked and enunciated by the United States Supreme Court in Palmore v. Sidoti might be applied in the Canadian custody realm in the context of sexual orientation as well as race. In particular, such reasoning can be applied where a decision is based on speculation as to the impact of a "supposed" environmental pressure on a child. This invocation of "peer group" arguments, based on the proposition that a child may be harmed because of the teasing he or she may face due to the sex of his or her parent's spouse is problematic for several reasons.[36] First, this argument substantiates discrimination and provides it with teeth; instead of allowing children to cope with the type of feelings teasing invokes, the solution is to try to obliterate the immediate cause.[37] One can only imagine the uproar which would arise if a child was removed from his or her parent's custody, because that parent was grossly overweight; surely, having a parent who is

overweight is a source of peer teasing.[38] Secondly, it is difficult for gay and lesbian parents to respond to this argument, for it places them in a "Catch 22" scenario. If a mother reassures the court that she will be sensitive to her child's situation, the court views this as the mother making an admission that the situation is problematic. If, however, the mother does not give this type of argument any merit and it is not referred to by the mother, she is seen as ignoring her child's best interests and lacking sensitivity.

> Both judges used the mother's recognition that this was an issue which would have to be dealt with sensitively against her, by saying that she herself recognised the problems which would arise from their relationship.[39]

Finally, this type of argument ignores that studies indicate concerns regarding this type of teasing are overrated, and, ignores the potentially positive outcome which may result from being raised in such a diverse background.[40] Despite the potential for this argument, the feasibility of such an approach is gravely restricted as will be discussed, as the Supreme Court of Canada has to date, severely restricted the type of arguments which will be permissible in the custody realm.

Chapter Five will consider the implications of enacting a strong primary caregiver standard for cultures in which biological mothers are not held responsible for performing the primary caregiving functions. It will be suggested that prior to a primary caregiver presumption being recommended, feminist theorists must not only address the situation of First Nation mothers, but all other cultures and groups in which there may be a different system established regarding parenting responsibilities,

despite the fact that in substance, the caregiving may appear to be performed predominantly by the mother.

In the concluding chapter, the various arguments located throughout this thesis will be reviewed, with the objective of leaving the reader with a greater sense of knowledge regarding the current custody regime and its deficiencies. The objective of the examination of the Canadian custody regime is not to arrive at a solution which will be certain to alleviate the oppression of women and children in this realm. It is, however, to develop the proposition that the devaluation of women's caregiving so entrenched in the current system is inextricably linked to many of the difficulties faced in a custody dispute. In conclusion, perhaps some day western society will begin to address the monumental structural obstacles standing in the way of women's substantive equality and gender-neutral standards may be in the best interests of parents, as well as children. However, the grounding of custody laws upon an idealized notion of "mother", "father", "family" and "shared-parenting" is at present unrealistic, and for now, a standard grounded in the reality of parenting patterns is necessary.

## ENDNOTES - CHAPTER ONE

1. C. Backhouse in "Shifting Patterns in Nineteenth-Century Canadian Custody Awards" in Flaherty, ed., Essays in the History of Canadian Law (Canada: Osgoode Society, 1981) 212 at 216.

2. J. McBean in "The Myth of Maternal Preference in Child Custody Cases" in S. Martin and K. Mahoney, eds., Equality and Judicial Neutrality (Agincourt: Carswell, 1987) 184 at 184. See, for instance, Bell v. Bell [1955] O.W.N. (Ont. C.A.) 341 at 344, in which the preference was re-articulated:
"No father, no matter how well-intentioned or how solicitous for the welfare of such a child, can take the full place of the mother. ...the whispered consultations and confidence on matters which to the child's mind should only be discussed with Mother; the tender care, the soothing voice; all of these things have a tremendous effect on the emotions of the child. This is nothing new; it is as old as human nature and has been recognized time and after time in the decisions of our courts."

3. See, for instance, M.L. Fineman, "The Neutered Mother" (1992) 46 Univ.Miami L.R. 653 at 658-60. This transformation was grounded upon "notions" of gender equality, and thus, "transformation" is being used to denote the achievement of formal, as opposed to substantive, gender equality, for this transformation did not substantively improve womens' lives. According to the author, this so-called evolution is merely superficial, for although laws assumed both parents would contribute equally to child care, in reality, "It is the legal discourse, not society, that is now formally Mother-purged." See, for instance, the decision of Williams v. Williams (1989) 24 R.F.L. 86 (B.C.C.A.) at 89 regarding the tender years doctrine:
"The doctrine might have had application in 1865, or even 1935, in cases referred to us by appellant counsel but it has little, if any application in 1989, when, each day, we hear of instances where fathers are doing a very able job of looking after very young children. There was also some minor argument put forward that the children were two girls so they should be with their mother. That argument meets the same fate as the 'tender years' argument in the case at bar."

4. For a detailed analysis of the implications of the public/private dichotomy, see, for instance, K. O'Donovan, Sexual Divisions in Law (London: Weidenfeld & Nicholson, 1985)

and F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv.L.Rev. 1497. According to O'Donovan, at x-xi:
"The model that underpins this analysis is a model of social change in which there is movement from a community-based society, where kinship and property determine rights, to an individualistic society. This is accompanied by a separation of life as experienced by people into two major aspects: the public and the private." According to Olsen, many reform efforts aimed at liberating women have failed to result in the alleviation of oppression for these reform efforts are limited by their grounding in unchallenged ideological foundations. (at 1498)

5. See, for instance, S.B. Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Can.J.Fam.L. 79 at 88, and note 28, where the author states:
"The significance of a mother's primary parenting role, which studies tell us usually exist even where she is employed outside the home and appears to have no more time than father to devote to the child,..." According to K. Munro, "The Inapplicability of Rights Analysis in Post-Divorce Child Custody Decision Making" (1992) 3 Alta.L.Rev. 852 at 873:
"Most importantly, there is considerable research which shows that notwithstanding that fathers may be competent to care for children, they are simply not doing the bulk, or in some instances any, of the childcare in the family. Mothers, notwithstanding the women's movement into the paid labour force, continue to do the bulk of household and childcare labour. *The evidence of this is unanimous and overwhelming."* (emphasis, my own)

See also, D.S. Lero and K.L. Johnson, Canadian Statistics on Work and Family, (Ottawa: Canadian Advisory Council on the Status of Women, 1994) at 17:
"Research confirms that employed women still assume the majority of responsibility for domestic chores and for the primary care of children and elderly and disabled family members." For example, the statistics referred to indicate that for every hour a male spends on housework, which is defined to include primary child care, a women spends approximately, two hours. (at 21) Where both individuals work outside of the home, the hours vary slightly (77% of men participate in household chores; these men spend 14.2 hours per week on household chores, while women are spending 23 hours per week on the same).

In addition, the statistics indicate that not only are women caring for children, but 60% of women reported they were primarily responsible for caring for dependent relatives; only 26% of men could report the same. Not surprisingly, this includes the spouse's parents and other extended members of his family. (at 20). Finally, women are also primarily responsible for family health care issues, including "nutrition and rest and arranging medical and dental appointments to getting up at night with sick children and missing work to care for sick family members." Once again, this changes only slightly when these women work outside the home (at 21).

6. S.S. Klein, "Individualism, Liberalism and the New Family Law" (1985) 43 U.T.Fac.L.Rev. 116, citing Ontario Law Reform Commission, Report on Family Law, 1978:

"...new laws are frequently written in gender-neutral language, continuing social and economic inequalities result in costs of marriage that are far from gender-equal." Also, see, for instance, M.L. Fineman, "Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce" (1983) Wis.L.Rev. 789 in which Fineman criticizes the extension of liberal ideological doctrines from the market/employment area into domestic relations; the unequal burden of reproductive labour particularly disadvantages women who retain custody of children.

7. Despite claims made by fathers' rights groups, many studies indicate that women are discriminated against in disputed cases of custody. Often, statistics presented to support the claim that women obtain sole custody orders in the vast majority of cases, are based upon situations in which the issue of custody is not disputed. According to Munro, supra, note 5 at 883, and notes 130-32:
"Certainly, it is clear that women are more likely to be custodial parents than are men. However, these statistics, without more, are not indicative of a judicial mother-preference. The vast majority of custody orders are based on a pre-existing agreement between the parties to the divorce...The belief that mothers are easily obtaining custody of the children is unsubstantiated by statistics. Where statistics are kept, the reality is that men are more than likely to win in *contested* custody cases." (emphasis, my own) According to S.B. Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" (1990) 7 C.F.L.Q. 1 (hereinafter referred to as "Boyd") at 5, and note 12:
"Although the limited statistics available to us in Canada indicate that women retain custody of their children in the majority of cases (85.6 per cent), it is important to point out that these statistics include all contested and uncontested cases, whether both parents sincerely sought custody or not."

See, also S.B. Boyd, Draft of "Feminist Engagement with Child Custody Law Reform: What Difference Does Difference Make?, presentation at Osgoode Hall Law School workshop "What Difference Does Difference Make?, October 22-24, 1993 (with permission from the author) (hereinafter "What Difference Does Difference Make") at 2, who states that although mothers obtain custody more than fathers, this may be representative of the fact that "most parents upon separation and divorce recognize that children will be better off with the parent who has been the primary caregiver, statistically most often the mother." According to the author, the majority of cases are uncontested and settle out of court, thus, the cases which should be examined further are those which are contested:
"When these cases are examined, it is seen that fathers have a reasonably high success rate, although still not as high as mothers in Canada at least". Boyd continues:
"Some American statistics indicate that fathers have a better than 50% chance (sic) of winning custody in contested cases, but Canadian statistics do not seem to bear this out." (note 4)

8. See Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) at 361, where Judge R. Neely states:

"[in] the average divorce proceeding intelligent determination of relative degrees of fitness requires a degree of precision of measurement which is not possible given the tools available to judges."

9. See, for instance, E. Scott, "Pluralism, Parental Preference, and Child Custody" (1992) 80 Cal.L.Rev. 615 at 623, where the author states, in relation to custody disputes, "Fathers, even in contemporary society are likely to be disadvantaged if parental care during marriage is the focal enquiry."

10. See, for instance, Klein, supra, note 6 at 116-35, where the author states that changes in the law regulating the family can be analyzed in such a way as to demonstrate their grounding in liberal ideology, which emphasizes the individuality of partners to a relationship, as well as the voluntary nature of the relationship itself. Also, see, for instance, ibid., where the author characterizes the de-emphasis on past caregiving in custody law as reflective of the nature of overall family law reforms. These changes involve the embracement of principles of liberal individualism, in which custody rights are viewed as valuable entitlements.

11. See Boyd, supra, note 5 at 112-13.

12. Scott, supra, note 9, at 658 - 59. In general, traditional gender norms continue to have a pervasive influence on behaviour and attitudes, inhibiting movement toward shared family roles. The influence of gender norms is part and parcel of a society which refuses to accommodate the notion of a worker who has domestic responsibilities, so that "...women who seek to accommodate work and family obligations will continue to be limited to low-status, low-paying jobs."

13. Fineman, supra, note 6.

14. According to C. Meyer, "Legal, Psychological, and Medical Considerations in Lesbian Parenting" (1992) 2 Law & Sexuality, 237, at footnotes 48-49, and accompanying text, one-third of lesbians have been married, and most lesbians, have had a heterosexual experience. In all probability, at some level lesbian theory may encompass and reflect heterosexual experiences. In contrast, heterosexual or mainstream theory typically ignores the experiences of lesbian women, thereby creating its exclusionary nature.

15. My use of the term "choice" is by no means a rejection of theories advocating sexuality as determined genetically. It is my position that the reason for a life style being assumed is irrelevant in so far as the public's perception of the substance of the choice.

16. See, for instance, N.D. Hunter and N.D. Polikoff, "Lesbian Mothers Fight Back" (1979) 5 Quest (Spring 1979) 2 at 31.
"...attempts to deprive lesbian mothers of custody must be considered in the perspective of an historical pattern of punishing independent or political women in declaring them to be unfit mothers and taking their children... There are millions of women who face a daily

threat of losing their children: welfare mothers, incarcerated mothers, heterosexual mothers who are not married to their sexual partners, or even sometimes mothers with jobs outside of their homes. The lesbian mother deviates most from the patriarchal standard and so presents the greatest threat to male supremacy."

17. M. Leopold and W. King, "Compulsory Heterosexuality, Lesbians, and the Law: The Case for Constitutional Protection" (1985) 1 Can.J.Women & L. 163 at 163.

18. B. Hooks, "Out of the Academy and into the Streets" (1992) Ms. 80 at 82.

19. See, for instance, M. Kline, "Race, Racism and Feminist Legal Theory" (1989) 12 Harv.Women's L.J. 115 at 117-18, where the author states:
"I have two main purposes in this article: first, to draw attention to the diversity of women's experiences of oppression based on gender and race as well as the implications of this diversity for feminist legal theorizing, and second, to consider how contemporary legal scholarship is limited by inadequate consideration of race and racism."

20. See, for instance, ibid., at 128-34, where Kline examines the work of S.B. Boyd in relation to child custody, and states, at 133:
"The above analysis exposes important gaps in Boyd's work with respect to the experiences of Black Women and First Nations women in the context of separation from their children, whether as a result of infra-family custody disputes or coercive removal by the state."

21. It is not only the methodology within the child custody realm which is problematic, but in many other areas in which statistics regarding the family are collected. See S.B. Boyd, "What is a 'Normal' Family? C v C (A Minor) (Custody: Appeal)" (1992) 55 Modern L.R. 269 (hereinafter "What is a 'Normal' Family") at 272, and note 17, where the author states:
"Lesbian and homosexual families remain largely invisible, moreover, due to the penalties often attendant upon being visible, and the fact that statistics on 'families' are often collected through a methodology which renders them invisible."

In some ways, it is possible to utilize case law to draw certain conclusions. I agree with Boyd: this possibility stems from utilizing these cases to ascertain what judges were saying about certain issues, as opposed to ascertaining the winner/loser. Despite this use of case law, it is acknowledged that due to the censorship of judges, amongst other factors, cases do not always indicate the actual reason for the decision. See, for instance, S.B. Boyd, "Investigating Gender Bias in Canadian Child Custody Law" in J. Brockman and D. Chunn, eds., Investigating Gender Bias (Canada: Thompson, 1993) 169 (hereinafter "Investigating Gender Bias") at 179.

22. For instance, First Nations communities are faced with a "Catch-22" situation when forced to engage with the adversarial system due to the apprehension of their children. Firstly, any information possessed by the Ministry regarding family difficulties obtained

because of reliance upon ministerial services can be used as evidence. Secondly, the adversarial process, as presently applied, gives little recognition to cultural norms, and as such, depicts them as suspicious. See, for instance, British Columbia, Liberating Our Children/Liberating Our Nations: Report of the Aboriginal Committee, Community Panel, Family and Children's Services Legislation Review in British Columbia (Victoria: Ministry of Social Services, 1992) (hereinafter "Liberating Our Children") at 37:
"Because of the cultural gap that exists between our families on the one hand and non-Aboriginal social workers and courts on the other hand, a no-win situation is created for the Aboriginal family. If they express their emotional reaction to the threat of losing their children, the expression itself is interpreted as an indication of the family's emotional instability. If they suppress their emotional reaction, it is interpreted as uncaring apathy. Aboriginal culture mitigates against a public display of emotion. It also mitigates against public confrontation. Given the no-win situation presented by the non-Aboriginal Family Court, the most typical and culturally appropriate response is silence. Silence, however, is also usually interpreted by the non-Aboriginal court as apathy,..."

23. See, for instance, M. Kline, "Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations" (1992) 30:2 Osgoode Hall L.J. 375 at 423, where the author discusses the often unintended results of racism:
"Liberalism has structured legal discourse such that racism is most often unintended and rarely explicit."

24. This is not to say even these "privileged" mothers do not experience oppression in the legal system, for they clearly do.

By "privileged", I am referring to women, like myself, who are white, middle-class, heterosexual and educated. As a Jewish women, I feel an allegiance with whose who must consider the implications of anti-semitism as well as sexism. However, until recently, I have even denied the impact of anti-semitism in my own life, maybe as a defence-tactic which allows me to function, albeit, dysfunctionally.

25. I use the term "traditional" to denote the ideal of a nuclear, middle-class, heterosexual family in which every child has exactly one parent of each sex. See, for instance, N.D. Polikoff, "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families" (1992) 78 Geo.L.J. 459 at 470, where the author states:
"A series of California cases illustrates the law's tenacious desire to give every child exactly one parent of each sex." At times, this tendency is also reflected in feminist literature.

26. A lack of resources refers to a means by which to obtain knowledge of oppressed groups of mothers apart from case law. Ideally, my analysis would have been complicated, and perhaps enhanced, through exposure to mothers facing oppression during the course of a custody dispute. This might have been achieved through living on a Reserve, or joining a custody support group. Unfortunately, due to my limited time

resource, this type of exposure was not possible. This limitation to my analysis should be remembered, both by the reader, and myself.

Despite this, it is possible to draw conclusions. See Boyd, Investigating Gender Bias, supra, note 21 at 180-81 where the author states:
"I am not convinced, however, that we must await such 'empirical' studies before drawing some conclusions about the general dynamics of a field such as child custody law. While keeping in mind the specifics of the Canadian state, we can examine the conclusions of more empirically oriented studies in other jurisdictions. Indeed, I have found that some of these studies have come up with conclusions startling similar or relevant to my own."

27. For example, we cannot assume the existence of a unitary lesbian community, for lesbian mothers involved in custody disputes are not a monolithic group within a monolithic community. See R. Robson, "Lavender Bruises: intra-lesbian violence, law and lesbian legal theory" (1990) 20 Golden Gate U.L.Rev. 567, in which the author states that when developing a lesbian legal theory, one can not assume the existence or character of a lesbian community. This is for the reason that many lesbians do not live within lesbian communities, and, if they do, they may still be isolated, and, at 589-90:
"...for although much lesbian discourse posits politically sensitive groups of lesbians, for many other lesbian communities, this is simply not the case. Further there is no guarantee that individuals within such communities will act according to their pronounced politics."

28. Kline, supra, note 19 at 120.

29. See, for instance, C.G. Costello, Esq., "Legitimate Bonds and Unnatural Unions: Race, Sexual Orientation, and Control of the American Family" (1992) 15 Harv.Women's L.J. footnotes 434-35, and accompanying text, where the author discusses the many similarities between homophobia and racism:
"First, the same individuals tend to hold racism and homophobic attitudes. Although there are homophobic people of colour and racist gay men and lesbians, most individuals who engage in racial harassment or gay bashing are young white men." According to Costello, this young white male is threatened by what he sees as the "antimale, antiwhite, antifamily, anti-Christian, and anti-American components of both movements. This "conflation" of inferiority provides the young white male with a rationale for his homophobic and racially-depraved treatment.

30. See Kline, supra, note 23 at 376:
"I use the term 'First Nations" throughout this work to refer to those who are descendants of peoples indigenous to the territory now called Canada, including: First Nations (e.g., Haida, Tlinkit, Mohawk), Metis, and Inuit."

I am using the term "First Nations" in the same manner, and to reflect the same idea, as the author.

31. The United States Supreme Court rarely interferes in state custody decisions. See Note, "Race as a Factor in Custody and Adoption Disputes: Palmore v. Sidoti (1984) Cornell L.Rev. 209.

32. Ibid, at 431. The court quoted a counsellor's recommendation for a change in custody based on the social consequences of an interracial marriage. See Note, "Will Palmore v. Sidoti Preclude the Use of Race as a Factor in Denying an Adoption?" (1983) 24 J.Fam.L. 497 at 502.

33. According to this clause, discrimination on the grounds of race by a state is prohibited:
"[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, 1. See Note, supra, note 31 at 210, and note 12, where the author states:
"When a state classifies people by their race, however, the Constitution requires that the state act pursuant to a *compelling* state interest and that the classification used be *necessary* to accomplish the government's purpose." (emphasis, my own)

34. See Palmore v. Sidoti 104 S.Ct. 1879 1893 (1984).

35. Ibid, quoting Palmer v. Thompson, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

36. See Boyd, What is a 'Normal' Family, supra, note 21 at 273-74.

37. Ibid. at 274, where the author states:
"This argument allows one discriminatory act (homophobia in a community) to condone another (depriving lesbians and homosexual men of custody)." The author discusses how this type of approach is in disfavour within the context of denying a parent custody who has entered into a racially-mixed relationship. Although I agree that this argument is now in disfavour, the attitude underlying this behaviour is still alive and kicking, and is reflected in case law discussed in later chapters.

38. In fact, one could argue that having an overweight parent may be physically harmful to a child, if that parent is responsible for monitoring that child's eating patterns.
As a child, I was teased at camp because my skin was darker than other children's. Admittedly, I cried, and I was upset; however, with the assistance of caring adults, I was able to cope and grow from this. I shudder to think that the solution may have been removing me from this environment, where despite the problems, I thrived, and perhaps, other children learned how to cope with difference.

39. See Boyd, What is a 'Normal' Family, supra, note 21 at note 26 and accompanying text.

40. Ibid. at footnotes 25 - 29 and accompanying text.

## CHAPTER TWO

## THE CURRENT CUSTODY STANDARD

In this Chapter, the current Canadian custody regime is presented with the objective of creating a context for the remainder of this thesis. This chapter includes a critical analysis of the best interests of the child standard from a feminist perspective, and an explanation of why the standard has been met with wide-spread criticism.[1] This background information will provide a basis upon which suggested reforms to the current standard can be presented in later chapters. The thrust of the argument is that all mothers and children will benefit from a custody standard which, unlike that of the best interests of the child, focuses upon one essential aspect of continuity in a child's life - caregiving. This Chapter will begin with a brief historical analysis of English-Canadian custody law. This analysis reflects that an actual power struggle between men and women within this realm has only existed for a relatively short period of time as compared to a history of legislative and judicial preference in favour of fathers.[2] Following this will be an examination of some of the ideologies that both ground and influence the operation of the current child custody standard. These ideologies also form the basis of the increased reliance on expert testimony in the custody realm, and several reforms which have been suggested as integral to a

solution for the problems experienced with the adversarial system. It will be argued that such reform efforts are harmful to both women and children for they deny that the primary caregivers of children are usually women, and thus inherently reject that this reality is an important one to take into account.

**The Historical and Legislative Background**

An analysis of the period from the early nineteenth century until 1839 in both Canada and England reflects that in so far as the resolution of custody disputes is concerned, fathers were treated as having rights which ranked supreme above all others.[3] Blackstone states that a father had absolute legal authority over his legitimate children: so that a father's power was over keeping the child in "order and obedience", whereas the mother had "no power but only reverence and respect".[4] In effect, once a woman married and bore children, she was resigned to remain within this familial structure unless she was willing to forego all custody rights. Courts rarely concerned themselves with examining the caregiving provided by the fathers, but focused upon protecting the father's absolute legal power over his legitimate children.[5] During this period of pure paternal rule, the Courts of Equity could be persuaded to intervene if the patriarchal power was characterized as excessive. Such cases usually involved instances where the father's behaviour was contrary to public policy: for example, exposing his child to unrecognized educational programs. In such cases, the justification for granting the father absolute power no longer remained and custody could be legitimately denied:

> ...the public right of the community to superintend the education of its members, and to disallow what for its

> own security and welfare, it should see good to disallow, went beyond the right and authority for the father.[6]

In 1839, An Act to Amend the Law Relating to Custody of Infants was enacted in England (hereinafter "Lord Talfourd's Act").[7] In Lord Talfourd's Act, Courts of Equity were given authority to hear appeals regarding custody of very young children; and where the child was seven years of age or younger, the judge could award custody to the mother. Lord Talfourd's Act did not apply where the mother had committed a matrimonial offence; however, in all other circumstances, Lord Talfourd's Act became the cornerstone of all English and Canadian legislation on custody. This shift in legal power did not bestow upon mothers a legal right over children such as that held by fathers, but instead, represented a judicial recognition of the so-called biological bond existing between a mother and a child of a very young age.[8]

In 1855, parallel legislation to Lord Talfourd's Act was enacted in Upper Canada, however any recognition of a mother's inherent right to the custody of her child ended upon the child reaching the age of twelve. The courts were also given the power to order maintenance payments.[9] Once this Upper Canada statute began to be interpreted by the judiciary, it became clear that while some English and Canadian judges were utilizing a conservative approach, other tended to interpret this statute more progressively. Many judges rejected any suggestion that Lord Talfourd's Act had altered the law; it was characterized as merely legislating the jurisdiction Courts of Equity previously held. A more progressive approach deemed Lord Talfourd's Act to

reflect an intent to recognize a mother's right to custody in cases where she was innocent of any marital wrongdoing. The application of a conservative approach became more dominant.[10]

From the 1880's and onwards, increasingly, Canadian judges began to appear more progressive and to recognize greater custody rights for mothers. This progressiveness was founded upon the emerging industrial society, and the characterization of the family as the one remaining area where the individual was valued apart from their economic worth.[11] As the separation between the home and the workplace increased substantially, so did the differentiation in roles between men and women; men were the primary players in the workforce, and women, the primary actors in the home. In addition, the development of an industrialized society elevated the status of children, who became a "national resource" to be trained appropriately by mothers.[12] This changing society served to elevate the status of women, but only in the private sphere of the home and hence, tied women to the home as opposed to the workforce. As Martha Fineman suggests:

> Contemporary norms sanctioned women's exclusion from the public or market aspects of life under the guise of protecting or sheltering women so they could fulfil their true roles as bearers and nurturers of the species.[13]

Thus, legislation was enacted in order to bring the legal position of women vis a vis children more in line with their responsibility over the proper care of the home; however, this increase in maternal authority was clearly only an increase in power given to judges in order to decide if a mother was in fact *deserving* of custody of her

children. Therefore, although legal changes did reflect an increased emphasis upon the role of the mother and the value of mothering, this emphasis arose only in so far as the mother did not play a role in the demise of the family through the commission of a marital offence. This type of "anti-social" behaviour automatically led to the conclusion that this individual could not, as such, be a good mother.

In 1887, An Act Respecting the Guardianship of Minors[14] (hereinafter the "Minor's Act") was enacted in Ontario which mirrored the English Guardianship of Infants Act[15]. This legislation, in essence, required judges to determine custody on the grounds of what is in the welfare of the child, and to consider the wishes of mothers and fathers in making such a determination. The Minor's Act also reflected the popular approach of the day, that of the idealization of motherhood and domesticity. Granting to women potentially greater authority over their children began to be seen as necessary in order for women to produce citizens who would be of some benefit to society. Although the acceptance occurred slowly, the Canadian judiciary increasingly began to award custody to mothers based on the way they interpreted the Minor's Act.[16]

By the end of the 19th century, custody decisions in Canada reflected the diverse nature of laws relating to custody. In some instances, judges applied the common law of paternal preference,[17] while in many cases, judges would give effect to what they saw as an alteration of the common law by the statutory authority given to women over children.[18] If one examines these different decisions, it is difficult to ascertain the amount of actual power held by the judiciary in making custody

decisions: it is unclear whether a custody order is based on the applicable legislation, or whether such an order is based on what the judiciary believed to be correct. Despite this uncertainty, what is clear is that any limitation upon the common law of paternal preference was based more on the characterization of mothers as being entrusted with the valiant duty of raising good citizens, than on a recognition of the value of women apart from raising children. Although the recognition of the value of women may appear to be an issue distinct from the good care of children, the role of women in caring for children means that there is an important link between the way that women are treated in society and quality of childcare.

Around the turn of the century, custody decisions continued to recognize the paternal preference in favour of fathers of legitimate children; however, mothers were increasingly allowed to claim custody rights regarding young children.[19] The 1920's evidenced increasing awards of custody of young children to their mothers where these mothers did not deviate from the expectation of "female purity", culminating in a judicial preference in favour of mothers.[20] The 1933 decision of the Ontario Court of Appeal in Re Orr further entrenched this "tender years doctrine". The court articulated a presumption that custody of children under the age of 7 should rest with mothers, because of the inherent capability of mothers to raise children of a young age.[21]

The years between 1921 and 1936 saw the divorce rate in Canada increase by almost two-fold.[22] Where mothers successfully obtained custody rights over their children during these years, it was only in so far as they were innocent of

fault during the marriage.[23] During the post-war years, judicial pronouncements reflected society's desire to give legal recognition to the alleged biological tie existing between mothers and young children.[24] During the post-war period, changes in custody law slowly began taking place, and the judicial preference in favour of mothers moved towards a more gender-neutral policy of the welfare of the child standard.[25] In a decision of the Privy Council in 1951, custody was awarded to the father based on the proposition that:

> ...the welfare and happiness of the infant is the paramount consideration in questions of custody. To this paramount consideration all others yield.[26]

The approach emphasizing the welfare of the child as the paramount consideration in custody disputes was not adopted in Canada by Parliament in 1968, at the time the first federal Divorce Act was enacted.[27] In fact, according to the 1968 Divorce Act, when making a custody decision "a court should do what 'it thinks fit and just to do so, having regard to the conduct of the parties, and the condition, means and other circumstances of each of them'".[28] During the post-war period, a mother was still required to remain innocent of certain conduct: for example, in the 1952 case of Nicholson v. Nicholson, a mother was denied custody of two young children due to an allegation of adultery.[29] Despite this, the mid-and late 1960's reflected that when the mother was innocent of any marital misconduct the tender years doctrine was still highly influential in custody decisions.[30]

Women's participation in the labour force began during the post-war period, and during this time, the courts began to apply more gender-neutral rules.

At the same time the divorce rate began to increase. The pressure to remain married still existed, however, even in abusing and unsatisfactory relationships.[31]

In the mid-1970's, the Supreme Court of Canada considered the applicability of the maternal presumption inherent in the tender years doctrine.[32] Grandpre J., for the majority, accepted that in making a custody determination pursuant to the Infants Act of Ontario, the welfare of the infant is the paramount consideration, and the tender years doctrine is relevant to that consideration.[33] However, the tender years doctrine is not a rule of law, but a principle of common sense.[34]

**The Current Standard for Custody Decisionmaking**

As stated previously, the application of more gender neutral rules regarding the resolution of custody conflicts began to be reflected in the 1950's alongside the rising divorce rate and an increase in women entering the workforce; however, the federal Parliament and the provinces and territories did not specifically adopt best interests of the child standards until the late 1970's and early 1980's.[35] One of the earliest examples was the 1978 Ontario Family Law Reform Act, which stated:

> Upon application, the court may order that either parent or any person have custody of or access to a child in accordance with the best interests of the child and may at any time alter, vary or discharge the order.[36]

In 1982, a more expansive articulation of the best interests of the child standard was seen in Ontario with the enactment of the Children's Law Reform Act.[37] Such

legislation, which later occurred throughout Canada, marked the beginning of a long period of legislative neutrality governing determinations of custody.[38]

Each province has its own scheme which regulates the issues incidental to the breakdown of a relationship, including the custody and access of children.[39] There is also a federal scheme regulating issues incidental to divorce, and therefore, custody law has developed in a consistent manner throughout the country.[40] The relationship between the provincial statutes on custody, such as the British Columbia Family Relations Act and the federal Divorce Act,[41] is often blurred. The Family Relations Act gives the Supreme Court jurisdiction to grant relief sought which is not under the jurisdiction of the Federal Government, and thus, unavailable under the Divorce Act. Section 5(1) of the Family Relations Act states:

> 5.(1) The Supreme Court continues, subject to the Divorce Act (Canada), to have jurisdiction in all matters concerning the custody of, access to and guardianship of children, dissolution of marriage, nullity of marriage, judicial separation, alimony and maintenance.

The provincial scheme in British Columbia will be discussed as an example, as much of the case law involving a lesbian or gay litigant has arisen in this province. In British Columbia, the test utilized by courts in determining custody disputes is that of the best interests of the child, as reflected in Part Two of the Family Relations Act. Like other statutes concerning the custody of children, the objective is to ensure that courts consider those factors relating to "the best interests of the child" in respect of issues of custody and access:

> 24. (1) Where making, varying or rescinding an order

> under this Part, a court shall give paramount consideration to the best interests of the child and, in assessing these best interests, shall consider these factors:
>
> (a) the health and emotional well being of the child including any special needs for care and treatment:
> (b) where appropriate, the views of the child:
> (c) the love, affection and similar ties that exist between the child and other persons;
> (d) education and training for the child; and
> (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise these rights and duties adequately.[42]

This list is not exhaustive, as at common law, the judiciary is empowered with the discretion to consider other factors not expressly enumerated.[43] According to the Family Relations Act, neither the gender of the parents, or the children, is a relevant factor in making a decision as to the best interests, for both parents are given equal entitlement to custody.[44]

According to the Family Relations Act, while the parents of the child of the marriage are living "separate and apart", the custodial parent is deemed to be the sole guardian of the person of the child and both parents are joint guardians of the estate of the child; the material well-being is only relevant where the guardianship of the estate of the child is at issue.[45] Section 24, subsections (3) and (4) relate to the relevance of past conduct to the best interests of the child. Past conduct may only be considered to the extent that such conduct affects one or more of the factors enumerated in section 24(1). Finally, the meaning of the word "custody" is not set out in the Family Relations Act, and thus, the court has the discretion to award the type of custody arrangement it feels is in the best interests of the child including joint

custody.

On January 23, 1986, Canada's second federal statutory scheme relating to the issue of divorce was passed by the Federal Parliament.[46] The Divorce Act embodies several developments relating to child custody and access. Section 16 of the Divorce Act relates to custody considerations, and subsection (8) specifically states:

> In making an order under this section, *the court shall take into consideration only the best interests of the child of the marriage* as determined by reference to the condition, means, needs and other circumstances of the child.[47] (emphasis, my own)

There is no presumption in the Divorce Act with respect to joint legal custody being assumed upon divorce; however, section 16(4) states:

> The Court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.[48]

Therefore, although there is no presumption in favour of joint custody in force, the courts have the discretion to order it where it would be in the best interests of the child.

In terms of making a custody order, there has been a shift in the federal legislation from the best interests of the child being the "paramount" consideration, to it being the only consideration.[49] In making this determination, the court may essentially consider any "circumstances" of the child; however, unlike the Family Relations Act, the Divorce Act does not contain a specific list of these needs and circumstances. According to the Divorce Act, past conduct is only relevant where it

would impact upon the ability of an individual to parent; therefore, in determining a child's best interests,[50] a judge is empowered with the discretion to assess how a history of domestic violence could threaten a child's future.

Finally, there are two provisions in the Divorce Act which articulate what is referred to as the "friendly parent rule".[51] These provisions are based on the philosophy that it is in the best interests of the child to have exposure to both the custodial and access parents, and therefore, the court shall consider the "willingness" of the individual who is seeking custody to facilitate such contact where it is in the child's best interests. These sections have been met with both praise and condemnation by interest groups throughout Canada.[52] Many groups representing the interests of the parent seeking sole custody fear that these provisions have a detrimental impact upon both pre-trial negotiations and the trial itself. This criticism is based on fear that the presumption may be used as a bargaining device upon marriage breakdown.[53] In addition, where an "alleged" victim of domestic violence seeks an order for sole custody, she may agree to generous access rights in spite of fears regarding the safety of her child or herself, in order to show she is a friendly parent.[54] Otherwise the friendly parent provision may be invoked against her.[55] Furthermore, even where one party does not wish any contact with the child whatsoever, it is feared that they may threaten to seek joint legal custody if the other party does not agree to lower support payments. This threat is made with the knowledge that if the joint custody claim is opposed in court, the friendly parent rule could be raised as against the party seeking sole custody.

**Values Underlying the Current Custody Standard**

As stated previously, individuals from a wide range of perspectives have raised criticisms regarding the current custody standard.[56] Although there is no monolithic opinion amongst feminists regarding the best interests standard, one school of thought is that in certain contexts, courts are making decisions which ultimately are not in a child's best interests due to biased assessments of their mothers. For example, mothers who fail to meet the heterosexuality expectation of motherhood must trust that those making custody decisions do not hold negative attitudes towards lesbians and gay men.[57] Given the indeterminacy of the current legislative scheme,[58] and the difficult nature of the custody decision,[59] when such bias occurs, it may be difficult to trace. Judges usually state that sexual preference is but *one* factor relevant to a judicial determination, and therefore not conclusive.[60] If, however, being heterosexual, or, engaging in heterosexual relationships, is in some way viewed as preferable when determining custody, the standard which allows for this dynamic must be critically examined. As articulated by one critic, with the best interests standard, judges may conflate a child's best interests with the judge's particular vision of a society, as influenced by individual biases:

> Instead of arguing that parental interests or the interests of children in general come into play when the child's particular interest is indeterminate, they take into account of these interests by making them part of the particular child's interest. I am not suggesting that judges consciously reason in this manner, only that their reasoning may be influenced by interests other than the particular child's interests, that are irrelevant under existing law but that they feel are morally pertinent or will lead to *socially desirable behaviour*.[61]

(emphasis, my own)

According to many legal commentators, the underlying difficulty is that judges are not directed, either legislatively or at common law, as to how much priority to give to any of the applicable elements relevant to "best interests". Judicial "vision" may therefore be substituted for a legally-permissible vision.[62] Given the composition of the judiciary, which is predominantly white, middle-class, male and heterosexual, it is not surprising that many litigants fear the potential for abuse, where they do not share the same background as the judiciary. For example, a recent Task Force was assembled for the purpose of preparing a report on women in the Canadian legal profession; as part of this study the Task Force considered the composition of the judiciary in Canada.[63] According to the Task Force Report, the number of women on Canadian courts is highly unrepresentative of the number of women in the legal profession:

> Women are under-represented on almost every court in Canada, both in terms of the proportion of women in the population and the proportion of women in the legal profession.[64]

The Task Force also found that the number of women from minority groups was nominal, at best:

> There are very few women from minority groups on the bench. This is to some extent due to the fact that Women of Colour and Aboriginal women have only in recent years been encouraged and financially assisted in pursuing a career in law.

As stated earlier, with the advent of gender-neutral standards, the scope

of a custody determination has expanded considerably. Despite this expansion, one common theme remains that in making a custody decision, the importance of concrete evidence regarding the past is downplayed in favour of making predictions regarding the future.[65] This theme is best exemplified through the denial of evidence as to past wife abuse in determining custody,[66] and continues, in the denial of past evidence of primary caregiving as a determinative factor.[67] To be sure, although past caregiving is recognized as a relevant factor, the emphasis fluctuates when a mother's fitness is on trial.

Accordingly, if the permissible scope of a custody decision was limited to past caregiving, an activity concerning which direct evidence will be available, the judiciary and others would no longer retain a free hand enabling a value-laden decision as to lifestyle.[68] The devaluation of women's primary caregiving in the Canadian legal system, by no means a recent trend, is one which has persisted in spite of family law reforms. However, according to many legal theorists, this is not necessarily a deliberate devaluation. It is attributable, in part, to the failure to consider the potential impact of structural constraints upon the effectiveness of an intended gender-neutral reform:

> In my view, we cannot ignore these structural constraints, particularly in this field where the ability of law and changes in legal language to resolve social problems has proved so limited and law's ability to exacerbate these problems remains considerable.[69]

One structural constraint, the impact of which has been downplayed, is that of the reality of the gendered division of primary caregiving. Despite claims that

the responsibility for childcare is determined without regard to gender, typically, women are most often responsible for directly performing childcare activities, or for taking a supervisory role in ensuring that the children are cared for. As long as the responsibility for primary caregiving remains a factor which the judiciary may choose not to take notice of where the quality of that caregiving is not at issue, the oppression of those women who deviate from a traditional lifestyle will continue. This is due to the fact that women are most often responsible for the caregiving of children, and this responsibility often impacts negatively on other areas, such as earning capacity, and the formation of new relationships. Economic considerations may play a background role in custody disputes such that when primary caregiving is treated as irrelevant, women have the most to lose due to their lower financial positions and failure to have new partners to play a role in childcare. Despite claims that these factors are irrelevant, they are considered in custody disputes. Thus, the issue of the appropriate custody standard to employ can also be characterized as part of a debate regarding the value to assign to the assumption of past caregiving responsibility.[70]

Laws must reflect the reality of the gendered division of reproductive labour through a recognition of past caregiving as *prima facie* evidence of custody entitlement. However, if one looks at the direction of custody reform, one might surmise that as a society, we appear to be moving away from this type of consideration.[71] It is within such a context that the best interests standard will be assessed. If evidence of primary caregiving was the only evidence relevant to a custody determination, most fathers' custody rights would be restricted, and the

judiciary would lose an effective tool for the reformation and punishment of mothers who deviate from the norm.[72] Furthermore, through directing judicial attention to past caregiving, it becomes more difficult for non-primary caregivers to utilize the custody forum as a means to perpetuate existing power structures.[73]

In response to suggestions that a standard be used that emphasizes past caregiving, critics have questioned whether the past can be a useful tool for making assessments about the future; and furthermore, whether we should look ahead to the potential for new relationships:

> ...in some situations, the past should be discounted to properly look ahead, because of the opportunity for new or changed relationships. They also challenge the utility of past conduct as a predictor of future behaviour.[74]

It is interesting to consider why the traditional function of the judiciary, being predominantly the utilization of evidence of past behaviour to make decisions related to the future, is being criticized in the context of family law. Plainly, the relationship which is relevant in a custody dispute is the one existing between the child of the marriage and its mother and father. Given the focus of the inquiry, why are new and future relationships, which have yet to be established, being utilized to justify the rejection of evidence which is both clearly relevant and readily available?[75] The source of this apparent contradiction is not easily defined, yet underlines many of the laws relating to custody. It is related to the public/private dichotomy that I will now address.

**Ramifications of Ideological Discourse and the Public/Private Dichotomy**

> I grant that the issue is exceedingly complex and does not lend itself to simplistic solutions. Yet, as I see it, once feminists began fighting for equal pay and for the right to abortion, the backlash was on. If women wanted to right to leave men or take men's jobs away from them, then men, and the women who support them, would simply repossess women's children as well as women's bodies. *While feminists, to our credit, may want to be "fair" to men, patriarchs are anything but "fair" to women.*[76] (emphasis, the author's)

As discussed in the past section, the best interests standard is based upon a model in which past caregiving is merely one of many factors relevant to a custody determination.[77] Arrangements of joint custody build upon the theory of shared parenting, because they are rooted in the sharing by both parties of post separation rights, despite the previous or future distribution of caregiving. As shared-parenting in the sense of equal caregiving is rarely the norm,[78] any custody standard (or reform) built upon this idealized notion, can be seen as attempting to encourage greater participation for fathers, and thus reflect a "societal commitment to promoting the sharing of parental responsibilities."[79] Regardless of the rationale behind such a presumption, the implications are that past responsibility is seen as meaningless, and thus, past caregivers, not deserving of legal recognition. When the law attempts to regulate the family through supporting standards which are based upon an idealized participatory father, the state is transmitting a message. In essence, by zealously endorsing the ideal of "father", the state empowers men by the recognition of their role

in the family regardless of the actual fact pattern of childcare responsibility. As a corollary, those families in which "father" is absent are seen as deviant, and where "father" is not only absent, but renounced, the punishment is severe:

> At the same time that law (in its various manifestations) may be encapsulating and legitimating a new subjectivity; it also may deploy power to relegate or disperse other subjectivities. In embracing certain subject positions as central, others are marginalized. Thus the central and determining metaphors in family law have become the welfare of the child *and the importance of the father as an instrument of welfare and as an individual who earns legal standing.*[80] (emphasis, my own)

In terms of marginalization, the implications for mothers not meeting certain expectations of motherhood - such as providing a father - are clear; for example, in cases of disputed custody involving a lesbian mother, the focus becomes the lesbianism, as opposed to a more tangible factor such as who was the primary caregiver of the child(ren)?[81] As long as mothers remain the invisible primary caregivers, but legislation remains grounded in an idealized model of the participatory father, his participation will continue to be deemed to be in the best interests of children. It is in this way that the law ensures fathers are able to maintain their rights to children, without the concurrent responsibility. The search to limit judicial discretion to determining who was the primary caregiver becomes increasingly important depending upon the deviation of mothers from the normative model of mothering. Mothers who deviate from any of the normative expectations of motherhood, such as

being white, legally married to her sexual partner and heterosexual, may be denied custody rights in disputed custody cases. Current custody law is based upon an ideal where the presence of "father" is deemed necessary for the production of "healthy" citizens.[82]

In its application of the best interests standard, the judiciary has been consistent in its denial of the value of 'caring for' children by rewarding 'caring about' children, and thus, reinforcing the message that a "projected capacity should carry the same moral weight as the *actual activity.*"[83] This results in "disregarding" or "silencing" those mothers whose claims are based upon "caring for", for this is deemed either equivalent to "caring about" or worthy of disregard where other factors are present:[84]

> She was making a moral claim which had its foundations in the years of care she had given to her sons. If we say this is nothing, or that it counts for little, we are adopting a position which affirms that the act of 'caring for' has no moral value in our culture. we continue to place 'caring about' above 'caring for' and *turn the moral claims which rest on acts of caring into self-interest.*[85] (emphasis, the author's)

In essence, through the denial of the value of primary caregiving, mothers no longer have a legal language through which entitlements may be claimed, and for those mothers who have been deprived of a legal voice, for example, First Nations mothers, lesbian mother and disabled mothers, the result is discouraging.

Integral to reform efforts having the ancillary result of eradicating the legal language of mothers, is the creation of an ideology of fatherhood, which in itself,

grounds many efforts at reforming custody law.[86] Examples of judicial discourse in which fathers are praised for increases in child care responsibilities are not rare:

> [T]here has come a radical change in the division of responsibilities between parents and in the ability of the mother to devote the whole of her time and attention to the household and to the family. As frequently as not, the mother works, thereby reducing the time which she can devote to her children. A corresponding development has been that the father gives more of his time to the household and to the family.[87]

This depiction of the participatory father builds upon notions of the public/private dichotomy, such as the presumption that as more women entered the workforce, fathers began to assume more responsibility for household and reproductive labour.[88] As evidenced by the previous history of custody legislation, paternal custody presumptions were premised upon the maintenance of patriarchy, not upon father's participation in the labour associated with childcare.[89] As more women began to emerge outside of the private realm, studies apparently reflected that men's role within the private sphere simultaneously underwent a significant transformation, and fathers became essential for the social and intellectual development of children. Closer examination of these studies supporting the need for a father figure suggests that the methodology ignored a mother's potential to impact upon a child's intellectual and cognitive skills.[90]

The ideology of fatherhood has ramifications in the legal system. For example, several arrangements offered by fathers in custody disputes, such as joint

custody, are premised upon the assumption that both parents contribute equally to child care.[91] This ideology, therefore, has the effect of silencing the concerns of mothers and children in the Canadian legal system.[92] In addition, the ideology of fatherhood, and its accompanying emphasis on the need for a father figure, implicates all those who may live alternative lifestyles. In these alternative familial forms, there may be no need for a father, due to the existence for example of same-sex parents. As such, this ideology has the effect of labelling such family forms as inadequate.

An examination of the history of custody law in Canada indicates that there has always existed uncertainty regarding the value to assign to caregiving. This uncertainty has both oppressed women as caregivers, and potentially harmed children they cared for. Even where women have been given greater recognition in custody law, this recognition related not to the value of caregiving, but the importance of producing valuable citizens. The movement away from a paternal preference and towards a gender neutral standard did not result in any significant difference in so far as those mothers who failed to meet the expectations of what good mothering entails. In part, this may be attributed to the lack of agreement regarding the amount of priority which should be given to any one factor alleged to be relevant to a child's best interests. For example, one expectation of motherhood is that both parent's of the child be heterosexual. In jurisdictions which utilize the best interests standard, if a mother loses due to the failure to meet this expectation, even where her sexuality has no effect on the child's best interests, the danger of applying a custody standard

which allows for too much judicial flexibility is evident.

One of the reforms which has been suggested in the custody realm involves placing a limit on the use of judicial discretion. One way to limit discretion is by transferring the onus for the custody decision to those individuals who are supposed to be experts in various fields that are relevant to custody decisionmaking. Although judges retain the ultimate discretion for the custody decision, the recommendation of the expert may carry a great amount of weight.[93] An examination of the role of these experts reflects that the responsibility for any alleged problem in the custody realm is based more on the legislative framework for making a decision than the person making the decision.

**Increased Reliance on Expert Testimony**

Any study based solely on case law would distort the extent to which this method of dispute resolution is relied on. The majority of custody disputes are resolved without either party appearing in court.[94] However, the legal system, with its accompanying best interests of the child custody standard, still impacts directly and indirectly upon the decision-making process of those involved in custody determinations: parties, lawyers, helping professionals, and other. Parties "bargaining in the shadow of the law"; in particular, parties to a custody dispute may be unwilling to sacrifice more than would be required by law when arriving at resolutions.[95] Legal theorists concerned with the application of the law by helping professionals maintain the need for further research examining how and to what extent helping professionals

apply the law when resolving disputes outside of the courtroom:"[96]

> We conclude this section of the book by suggesting some of the possible topics for badly needed empirical research in this area, in particular research on how different professionals make decisions in this field, on the perception of parents and children about these decisions, and on the long and short-term effects of these decisions on children and parents.[97]

Whether it is based on a call for further entrenchment of the role of helping professionals in a custody dispute, or allegations of discontent, a demand for further and more extensive research has accompanied the increased resort to mechanisms of informal dispute resolution and the use of expert testimony in judicial proceedings.[98]

In strongly contested issues of custody, where the ultimate decision is left to the judiciary, it is common for both or either party to commission the preparation of a private custody report by a member of a helping profession.[99] In such cases, the expert either makes a recommendation in accordance with the child's best interests, or, comes to a finding regarding the potential impact of varying factors in the child's life.[100] Increasingly, however, the judiciary has begun to order, and rely upon, one custody and/or access report which is prepared by *a Family Court Counsellor* gratuitously who is randomly assigned and who is a court employee.[101] This type of Report may be requested by either party, or may be ordered without being requested by the judiciary. This reliance is grounded upon the belief that this procedure is more cost effective, and less biased, than each side retaining an expert

to draft an opinion.

Similar to criticisms surrounding the lack of guidance accompanying the use of the best interests standard, the legislative scheme provides no scale with respect to how much weight these assessments warrant.[102] Those who oppose this delegation of responsibility to the helping professions state that increasingly, judges are applying the recommendations of experts without hesitation, such that these professionals are playing a "quasi-judicial function".[103] If this is true, the situation is highly problematic, for questions continue to be raised regarding the bias of these professionals:

> ...commentators and judges are starting to recognize that assessors, like all of the other professionals involved in the process of dispute resolution have values and biases that can affect their view of what is in the 'best interests' of a child, and their recommendations.[104]

Furthermore, individuals utilizing a system of private ordering to facilitate custody resolutions often rely on the recommendations found in these expert reports; therefore, the decision not to engage in litigation often hinges upon their contents. This reliance is problematic, for currently, little information exists pertaining to "how Canadian assessors interpret and apply the 'best interests' of the child standard", and what effect this may have on the settlement and litigation process.[105]

Initially, it appeared that the response to the increased reliance upon mechanisms of informal dispute resolution was favourable. Increasingly, however,

feminist critiques have begun to emerge. Martha Fineman,[106] for example, argues that mediators and social workers have appropriated child custody decision-making power in this realm, which has had a striking substantial impact on the way in which child custody disputes are resolved.[107] This apparent appropriation has had, and continues to have, a serious impact on the rights of custodial mothers, who have been unable to express themselves in such a way as to align their discourse with that of the helping professions. In the discourse of the helping profession shared parenting is the ideal, so that where a mother feels sole custody would be in the child's best interests, she is immediately suspected of acting selfishly, and against the welfare of her child:

> The professional language of the social workers and mediators has progressed to become the public, then the political, then the dominant rhetoric. It now defines the terms of contemporary discussions about custody and effectively excludes or minimizes contrary ideologies and concepts.[108]

For these reasons, feminists such as Fineman, have found themselves in the ironic position of supporting aspects of the same system they have traditionally criticized; specifically, the public formal legal system:

> The public nature of the legal process means that the basis for decisions will be explained, debated, and publicly considered. This process may not be foolproof, but it is better than one in which substantive rules and standards evolved and are implemented behind closed office doors without any possibility of checks from the political office.[109]

The analysis utilized by Fineman is grounded upon the development of

a dominant discourse by the helping profession, which incorporates the language of co-parenting and continued relationships after divorce. In contrast to this discourse, and viewed suspiciously by the helping profession, is the now disempowered discourse of sole custody. Through emphasizing elements of shared-parenting and exerting control over the concepts and ideas within child custody, Fineman views helping professionals as having successfully appropriated decisionmaking in this realm. In essence, she finds the current debate between sole custody and joint custody reflective of a struggle between two opposing ideologies; one being the ideology of law, with its corresponding adversarial model, its lawyers and its judges, the other being the ideology of the helping professions, with its corresponding therapeutic model, social workers, psychologists and mediators. Fineman does not perceive the increased reliance upon the helping professions as an outgrowth of the dissatisfaction with the adversarial model, as experienced by litigants and lawyers working within this model, and thus, as a development reflected in the increased reliance upon helping professions by the courts. Perhaps the group most dissatisfied with the adversarial model, is the group that has a vested interest in an increased reliance upon the helping professions, such as mediators and other members of the helping profession.

Fineman also perceives, as integral to the appropriation of custody decisionmaking by the helping professions, a corresponding withdrawal from the courtroom setting by lawyers, judges and legislators, who find the idea of relying on

the helping profession attractive. Many individuals currently involved in the custody realm experience discomfort with adjudication involving the resolution of child custody disputes.[110]

According to Fineman, the shift in ideology from adversarial to therapeutic approaches results in a process which may have a detrimental impact upon women and children.[111] For in terms of mothers who are already marginalized due to race, religion, and/or sexual preference, it is difficult to predict whether matters will be worse; however, in general, mothers are already extremely limited in the language they may use to define their concerns. This situation may be exacerbated by the therapeutic approach. For example, it may appear selfish for a mother to ask for "sole" custody, for the assumption may be made that she will not facilitate the relationship between the child and the other parent. Therefore, the word "sole" is no longer a word which a mother may use to articulate the type of custody arrangement she is seeking. Utilizing a system which may retain the same biases as those currently operating within the judicial system, while simultaneously eradicating the only language some mothers may have, can only result in further oppression.[112]

Fineman concludes by finding that the solution to the problems inherent in the therapeutic and adversarial model is to find a rule which avoids some of the pitfalls of the best interests standard while also guarding against the potential for abuse by lawyers and members of the helping profession:

> The task is to find a rule that both avoids moralizing in making choices between parents and is determinate enough to be applied within the traditional legal system.[113]

According to Fineman, this rule is the primary caregiver presumption, because its foundation is the rejection of speculating as to the future and the use of the past as the best indicator of future care.[114] Despite Fineman's belief that primary caregiving is the factor which most clearly indicates the appropriate caregiver, there are other suggested methods of resolving disputes which do not elevate the importance of past primary caregiving. Some of these methods involve changes to the form of resolving disputes, such as its languages, while others involve changes to the entire procedure currently in place; however, none of these suggested methods reflect the reality of the gendered division of household labour.

**New Trends in Custody Reform**

In a growing number of jurisdictions outside of Canada, the custody determination process is beginning to use new terminology and approaches to parenting after separation or divorce. In the state of Florida, the goal upon separation is to maximize contact between parent and child as well as to enhance sharing in decisions impacting upon the child.[115] In Maine, with the enactment of the Domestic Relations Statute, the traditional language associated with custody disputes has been replaced, using instead the "language of parental rights and responsibilities".[116] In addition, parents are given three options regarding post-separation arrangements, ranging from sharing

various aspects of a child's welfare to leaving exclusive responsibility with one parent (not including support).[117]

In the state of Washington, the relevant legislation is the Parenting Act.[118] This legislation replaces the traditional language of custody and access with the concept of parenting, while encouraging parents to create plans which meet the objective of providing for the child's needs.[119] These are called "parenting plans" and can be defined as:

> ...a devise that instructs parties about what parental responsibilities should be considered and direct parents to think through carefully the arrangements they want to make for their children.[120]

These needs are met through parents (or lawyers and/or mediators) drafting agreements structuring responsibility for the major aspects of the child's life upon separation of the parents, as well as the day-to-day care of the child. Such decisions involve where the child is to live, as well as who is authorized to make certain decisions, such as those involving religion and education.[121] Integral to this statute is the enactment of a mechanism by which future disagreements or questions involving the child may be answered through, for example, resource to a mediator or a psychologist.[122]

It appears that typically, reform efforts aimed at implementing "parenting plans" are accompanied by attempts to reform the language used in custody disputes. This language has been characterized by some as "archaic and possessory", such as

the terms "custody" and "access".[123] For example, the English Children Act 1989, uses new terms which are more neutral in form. These terms are intended to reflect a more modern mode of thinking about the responsibility for child care upon the dissolution of the parents' relationship.[124]

As with most suggested schemes within the custody realm, the above changes to the current custody regime have been both endorsed and denounced by legal theorists. According to the supporters of changes in the language of custody law, this may serve to redefine both the responsibilities and entitlements of each parent after the demise of the parents' relationship, and in such a way as to be "more meaningful" to the parents:

> 'Residence orders' (specifying with whom a child will reside) are more meaningful to more parents than 'custody'. 'Visitation orders' or 'continuing relationship' orders (requiring a person with whom a child resides to permit the other parent to visit with or have contact with a child) have more inherent significance to most parents than 'access'.[125]

Supporters acknowledge that changing the language of custody law will not, in and of itself, alter the generally negative associations with the process. In spite of this, they argue that such a change may "lower the stakes" when disagreement regarding the issues occur, or, at a minimum, may make the process more understandable to those involved.[126] Two such supporters have endorsed the enactment of custody legislation in Canada utilizing these redefined concepts of parenting, and, in fact, have drafted shared parenting schemes based largely on those in Washington State and

England.[127]

Some critics have pointed to the tendency for Canadian legislators to be overzealous in their attempts to follow American reforms, prior to the reforms being successfully tested:

> Canada often seems overly eager to emulate reforms in other jurisdictions before they have been tested in these jurisdictions. We narrowly avoided doing so in the instance of joint custody presumptions in 1986, and then discovered that California -- the example often cited as groundbreaking in the joint custody field -- repealed its joint custody presumptions in 1988. *The 'flavour of the month' in custody law appears to be 'parenting acts', the examples most often cited being those in England and in Washington State.*[128] (emphasis, my own)

Recently, the Canadian Department of Justice considered the feasibility of enacting legislation pertaining to "parenting plans" through its publication of a Public Discussion Paper, in which various aspects of Custody and Access issues are discussed.[129] Although "parenting plans" and other possible reforms were discussed, no conclusion is reached, for the stated purpose of the Justice Paper is the procurement of responses:

> The purpose of this Discussion Paper was to review the need for change to the current law respecting child custody and access and to seek input respecting the seriousness of the problems and the nature of alternatives that should be pursued.[130]

In a recent response to this paper on custody reform presented by the Department of Justice, the Canadian Advisory Council on the Status of Women

(hereinafter the "CACSW") evaluated the notion of "parenting plans" . Several concerns have been articulated regarding attempts at custody reforms centering upon the notion of "parenting plans".[131] The CACSW Paper, for example, contains several recommendations regarding both the substance of the Justice Paper and its recommendations regarding the future of custody law.[132] Specifically, the CACSW Paper rejects the imposition of an approach to custody disputes involving "parenting plans".[133] The reasons given include the propensity of parenting plans for increasing the cost of even non-contested divorces, and thus, its adverse and uneven impact upon low-income families;[134] the unknown impact of regimes involving "parenting plans";[135] the unsuccessful utilization of "parenting plans" by those who chose to use it voluntarily;[136] and the way in which plans may impact detrimentally upon women, given that in many cases, provisions which impact on certain women, such as women who have been physically abused during the relationship, are not properly explained to them.[137]

Although different groups (and individuals) articulate a number of concerns about these "parenting plans", at a certain level, the criticisms appear to be similarly rooted.[138] In essence, the introduction of "parenting plans", and the accompanying change to the language of custody law, results in a scheme which ignores reality, such as the reality of mothers being the predominant caregivers of children. As such, the proposed scheme facilitates the creation of an atmosphere in which women are unable to articulate custody claims and concerns.[139] Therefore, the

CACSW recommends that the government move away from such unrealistic changes:

> The CACSW recommends that the federal government not introduce into divorce laws new terminology which is based on idealized, culture-bound, narrowly-defined, or unrealistic notions of family and family relationships.[140]

In changing the language of custody law, reformers, both feminist and otherwise, are attempting to transform the nature of custody disputes away from property and ownership notions. In an ideal world, where both parents assume responsibility for all aspects of child care, this would indeed be a valid objective. To date, however, regardless of the terminology utilized, custody rights are too often used as a form of property right by fathers attempting to establish lower support payments. Changing the language without redressing this tendency will not change substantive inequality, but in fact, may exacerbate it:

> The question is whether lowering the stakes eliminates gender-based power imbalances and potentially coercive negotiating tactics... *Indeed symbolic but nevertheless hollow linguistic changes may replicate the more subtle processes whereby mothers are reproduced as the carers and fathers as the authority figures.*[141] (emphasis, my own)

According to the CACSW Paper, changes in the language of custody and access are typically accompanied by an endorsement of the view that divorce is an emotional crisis to be handled by the helping professions rather than lawyers, through processes such as mediation. In fact, most mediation literature favours some form of joint custody, often referred to as "shared parenting", including a presumption in

favour of joint custody of the child.[142] However, as has been argued, the concepts of joint parenting promoted by helping professionals can result in rendering invisible the work that mothers perform. Another problem with concepts of shared parenting is rooted in the biased initial starting point of some researchers.[143] For example, Irving and Benjamin, the authors of Family Mediation, in which shared parenting is endorsed, acknowledge that they start from a bias in favour of joint parenting:

> At the outset, they state that they have a bias in favour of joint custody because in their 'experience it contributes significantly to the post-divorce adjustment of all members of families who try it. They further sate that they initiated their joint custody study in an effort to develop 'objective grounds' with which to 'rationalize' the joint custody option.[144]

Even where the biased starting position is acknowledged it is still problematic. Often, these studies are used to endorse joint parenting regimes and the biased starting position is not referred to or is ignored by those applying the results of the data.

The undervaluing of the work done by mothers can only be exacerbated by changing the concepts and restricting the available language, which will result in reforms which deny the importance of primary caregiving. For those mothers already facing a limited language which can be used to express themselves, new concepts such as "parenting plans" can be potentially harmful. In essence, the law cannot attempt to influence behaviour by adopting models which ignore the power imbalances, such as models which fail to recognize primary caregiving:

> If we agree that the worse problems have to do with gender based power dynamics between women and men that are played out through children, then safeguards must be built into legislation to deal with these and to protect the interests of those vulnerable to abuse.[145]

Therefore, it is suggested that reforms must instead be based on the current reality of women's responsibility for primary caregiving.

## ENDNOTES - CHAPTER TWO

1. Adversaries of the "best interest standard" are by no means limited to the feminist realm; those who criticize the standard transcend all boundaries. See for example R. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 Law & Contemp.Probs. 226.

2. See McBean, supra, note 2, Ch. One at 184. This is to say that as women were denied any power over children until approximately 1839, the struggle which took place could not be reflected in the legal system.

3. See Backhouse, supra, note 1, Ch. One at 215, where the author states: "In tracing the development of nineteenth-century English-Canadian custody law, one must look first to the period from the turn of the century to 1839, which reflected a stage of patriarchal supremacy. The father's legal authority over his legitimate children was dominant and superior to the mother's."

4. See W. Blackstone, Commentaries on the Laws of England (London 1765-9; facsimile ed. Chicago, 1979) I 441,449.

5. C. Smart, "Power and the Politics of Child Custody" in Smart and Sevenhuijsen, eds., Child Custody and the Politics of Gender (Great Britain: Billings & Sons Limited, 1989) 1 at 3.

6. W. MacPherson, Treatise on the Law Relating to Infants (London 1933) 3-4. See, for instance, R. v. De Manneville, (1804), 5 East 221; 102 English Reports 1054 (King's Bench) for a case exemplifying the reluctance of the Courts of Equity to intervene. In R. v. De Manneville, a father who abducted his nursing child, and subjected the child to poor weather, was given custody at law, due to an absence of proof of the father's failure to nurture his child.

7. An Act to Amend the Law Relating to Custody of Infants, 2 & 3 Vict. (1839) c.54 (hereinafter "Lord Talfourd's Act"). This resulted because of the celebrated case of a distinguished literary woman, Mrs. Caroline Sheridan Norton. Although physically

abused by her husband, Mrs. Norton was refused access to her children. This resulted in Mrs. Norton campaigning with Thomas Noon Talfourd to amend the custody laws in England.

8. See Smart, supra, note 5 at 6.

9. An Act Respecting the Appointment of Guardians and the Custody of Infants, 18 Vict. (1855) c.126 (Can.).

10. For an example of this see, for instance, the case of Re Allen, (1869), 5 PR 443, involving a custody dispute over two children of tender years. In his decision granting the mother custody, Morrison, J., of the Ontario Court of Queen's Bench, found that the intention of Lord Talfourd's Act was to allow the court to be untrammelled by any previous exercise of law or equity. On appeal, the majority of the Ontario Court of Queen's Bench reversed the custody order, and stated that the new legislation does not limit the common law paternal right where a father can secure the best interests of the child while simultaneously retaining custody.

11. See Backhouse, supra, note 1, Ch. One at 229.

12. K. Arnup, "'Mothers Just Like Others': Lesbians Divorce, and Child Custody in Canada" 3 Can.J.Women & L. 18 at 24.

13. See Fineman, supra, note 3, Chapter One at 657.

14. An Act Respecting the Guardianship of Minors, 50 Vict., c.21 (hereinafter the "Minor's Act").

15. English Guardianship of Infants Act, 1886, 49 and 50 Vict., c.27 (UK).

16. See, for instance, Re Dickson Infants (1988), 12 P.R. 659 which was the first case to consider this legislation, and involved a custody dispute over two young children. The court awarded custody to the mother based upon an application of the new legislative test, which they claimed enlarged and simplified the powers given to them. The court found that due to his drunken habits which caused him to be physically abusive to his wife, Mr. Dickson was unfit to care for the children.

17. See, for instance, Re Foulds (1893), 9 M.L.R. 23. Manitoba had enacted no custody legislation equalizing the status of mothers and fathers.

18. See, for instance, Re Ethel Davis (1894), 25 O.R. 579.

19. See S.B. Boyd, "Child Custody Law and the Invisibility of Women's Work" (1989) 96(4) Queen's Quarterly 831 at 834-35.

20. Ibid. at 835.

21. Ibid. See Re Orr [1933] O.R. 212, [1933] 2 D.L.R. 77 (Ont. C.A.).

22. Ibid. at 836.

23. Ibid., where the author states:
"Mothers were likely to obtain custody in those cases contested by husband, but only if they had not been "at fault" in the marriage - if they had not deserted their family, committed adultery, or engaged in other immoral conduct."

24. Ibid. See also Bell v. Bell, [1955] O.W.N. 341 at 344 (Ont.C.A.):
"No father, no matter how well-intentioned or how solicitous for the welfare of such a child, can take the full place of the mother. Instinctively, a little child, particularly a little girl, turns to her mother in her troubles, her doubts, and her fears. In that respect, nature seems to assert itself. The feminine touch means so much to a little girl; the frills and flounces and the ribbons in the matter of dress; the whispered consultations and conferences on matters which to the child's mind should only be discussed with Mother; the tender care, and soothing voice; all these things have a tremendous effect on the emotions of the child. This is nothing new, it is as old as human nature..."

25. Ibid. at 837.

26. See N. Bala and S. Miklas, Rethinking Decisions about Children: Is the "Best Interests of the Child" Approach Really in the Best Interest of Children 1992 (Toronto: The Policy Research Centre on Youth and Families) note 11 and accompanying text, where the authors cite McKee v. McKee, [1951] 2 D.L.R. 657 at 666 (P.C.).

27. Ibid. at 11. See Divorce Act, R.S.C. 1968, c. 24.

28. Ibid. at 12.

29. [1952] O.W.N. 507 (H.C.). See, for instance, ibid. at 10:
"The Court characterized the mother's conduct, living with a man she was not married to, as 'contrary to all the established rules of human society', though suggesting that if she later established a 'proper home', she might apply for custody."

30. See, for instance, Boyd, supra, note 19 at 837.

31. See, for instance, Bala and Miklas, supra, note 26 at notes 1 and 2 and accompanying text:
"The divorce rate per 100,000 of the population in Canada was 0.08 in 1871-75, 0.2 in 1896-1900, 6.4 in 1921, 37.6 in 1951, 243.4 in 1978 and 339 in 1987."

32. See Talsky v. Talsky (1976), 21 R.F.L. 21 (S.C.C.).

33. See The Infants Act, R.S.O. 1970, c. 222, s.1(1).

34. Supra, note 32.

35. See, for instance, Bala and Miklas, supra, note 26 at 12-13.

36. S.O. 1978, c. 2, 2.35.

37. S.O. 1982, c. 20, s.24.

38. See, for instance, Bala and Miklas, supra, note 26 at 14 - 17.

39. "Divorce Act Contrasted with the Family Relations Act" in Kraemer, ed. Practice Material: Family Law (British Columbia: The Continuing Legal Education Society of British Columbia, 1993/94) 1 at 3.

40. An Act Respecting Divorce and Corollary Relief (hereinafter the "Divorce Act," 1985, R.S.C. 1985, c.3 (2nd Supp.) For further information regarding the legislative scheme. See Bala and Miklas, supra, note 26 at 17:
"Courts throughout Canada seem to be applying the same broad standard: disputes between parents and children are to be decided on the basis of the 'best interests of the child'. while there clearly are judicial differences in how this test should be applied to individual cases, none of these differences seem related to variation in applicable legislation." Furthermore, see footnote 21, and accompanying text, where the author's conclude:
"In any event, the existence of a national Divorce Act has probably contributed to the evolution of similar approaches throughout Canada, since this legislation is constitutionally paramount in the case of conflicting orders, and in practice, any divorcing parent who wishes can involve this federal statute."

41. Family Relations Act, R.S.B.C. 1979, Chapter 121.

42. See ibid. at section 24(1).

43. See ibid. at section 5(1) which states that pursuant to its parens patriae power, the Supreme Court has inherent jurisdiction to determine matters of custody regarding

a child situate within its territorial jurisdiction. Any gaps in the Supreme Court's statutory authority may be filled by the exercise of its parens patriae power.

44. Ibid.

45. See ibid., sections 24(2) and 27. This section relates to the issue of parental guardianship, and sets out the legal rights and responsibilities of the child's legal guardian, both in the presence and absence of legal orders.

46. Divorce Act, supra, note 40, section 16(8).

47. Ibid. at section 16(8).

48. Ibid. at section 16(4). The term, joint custody, is without a definition that is precise. It can therefore entail one of the following arrangements in theory; however, this list is not exhaustive: (1) joint physical and joint legal custody so that the child lives with both parents for an equal amount of time, and the parents share in decisionmaking regarding the child; (2) joint physical custody meaning that the child spends significant periods with each parent although decisionmaking may be made by one parent; (3) joint legal custody meaning that both parents have the legal right to share in making decisions relating to the health, education and welfare of the child although the child's primary residence may be with one parent; and (4) custody as determined according to an Agreement executed by the parents or a court Order deemed to be a joint custody arrangement. Although joint custody may take several forms, it typically refers to one of several forms of "parent sharing", whereas with sole custody orders, the child lives with one parent and that parent makes all of the decisions regarding the child without any duty consult with the other parent. For an overview of joint custody arrangements see, for instance, S. Swift, "Joint Custody: An Overview of the Debate, Research, and the Law: Current Issue Paper: no. 89" (Toronto: Legislative Library of Ontario, 1989) at 2. For a discussion of the ramifications of joint legal custody see, for instance, A.M. Delorey, "Joint Legal Custody: A Reversion to Patriarchal Power" (1989) 3 Can. J. Women & L. 33 - 44.

49. Ibid. at section 16(8).

50. Ibid. at section 16(9).

51. Ibid. section 16(10) and 17(9).

52. See for example, Department of Justice, Custody and Access: Public Discussion Paper (Ottawa: Minister of Supply and Services Canada, 1994) at 7-12 for a discussion regarding the concerns of various provisions of the Divorce Act.

53. See, for instance, A. Ehreke, "Limiting Judicial Discretion in Custody Proceedings on Divorce" 6 Can.J.Fam.L. 211 at 240-41.

54. See Department of Justice, supra, note 52 at 11. What is truly remarkable is the way in which the Department of Justice discusses the issue of allegations of abuse within the custody realm:
"It should be noted that some concern has been expressed about focusing undue attention on the issue of abuse within a custody context because of the possibility of untrue allegations. A similar concern has been raised about the growing use of allegations of sexual abuse as a weapon in custody battles.

Through the discussion of this "problem", the Department detracts from the reliability of studies indicating that false allegations are indeed, a rare occurrence, through focusing on sensational and questionable statistics. Furthermore, it is difficult to ascertain the meaning of the words, "Such cases are particularly stressful for both parents and children." It is difficult to see how *any* attention to this issue can be characterized as "undue", when it may increase social awareness of this crisis. Finally, there is a failure to communicate the link between a child's best interest and the abuse of women; this issue is discussed in gender-neutral terms which perpetuates myths about the sex of the victim and the perpetrator.

55. See, for instance, S.B. Boyd, "W(h)ither Feminism? The Department of Justice Public Discussion Paper on Custody and Access" (1994) Can.J. of Family Law, forthcoming at 5.

56. See, for instance, J. Elster, "Solomonic Judgments: Against the Best Interest of the Child" (1987) 54 U.Chi.L.Rev. 1 at 26.

57. See infra, Ch. Three where the judicial treatment of custody disputes involving the issue of sexual orientation, and the judicial prejudice against lesbian and homosexual parents is discussed. The family forming the basis for the model of the "best interests" standard is white, nuclear and heterosexual. See Boyd, "What is a 'Normal' Family", supra, note 21, Ch. One at 273, where the author states:
"The ruling ideal of the heterosexual nuclear family remains very powerful nonetheless, and since men tend to remarry more often than women, they are more likely to be able to present an image of an 'ideal' family to a court. Lesbian and homosexual families remain largely invisible, moreover, due to the penalties often attendant upon being visible, *and the fact that statistics on 'families' are often collected through a methodology which renders them invisible.*" (emphasis, my own)

58. In other words, the many variables which may legitimately be considered by the trier of fact pursuant to the current custody regime makes it difficult to ever determine

conclusively if, and when, other variables, which may *not* be worthy of consideration, are really undermining the process.

59. Generally, most would agree that child custody determinations are one of the most difficult, due to the emotional context; furthermore, where a case-by-case is being utilized, as opposed to a presumption, the answer may not be clear cut. See, for instance, W.L. Gross, "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent" (1986) 3 Can.J.Women & L. 505 at 505.

60. As I will show, the current legislative scheme does not specifically mention sexual preference as a factor which should be considered. For a factor to be characterized as in violation of a child's best interests, there must be evidence brought forth to establish such an allegation. As will be shown, the judiciary often accept sexual orientation as *prima facie* evidence of harm being wrought to a child.

61. Elster, supra, note 56 at 29. This presents somewhat of a bleak picture, for, as stated above, morality plays a role in judicial decisionmaking and modern custody law is by nature, interventionalist; thus, judges may also presume they can challenge, or change, choice about sexual preference, in the process of adjudication. If this is the case, judges may inadvertently, or purposively, be attempting to penalize lesbian mothers when the judges are making a custody determination, and thus, be attempting to shape choices about sexual preference. See, in part, Scott, supra, note 9, Ch. One at 670.

62. See, for instance, Munro, supra, note 5, Ch. One at 859.

63. The Task Force On Gender Equality, "The Judiciary" in Touchstones for Change: Equality, Diversity and Accountability (Canada: The Canadian Bar Association, 1993) 185 at 186.

64. Ibid. at 186. However, the Task Force Report also found that 35 out of 80 judges appointed in Canada from 1989 until 1991 were women, and 10 out of the 80 appointees were Aboriginal individuals. (at 187-88)

65. See, for instance, Boyd, supra, note 7, Ch. One at 11 and 27 where the author discusses the primary caregiver presumption as an answer to "the need for coherent decision-making by looking backward in time,..."

66. Supra, note 52 at 11 - 12.

67. See, for instance, Boyd, supra, note 7, Ch. One at 25 where the author states: "...the fact is that in our society at this conjuncture, in most families one person *is* primarily responsible for childcare."

68. See, for instance, B. Ziff, "The Primary Caretaker Presumption: Canadian Perspectives on an American Development" (1990) 4 Int'l J.L. & F. 186 at 197, where the author states:
"Again, judicial biases are less easily cloaked where a determination of primacy of caregiving must be made and can be scrutinized by a higher court."

A narrower scope has implications for others partaking in custody decision-making, as well as the decision-makers and participants. Mediators, court-appointed assessors and those involved in the helping professions, are amongst a small number of groups and individuals who may be affected by a reform in the custody standard.

69. See S.B. Boyd, "Rethinking the Rethinking of Decisions About Children, Or, The Disappearing Feminist", a response to N. Bala and S. Miklas, Rethinking Decisions about Children: Is the "Best Interests of the Child" Approach Really in the Best Interest of Children? (Toronto: The Policy Research Centre on Children, Youth, and Families, 1993) at 3. See also G. Cippen, Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard Setting in Wake of Minnesota's Four Year Experiment with the Primary Caregiver Preference" (1990) 75 Minn. L. Rev. 427 at 430-31, where the author describes the struggle between the desire to utilize a custody standard according to the rule of law and a standard which allows for judicial flexibility. According to the author, this can be seen as the struggle between certainty and discretion, and is apparent in many other family law matters.

70. See, for instance, Scott, supra, note 9, Ch. One at 617, where the author states: "There is, I argue, no sounder basis for the prescription that past relationships...serves the law's traditional objectives of promoting continuity and stability for the child...Moreover, again because it is more likely to reflect parents' actual preferences..."

71. In contrast to the judicial discourse of primary caregiving, custody reform has been moving towards the adoption of "Parenting Plans" or mediation schemes. See infra, notes 115 - 124 and accompanying text. Both of these methods of dispute resolution emphasize joint custody as opposed to primary caregiving.

72. See, for instance, Fineman, supra, note 3, Ch. One at 662, where the author states:
"The nature of law is conservative. It tends to reformulate, not render obsolete, the core tenets of our society, and challenges that are too radical or extreme are typically deflected. In the family context, the basic ideological construct is patriarchy, ..." and further:
"Because the legally constructed image of family expresses what is appropriately considered family, it also constitutes the normal and defines the deviant. *The*

*designation of some intimate relationships as deviant legitimates state intervention and regulation.*" (emphasis, my own)

73. Although the custody realm is one structure which may be used by men to maintain power, this is not to say that changing the law will necessarily shift power relations. According to Boyd, supra, note 7, Ch. One at 29:
"Without more structural changes to enhance the ability of parents to participate meaningfully in the labour force and in parenting, we will not achieve real changes to the sexual division of labour in both spheres...The complexities of custody lie in the social structure within which parenting exists in the late 20th century."

74. See Cippen, supra, note 69, at 490, where the author articulates some arguments presented by those who oppose a standard which concentrates on the past. See also Ziff, supra, note 67 at 193, where the author states, in the course of rejecting any undue emphasis upon past caregiving:
"Just as Garska is uninterested in assessing the quality of performance of the designated activities, it also presumptively excludes a wide range of other indicia pointing to a future placement. Hence excluded from consideration is the plan of the primary caregiver...under Garska, future plans are not relevant unless, arguably, the spectre of unfitness is raised. ...Remarkably, any plans for the delegation or fulfilment of primary caregiving would also not be pertinent! The intentions of the past caretaker to leave a child in extended daycare, with a relative or anew spousal partner, is of no consequence to a court which is properly applying Garska."

75. See, for instance, M.L. Fineman, "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking" (1988) 101:4 Harv.L.Rev. 727 at 772, where the author states, "...it involves past fact-finding, an inquiry traditionally performed by courts." See also Boyd, supra, note 8, Ch. One at notes 37-39, and accompanying text. The author articulates the tendency for disputes within the family context to be perceived differently than other types of legal disputes. This may explain, in part, why within the custody context, judges are being called upon to make legal decisions in a fundamentally different manner: (at 13)
"The argument is that compromise and forgiveness should be more prevalent in family disputes than in other disputes. At the same time it ignores the general nature of 'compromise and forgiveness' in the family context. These assumptions also replicate the public/private divide between the family and the market place."

76. See Chesler, "The Men's Auxiliary," in Hagan, supra, note 5, 133 at 137.

77. In addition, the family which forms the basis for the model is that of the white and heterosexual family. See, for instance, Boyd, What is a 'Normal' Family, supra, note 21, Ch. One at 273:

"The ruling ideal of the heterosexual nuclear family remains very powerful nonetheless, and since men tend to remarry more often than women, they are more likely to be able to present an image of an 'ideal' family to a court. Lesbian and homosexual families remain largely invisible, moreover, due to the penalties often attendant upon being visible, and the fact that statistic on 'families' are often collected through a methodology which renders them invisible." (where she notes, at 17, 1991 Census form)

78. See, for example, Scott, supra, note 9, Ch. One at 626:
"Most mothers and fathers, however, are not co-primary parents, and thus the case for joint physical custody cannot be made on the ground that this arrangement reflects the typical allocation of parental roles in contemporary marriage." See also supra, note 5, Ch. One.

79. Ibid.

80. See C. Smart, "The Legal and Moral Ordering of Child Custody," (1991) 18 J.L.& Soc. 485 at 486.

81. See Boyd, What is a "Normal' Family, supra, note 21, Ch. One at 272, where the author states:
"As Julia Brophy has commented, in lesbian custody cases, judges often focus on women's sexual behaviour rather than on issues of the welfare or primary care of the child." (Julia Brophy, 'Child Care and the Growth of Power: The Status of Mothers in Child Custody Disputes' in Julia Brophy and Carol Smart (eds), Women in Law: Explorations in Law, Family and Sexuality (London: Routledge & Kegan Paul, 1985) 97 and 104-5.

82. See D.L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce (1984) 83 Mich.L.R. 477 at 487, notes 49-51, and accompanying text. According to the author, there are three sets of interests which conflict in a typical custody dispute: (1) those of the child's, in being placed in the "best" setting; (2) those of each parent, in maintaining contact with the child; and (3) "...society's interests in preventing the child from becoming seriously antisocial and, more debatably, *in encouraging the development of the child into a 'good citizen'*" (emphasis, my own)

This is not to say that mothers who do not deviate from any of the expectations of motherhood are safe, for as long as primary caregiving is not determinative, even the mother society perceives as "ideal" may be in danger of losing custody rights.

83. See Smart, supra, note 80 at 494.

84. See Fineman, supra, note 3, Ch. One at 655:
"In law, this has been accomplished through the transfiguration of the symbolically positive cultural and social components of parenting typically associated with the institution of motherhood into the degendered components of the neutered institution of 'parenthood'."

85. See Smart, supra, note 80 at 491.

86. It is outside the scope of this paper to trace the development of this theory; however, it is necessary to outline its impact upon custody reform. Please note, this ideology is perpetuated through the media, political pressure exerted by fathers' rights groups and social science studies. For example, in popular films and television situational comedies, fathers are often portrayed as the nurturers; however, it is well documented that the influence of the media is in building images not in depicting reality. See J. Drakich, "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood" (1987) 3 Can.J.Women & L. 69 at 80. Fathers' rights groups utilize the media in order to support their position that they are treated unfairly in the courts, and in this presentation, they ground their allegations with statistics. In doing so, they are also constructing an image of a father who in statistical reality, does not exist, and in the process, manage to empower the fathers' rights movement, and earn the assistance of legislators to take on the cause.

87. Ibid. at 87, where the author cites Regina Graycar, "Equality Begins at Home," Paper presented at the Feminism, Critical Theory and the Canadian Legal System Workshop, University of Windsor, June 1988, 3 (at note 61).

88. Ibid. at 69. See also supra, note 5, Ch. One.

89. According to Munro, supra, note 5, Ch. One at 875, the ideology of fatherhood sustains an image of the father who is involved equally in childcare, although in most cases, fathers are merely babysitting their own children, "...not taking responsibility for one-half of the work or childcare associated with families."

90. See, for example, R. Parke, Fathers (Cambridge, Massachusetts: Harvard University Press, 1981) at 2. When research in regards to a father's impact on the well-being of a child is collected, it often emphasizes the influence in traditionally masculine areas, while ignoring how a father's participation may detrimentally impact other areas of a child's development, such as that of interpersonal communication, typically perceived as maternal traits. This may point towards the need for research in the realm of fatherhood, concentrating upon these areas, through the utilization of a different methodology. According to Munro, ibid. at 871, after an examination of research data:

"From this research, one would be led to presume that males are competent and caring parents, even if sexist, and that children are at grave disadvantage if deprived of their father's care and attention. However, one must practice restraint in using such research to support a state policy of imposing joint custody post-divorce. Certainly, none of it proves that fathers *are* better parents than mothers; it merely proposes that fathers *can be* competent parents." (emphasis, the author's)

91. Ibid. at 875:
"This becomes important because courts seem willing to view any fathering at all as extraordinary and mothering as meaningless." See Fineman, supra, note 3, Ch. One at 659, and note 14:
"In efforts to exonerate 'deadbeat dads,' for example, the widespread nonpayment of child support was justified by images of beleaguered fathers victimized by a court system which consistently awarded mothers custody and treated fathers as nothing more than 'walking wallets'."

92. According to Boyd, Investigating Gender Bias, supra, note 21, Ch. One at 171, "...fathers' rights groups have been very vocal, and very persuasive, in presenting anecdotal evidence about the ways in which custody laws discriminates against them..."

This notion of shared-parenting has led fathers' rights groups to lobby for mandatory joint custody laws. Many feminists have, and continue to, argue against the enactment of such legislation, for:
"...fathers still are non-involved, but with joint legal custody they have a legal veto to any major lifetime decision the caregiver mother make." Munro, supra, note 5, Ch. One at 880.

93. See, for instance, J. Wilson, "Assessing the Child Custody Assessors" (1990) 27 R.F.L. (3d) 121. See also N. Mayers, "Cross-Examining A Custody Assessor" (1991) 7 C.F.L.Q. 343. See J.G. McLeod, Annotation to Saffin v. Saffin (1991) 35 R.F.L. (3d) 250 at 254:
"While assessments often end the litigation, this is only because in most cases the courts and lawyers accept the assessors' recommendations. In most cases the person successful on the assessment has a distinct advantage. The assessment is one of the impartial materials upon which the court has to rely. The assessment recommendation carries more weight that the observations of others because of the perceived expertise and impartiality of the assessor. In fact, the assessor may have less expertise than believed in any particular case...As well, the assessor may not be impartial."

94. See, for instance, supra, note 7, Ch. One regarding statistics pertaining to awards of custody.

95. See, for instance, R. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law" (1979) 88 Yale L.J. 950 at 950-56. See also Department of Justice, supra, note 51 at 18 where it is acknowledged that although only a minority of cases are ever litigated, the law, or more importantly, the litigants' understanding of the law, impacts upon the arrangement reached:
"Research undertaken for the Divorce Act Evaluation confirms that disputes may not occur as often as perceived and then even fewer require judicial determination...Even when informal private arrangements are worked out between the parents, it is arguable there is an indirect impact because the parents perception or understanding of the law guides the informal discussions Thus the eventual arrangements can be seen to be based, at lease in part, on what the parents perceive to the their basic rights and obligations."

96. See, for instance, Bala and Miklas, supra, note 26, Ch. Two at 5. See also Sheppard, "Lesbian Mothers II: Long Night's Journey Into Day" (1992) 14 Women's Rts.L.Rep. 185 at 204, who discusses biases held by the helping professions regarding the characterization of homosexuality. There is a wide range of views regarding the influence of homosexuality upon children. Although this, in itself, is not problematic, it becomes so when these experts are called upon to testify in a custody hearing:
"Indeed, it is fair to say that their debate, as framed by their conflicting testimony, mirrors rather than illuminates the debate in which courts are presently engaged." Unfortunately, in some cases, the word of these professionals is gospel.

97. See Bala and Miklas, ibid. at 6.

98. See, for instance, J. Rifkin, "Mediation From a Feminist Perspective: Promise and Problems" (1984) 2 Law & Ineq.Rev. 21 at 22.

99. See, for example, Children's Law Reform Act S.O. 1982, c.20, s.30; Courts of Justice Act, S.O. 1984, c.11, s.125, Family Relations Act, R.S.B.C. 1979, c. 121, s.15.

100. See Bala and Miklas, supra, note 26 at 58 - 62, and accompanying notes.
"In Weaver v. Tate (1989), 24, R.F.L. (3d) 266 (Ont.H.C.), Granger, J. suggested that an assessor should not even offer a recommendation as to the appropriate custody arrangement. However, this view was rejected by the Ontario Court of Appeal (1990), 28 R.F.L. (3d) 188 (Ont.C.A.)."

101. For instance in Victoria, British Columbia, parole officers are trained to write reports pertaining to custody and access in disputed cases of custody. Upon the court ordering that such a report is to be prepared, Family and Child Services is advised, and the case assigned to one of two caseworkers who are employed in the

downtown Victoria area. (Telephone interview with Mel Rossmo, Area Director, Family and Child Services, Victoria, British Columbia, January 18, 1995).

102. Allegations of misuse of this process are as prevalent as criticisms regarding the standard utilized. For example, E. Pickett, in her article "Familial Ideology, Family Law and Mediation: Law Casts More Than a 'Shadow'" (3d) J. of Hum. Justice 27-43, argues that the increased reliance upon the helping professions reflects an outgrowth of the formal legal model, in which gender stereotyping with respect to roles is pervasive. According to Pickett, proponents of the mediation movement characterize the nature of a family dispute such that its resolution would be inappropriate anywhere but within a private setting, allowing traditional roles within a family to be assumed, and prevail. This assumption regarding appropriate gender roles is accepted by the judiciary, who then transfer the responsibility for making these decisions upon court-appointed psychologists and social workers. However, according to Pickett, these "experts" operate upon the same assumptions regarding gender-roles. Thus, this problem of presuming appropriate gender roles is the real issue, and the reinforcement of this type of thinking will occur, whether through mediation schemes, or through the recommendations made by court appointed helping professionals.

103. See Bala and Miklas, supra, note 26 at note 84 and accompanying text where the authors' cite the study of Deleury and Cloutier, "The Child, The Family and State: Seeking to Identify the Best Interests of the Child", in Hughes & Pask eds., National Themes in Family Law, Toronto: Carswell, 1988, 211 at 232:
"...in almost 80% of cases the judge's decision conformed with the experts' specific recommendations, while in only 8.7% was there complete divergence." In addition, they cite another study, by P. Tobin, "Clinical Recommendations for Sole Custody in Decision-Making and Assessment Process" (Ph.D. Thesis, Ontario Institute for Studies in Education, 1989):
"...in which in 62 out of 64 cases the judges' rulings were consistent with the assessors' recommendations; the 62 cases include both negotiated settlements and the result of judicial rulings after a contested case."

104. Ibid. at note 61. For a further discussion, see notes 85 - 87 and accompanying text.

105. See N. Bala, "Assessing the Assessor: Legal Issues" (1990), 6 C.F.L.Q. 179-226.

106. See, for instance, Fineman, supra, note 75.

107. Ibid. at 729, where the author states:
"This article, therefore, is not a discussion of the merits of voluntary joint custody or voluntary mediation as an alternative dispute resolution technique." The focus of this

article is the lack of power of custodial mothers as a group who are disadvantaged in what she perceives to be the political process of child custody dispute resolution.

108. Ibid. at 731.

109. Ibid. at 770.

110. See, for instance, Elster, note 6 and accompanying text, where the author discusses the difficulty of litigation involving the custody of children:
"Custody disputes are also highly traumatic for the third parties called upon to resolve them. Judges and welfare officials report that these are among the most difficult cases to decide." And further, at note 6:
"'Any judge or trial lawyer, any forensic psychiatrist or other mental-health specialist will affirm that child custody is, indeed, the ugliest of all litigation.'" See also M. Bailey, "Unpacking the "Rational Alternative": A Critical Review of Family Mediation Movement Claims" (1989) 8(1) Canadian Journal of Family Law 61 at note 43 and accompanying text, where the author discusses how the helping profession has created a discourse in which divorce is viewed as an emotional crisis:
"[A]ll the available evidence suggests that the adversarial system is poorly suited to the resolution of disputes between divorcing spouses."

111. See Fineman, supra, note 75 at 761:
"This ideological shift may in fact result in a process that produces bad decisions for many women and children."

112. Once again, the realm of how the therapeutic model impacts differently depending upon race, colour, sexual preference, religion, etc must be considered by feminist legal theorists prior to abandoning or embracing suggested reforms. I am not trying to align the interests of all marginalized groups of mothers. I am trying to demonstrate that as with any reform, we must consider its impact on the many different individuals who may be affected, especially those who face current oppression.

113. See Fineman, supra, note 75 at 770.

114. Ibid. at 771.

115. See Department of Justice, supra, note 52 at 36, where the Shared Parental Responsibility Act as enacted in 1982 is discussed. According to the paper, the aforementioned objective is stated as being the public policy of the state of Florida in so far as minor children is concerned.

116. Ibid.

117. Ibid. at 36 - 37.

118. See Parenting Act, Wash. L. 1987, c.460, Domestic Relations Code, 26.09. 181 to 220.

119. See Department of Justice, supra, note 52 at 37. See, for instance, Canadian Advisory Council on the Status of Women, Summary Notes of the Custody and Access Workshop, September 24-26, 1993 (Copies available from the Canadian Advisory Council on the Status of Women upon request) (hereinafter the "Custody Workshop Summary Notes") at 42. According to a discussion of these Parenting Plans as lead by a Family Law Practitioner in Washington State, Kimberly Prochnau, the legislation requires these plans be created by "all parents who divorce, or at one parent's request, unmarried parents when there is a paternity action,..."

120. Department of Justice, ibid. at 38.

121. Ibid. at 37.

122. Supra, note 118.

123. See Bala and Miklas, supra, note 26 at 197. See also Department of Justice, supra, note 52 at note 32 and accompanying text.

124. Children Act, U.K. 1989, c.41. See Bala and Miklas, supra, note 26 at 197.

125. See Bala and Miklas, supra, note 26 at 198.

126. Ibid.

127. Ibid. at 199. However, the authors favour a parenting plan with "...a limited presumption in favour of young children having their principal residence with the person who was their primary caregiver before family breakdown".

128. See Boyd, supra, note 55 at 19.

129. See Department of Justice, supra, note 52. According to Boyd, supra, ibid. at 2 - 3, the Department of Justice released this publication in March of 1993, and invited public responses by December 31, 1993. Although the paper presents a clear overview of the custody regime in Canada, it is limited in scope. It reviews only those custody issues arising upon marital or cohabitation separation and not those in the child welfare realm, or, potentially, those related to lesbian families. For the purposes of this paper, only those issues contained in the Justice Paper relating to the implementation of "parenting plans" will be discussed.

130. Ibid. at 43.

131. See, for example, Boyd, supra, note 55 at 14-17.

132. See CACSW, Child Custody and Access Policy: A Brief to the Federal/Provincial/Territorial Family Law Committee (February 4, 1994) (hereinafter the "CACSW Paper").

133. Ibid. at 26.

134. Ibid.

135. Ibid.

136. Ibid.

137. Ibid. at 25. For instance, section 10 of the Washington State Model limits any assumptions which may be made regarding shared parenting in cases of child abuse, domestic violence and abandonment. According to a lawyer who has worked within the Washington State model, section 10 is not properly explained to those its operation may impact:
"Evidence from interviews and court files indicates that the proponents of section 10 have reason to be concerned about whether attorneys are mentioning and explaining section 10 to clients, whether attorneys may be ignoring or dismissing valid section 10 claims,..."

138. For an example of an individual response to parenting plans see Boyd, supra, note 55 at 18 - 23.

139. Ibid. at 8, where she responds to draft "parenting plan" as suggested by Bala and Miklas, supra, note 26, Ch. One. Boyd finds that these authors have missed the essence of feminist work relating to ideology and child custody. In addition, the author agrees that many of these changes result in furthering women's inequality by removing their ability to make custody claims:
"The recommendations in this paper, while certainly well-meaning, perpetuate a situation where mothers do not possess a legal language for putting their cases forward, thereby exacerbating the unequal power they have in familial disputes." (at 8)

140. See CACSW Paper, supra, note 132 at 29.

141. See Boyd, supra, note 69 at 15.

142. See Bailey, supra, note 110 at notes 61 - 74 and accompanying text where the author discusses the bias on the part of Mediators in favour of joint custody: "Mediators argue that joint custody is in the best interests of children. Mediation is advocated as the means of achieving this custody result; therefore it too is implicitly held out as being in the best interests of children."

143. Ibid. at 82.

144. Ibid.

145. See Boyd, supra, note 55 at 23.

## CHAPTER THREE

## LESBIAN MOTHERS[1] AND THE CUSTODY REGIME[2]

### The Nexus Requirement in Theory

The best interests standard, in its current legislative form, fails to provide guidelines regarding the weight to accord to the various factors present or absent in a child's life.[3] One difficulty with this omission is the lack of agreement regarding the positive or negative impact of the vast majority of factors decision-makers may be called upon to assess. This lack of consensus is by no means restricted to the judiciary, but extends to all groups working in the custody realm, including lawyers, psychologists and mediators. Unfortunately, it is in the context of cases involving difficult issues that guidance becomes crucial, for the less difficult cases are those most likely to settle out of the realm of an adversarial court-room setting.[4] The result, therefore, is a judiciary attempting to assign value to uncertain factors while, presumably, attempting to ensure personal biases do not form part of the ultimate decision. Despite these attempts at evenhandedness, certain expectations of motherhood, when not met, continue to inform the decisionmaking process in the custody realm.[5] One expectation of "mother" is that she be heterosexual and innocent

of any explicit sexual conduct; conversely, where a mother deviates from this expectation, case law indicates that her custody rights are often restricted or at least a negative message is conveyed.[6] The discourse in which these restrictions are reflected ranges from subtle to extremely explicit demonstrations of bias. Therefore, ascertaining evidence of intolerance may require reading between the lines of the judgement. Or, as in the following case, intolerance may be explicit:

> It is not disputed the mother gives to the children much warm affection. They are entitled to more. They should have guidance, direction and discipline. There should be good examples set for them. Whatever one might accept or privately practice, *I cannot conclude that indulging in homosexuality is something for the edification of young children.* The mother and Mrs. Whittle have satisfied the psychiatrist and the family counsellor that their involvement is private and discreet and can, therefore, have no effect upon the children. It is clear, however, that their relationship as seen by Tim and Simon has hurt them emotionally. Unless Jacqueline is removed from the environment she, likewise, will suffer.[7] (emphasis, my own)

Katherine Arnup, a social historian who has researched lesbian custody issues, contends that prior to both the advent of human rights legislation and the growth of the lesbian and gay movement, custody applications by lesbian mothers who were leaving, or had left marriages, were rejected without question.[8] This is not surprising, given the way in which homosexuality and lesbianism were perceived by various medical and psychiatric professional bodies: until about twenty years ago, such individuals were regarded as manifesting a mental illness.[9] In 1973, the American Psychiatric Association (the "APA") departed from defining homosexuality as an illness, and instead, defined it in terms of a "sexual orientation disturbance".[10]

Although there are several reasons for the APA's departure, it became evident that homosexuality is not learned by example, as reflected by the fact that the vast majority of lesbian and gay men were reared by heterosexual parents.[11]

With the APA's pronouncement, and the supposed increase in tolerance regarding sexual orientation, judges began to distinguish between lesbian mothers, and lesbian mothers living openly lesbian lives; according to Arnup, custody was still often denied to the latter group of mothers.[12] Despite any distinctions which may have been drawn, the concept of "mother" remained constructed as mutually exclusive from the concept of "lesbian":

> In the view of many heterosexuals, 'lesbian' and 'mother' were mutually exclusive constructs. *'Mother' was keeper of order, provider of safety, moral guide. 'Lesbian' conjured up images of darkness, disorder, and moral, perceptual, and behavioral deformation-the antithesis of 'mother'.*[13] (emphasis, my own)

The emergence of a more politically correct judicial discourse, in which judges were careful to use language free from explicit bias, followed closely behind the allegedly more tolerant climate of the late eighties. Legal theorists in the nineties must therefore delve further behind the reasons for a decision in order to detect the operation of judicial bias.[14] In many ways, attempting to find an improved method of resolving custody issues in such a climate may prove daunting, for what is needed is a standard which allows for flexibility, while simultaneously, ensuring that the free reign of the judiciary remains checked against the possibility of bias.[15]

Such a standard may prove impossible to develop; one reason being that societal opinion towards lifestyle choice is extremely volatile, and many assert that

the responsibility of the judiciary is to reflect the consensus:

> A judge has a responsibility to assess community standards as reflected by thinking members of society. Given all the circumstances here, and the stability of a sexually orthodox environment being available for this child, Judge Davis concluded that extended access would not properly reflect to and for that child currently accepted standards. I need not expound on the difficulties the child may well experience if the learned judge concluded otherwise.[16]

Furthermore, both practically and ideologically, law is involved in both the manufacture of intolerance involving sexual orientation, and, the reproduction and fortification of this oppressive mode of thinking.[17] When lesbian and homosexual individuals choose to utilize the legal system within the child custody realm, the decisions arrived at reflect one indicator of the state's treatment of alternative lifestyles.[18] To allow for any flexibility in the standard utilized in deciding custody may result in encouraging personal intolerance to permeate the custody decisionmaking process of the judges, lawyers and/or expert witnesses.[19]

An analysis of case law involving custody disputes between a lesbian mother and another attempting to restrict her custody rights, reflects that one's sexual orientation remains a factor which is not treated as neutral. Some members of the judiciary implicitly see sexual identity closely associated with one's ability to parent, and thus, with a child's best interests.[20] This attitude prevails despite the amount of research indicating that "stability of the home seems to be a more important indicator of adjustment than the sexual orientation of the mother".[21] In the United States several approaches are utilized in custody litigation where one party is gay or lesbian. Such

approaches range from an irrebutable presumption that the parent is unfit,[22] to a nexus approach, where the court ascertains whether the evidence establishes that an alternative sexual preference negatively impacts upon the child.[23] In most states there is no irrebutable presumption, however, in order for the lesbian or gay parent to establish a continued right to custody or access, they must establish that they have a good relationship with their child.[24]

In Canada, the current articulation of the best interests standard deems relevant only that conduct associated with a child's best interests; however, many elements of this test remain discriminatory for lesbian families. For example, some lesbian couples may not be "out" due to fears of discrimination in the workplace. According to Katherine Arnup:

> "'Stability of the family unit', for example, is a hard one for lesbian families to prove - since lesbian couples can't marry and, due to the closeted nature of many lesbian and gay relationships, they cannot offer statistical evidence of the longevity of same-sex relationships."[25]

Therefore, a parent's conduct, whatever that may be, should be irrelevant unless it can be established that the conduct at issue relates to the ability of a person to act as a parent.[26] The application of this principle would render sexual orientation irrelevant to a custody determination unless its effects are proven to be detrimental to the child involved. This statutory instruction forms part of what will be referred to as the "nexus requirement".[27] As it turns out, however, courts typically do not require this nexus, and in fact, regularly find that the exercise of sexual preference, *not its effect* on the child, justifies a denial, or restriction, of custody rights:

> In effect, courts have simply inched beyond the point of treating the status of lesbianism as per se unfitness to the point of treating the *practice* of lesbianism as per se unfitness. The missing element is a test under which the court could consider the mother's sexual activity only if there was specific, concrete evidence of a connection between it and the child's welfare.[28] (emphasis, the author's)

When judges, without warrant, consider one factor to the exclusion of all others, they run the risk that the presence or absence of factors which are not considered may or may not be in a child's best interests. Through a preoccupation with lesbianism,[29] a characterization of lesbianism as not being in a child's best interests, and a simultaneous devaluation of primary caregiving, the judiciary has at times produced results which may not be in the best interests of children.[30] Research within this area clearly indicates that lesbian mothers are continuously denied custody rights with "...little or no factual or clinical evidentiary basis for denying the mother custody."[31]

As the following Canadian cases illustrate, the denial of custody rights to lesbian mothers may be viewed at one end of a spectrum in which some mothers have been oppressed because of the operation of a dominant ideology of motherhood.[32] This ideology of motherhood embodies norms which all mothers are expected to meet. If they fail to do so, the result may be denial or limitation of custody rights by those informed by this construct.[33] It will be argued that if one accepts that this dominant ideology of motherhood informs and influences judicial decision-making in the custody realm, the solution may be found in enacting legislation which limits the operation of this ideology.[34]

**The Nexus Requirement in Practice**[35]

Elliott v. Elliott, an unreported decision of the British Columbia Supreme Court, involved a dispute over a seven year old girl between the child's biological mother and father.[36] Upon the separation of the parties, the mother left home with the child; seven months later, she became involved in an intimate lesbian relationship and her partner moved into her new home.[37] According to the testimony of the Family Court Counsellor, custody of the child should remain with the mother due to the lack of evidence demonstrating any detrimental impact of being raised by a caregiver who is involved in a lesbian relationship:

> In recent years several psycho-social studies have been carried out of children who have been brought up by mothers living in lesbian relationships. None of these has produced any evidence that the relationship, on its own, has had any impact on the children's sexual orientation or gender identity.[38]

Not only did the Judge dismiss this testimony, but, the Family Court Counsellor was admonished for: (1) rendering an opinion as to where custody should be awarded; and (2) not explaining the term the "psycho-sexual development of the children."[39]

In this case, custody was awarded to the father primarily because of the emphasis placed upon Affidavits made in support of the father's application for custody by two sons of the marriage. The information in these Affidavits was seen by the Judge as exemplifying that the lesbian household reflected the presence of elements unsuitable for the proper rearing of children. The implication appears to be that the presence of these elements is "unmotherly"; however, it is difficult to ascertain the precise role sexual orientation plays in the final decision, especially given the

descriptions utilized in the course of the judgement:

> ...the environment described by them is unsuitable for young children. It is not the untidy appearance or even lack of discipline and order which causes great concern. The existence of swearing, obscene language and pornography are matters that, clearly, are harmful to a child. In addition to that it is necessary to turn, once again, to the homosexual relationship.[40]

Emphasized in the judgement was the mother's reluctance to abandon her lesbian relationship in favour of raising her children. According to the judge, this reflects both the unsuitability of the home for a young child, and, the unsuitability of the mother as a parent. The judge implicitly characterizes both of these factors as indicative of a "selfish" mother, who neither wants, nor is deserving of, custody of her children:

> *It is, in my view, relevant and significant that the mother would risk losing custody of the girls rather than terminate her cohabitation with Mrs. Whittle*...It was she who sought the variation on the grounds of terminating the cohabitation. In resuming it, she left no doubts as to the priority of her relationship with her companion. It was the paramount consideration. *She wanted custody. It was, however, not at the sacrifice of the homosexual relationship.*[41] (emphasis, my own)

This decision reflects the many dangers implicit in utilizing the best interests standard; moreover, the decision reflects certain features which are common to a custody dispute where one parent is lesbian. These features include: (1) the tendency to find a positive correlation between lesbianism and harm to a child where a lesbian couple live together and thus potentially engage in displays of affection in front of the children; (2) characterizing lesbianism as a bar to custody where a lesbian mother is more actively pursuing a lesbian lifestyle, which includes being politically or

socially active in the lesbian community; and (3) characterizing lesbianism as detrimental where it is discussed openly in front of the children.[42] The judicial tendency to characterize these factors as not being in a child's best interests operates simultaneously with the characterization of other factors as detrimental to the welfare of a child. Such factors involve working outside of the home, relying upon non-relative childcare, a poor financial position, and/or allegedly illicit sexual conduct. These factors in some way tarnish the construct of the idealized mother. The application of the best interests test in such a way as to force mothers to deny all aspects of their life except for those directly related to childcare exemplifies the danger of considering the well-being of a child in a vacuum in which the mother's happiness is deemed irrelevant. Surely, there are both short and long term ramifications involved when a child is raised in an atmosphere where the primary caregiver is forced to deny most aspects of her life, especially those related to her sexual orientation.[43]

What is clearly lacking in this judgment is consideration of the relative time spent with the child prior to the separation of the parties, and, any discussion of which parent performed the primary caregiving role. The focus of the judgment appears to be an assessment of the child's year-long relationship with the father's new wife, which is characterized as "close and warm". Certainly, this is a relevant factor according to the best interests standard; however, it should not be considered instead of the lengthy relationship between the child and his or her primary caregiver. Any undue emphasis upon the relationship between a child and step-parent denies the importance of continuity - a factor which has been established as being a reliable

indicator of a child's future welfare, unless of course the case is one in which the step-parent has played a substantial role in the child's life.[44] Furthermore, the relationship between a child and step-parent contains many unknown variables, for it is relatively new, and quite often, turbulent for some period of time. It is difficult to consider how this unknown variable can be preferred over one which is established, especially at the time of separation, when the child desperately requires continuity. Even though the evidence reflects that Jacqueline's strongest emotional, physical and intellectual bond was to her mother, MacKinnon J. comments:

> Mr. and Mrs. Elliott are capable of giving Jacqueline not only love but of providing an environment where she will receive proper guidance, stability and training, to fit her for her life in the future. *They are, in the circumstances, in a much better position to fulfil the present and future needs of Jacqueline.*[45] (emphasis, my own)

The tendency for some judges to deny the importance of past caregiving demonstrates the reluctance to give this factor the consideration which is warranted. This case also demonstrates how the development of case law within the custody law realm perpetuates a vision of past caregiving as irrelevant. Even where both parents may have participated equally in providing primary care to a child, this factor requires some emphasis. Instead, where sexual orientation is at issue, case law indicates that judicial consideration of this factor often dominates and other factors worthy of consideration may be ignored.

In denying the mother custody of her daughter, MacKinnon J. emphasizes the past lesbian relationship of the mother's partner, as well as the fact

that the child saw at least one pornographic movie involving a lesbian scene while in her mother's custody.[46] The judge also discusses the pelvic infection of one child without referring to how this is relevant to the custody issue. It may be that the judge finds there to be a relationship between the sexual conduct of the mother and the fact that her daughter became sexually active and infected:

> Anita, now 17 years of age, has had a pelvic infection resulting from sexual intercourse. I concluded from testimony in this regard that Anita had been actively engaging in sexual intercourse since she was about 13 or 14 years of age.[47]

Overall, this decision reflects that where a litigant to a custody dispute fails to meet the expectation of heterosexuality, this failure will rarely be treated as a neutral factor, even where there is no evidence indicating it has no impact on the child.

S. v. S. involved a custody dispute over two children of a marriage of approximately thirteen years, in which the mother came to the realization that she was lesbian.[48] During the marriage, the mother, Ms. S., did not work full-time, and at times, stopped working in order to care for the children. In spite of this, Melnick, J. appears to characterize the direct time the mother spent with the children as time the child also spent with their father, and as such, found both parents spent a considerable amount of time with the children.[49]

One of the central issues considered in this decision involved Ms. S.'s desire to move to Vancouver with the children, a move she would embark upon after being ordered custody.[50] Melnick, J. states emphatically when first discussing the issue of custody, that the sexual orientation of the parents will play no role in denying or granting

custody:

> *...I start from the base assumption that being a lesbian or a homosexual does not, in itself, make a person unfit to be a parent or have custody of a child.* What I have examined, in this case, is what factors lead me to determine that, at this point in time, it is better to give custody to one parent or the other quite aside from his or her sexual orientation.[51] (emphasis, my own)

Despite this discourse of irrelevance, Melnick, J. gives considerable weight to several factors which relate indirectly to Ms. S.'s sexual orientation. First, Melnick, J. continuously emphasizes the amount of time spent by Mr. S. with his children, and in doing so, devalues the time spent by Ms. S with them:

> I do not accept that Ms. S.'s extra-curricular activities were as limited as she makes out that they were and I have no doubt that she spent numerous evenings away from home (in fact probably many times during the day as well) involved in these activities, studying, and preparing for lectures,...[52]

Implicitly, it appears that the judge perceives Ms. S.'s attempts to improve both her education and lifestyle as inextricably tied to her desire to acknowledge and engage in a lifestyle true to her sexual orientation. Furthermore, he perceives Ms. S.'s desire to move to Vancouver, initiated by her desire to "seek out new relationships so that she could experience her lesbianism" as indicative of behaviour inconsistent with a person who cares about her children's best interests. All-in-all, Ms. S fails to meet many of the expectations of the dominant ideology of motherhood. Because Ms. S. acts as if her mental well-being and her children's happiness are connected, she is characterized as a "selfish" mother:

> Ms. S's denial of this I take either as her being so

> intent on moving away and so wrapped in her own need to do so that she is blind to the needs of her children or an attempt to mislead me by downplaying any negative aspect of the children moving to Vancouver with her. I suspect the former is the case. On the other hand, I find that Mr. S. is well aware of the children's current psychological needs."[53]

Secondly, there are suggestions that Ms. S is an unstable person; she is depicted as being in the process of establishing a lifestyle full of uncertainty. This process of Ms. S. attempting to determine if this lifestyle is one which will make her happy, is viewed as mutually exclusive from any positive impact which this may have on the long-term well-being of her children. Finally, Melnick, J. postulates that if Mr. S. is granted custody, the children will be accorded more contact with the non-custodial parent than if the reverse were the case. Despite the invocation of a "friendly-parent" discourse, no consideration is given to the manner in which Mr. S. will assist his children in learning about their mother's sexual orientation, and any other corollary issues which this might entail. Melnick J. does not consider the harm which may be caused by allowing Mr. S. to remain in the position of the custodial parent. Surely, there must be some impact upon the development of children whose mother is continuously denigrated in front of them. It seems inconsistent that Melnick, J. could be concerned with the non-custodial parent having contact with the children, yet simultaneously ignore the potential for Mr. S. to speak negatively about his ex-partner.[54]

Saunders v. Saunders involved a custody dispute over an eight year old child as between a heterosexual mother and a homosexual father, and is particularly alarming in its insensitive treatment of homosexual and lesbian parenting issues.[55]

According to the judgment, the parties had been married for four years, and upon separation, custody was granted to the mother with reasonable access to the father. This arrangement remained in place until the child reached the age of eight, at which time overnight access was denied to the father based upon his involvement in a homosexual relationship.[56] In this case, the father felt it important to his relationship with his partner that they continue to share a room when the child was present in the home. This desire was characterized in such a way as to make clear that Wetmore, J. deemed it *prima facie* evidence that Mr. Saunders cared little for the interests of his child:

> While it is an impossibility to protect a child from many undesirable situations, even when they are very young, the prudent parent does not voluntarily and deliberately expose a child to any environmental influence which might affect *normal development*... I am not convinced that the exposure of a child of tender years to an *unnatural relationship* of a parent to any degree, is in the best interests of the development and *natural attaintment of maturity of that child. That is the issue, not the rights of homosexuals.*[57] (emphasis, my own)

The nexus requirement, if adhered to by the judiciary, requires that any judicial opinion regarding a child's best interests be based upon evidence as to the alleged effect of certain factors on the child as established by witnesses or court appointed psychologists. This requirement is glossed over through deeming a scenario not to be in a child's best interests and thus, rejecting any evidence which may suggest differently.

This decision also demonstrates that where certain other issues come into play in a case, little attention is given to the role played by the father in the

psychological development of the child. This is ironic, especially in light of the current emphasis upon shared-parenting, and how depriving a child of his father's influence would impact upon this. This fashionable shared-parenting discourse as influenced by the ideology of fatherhood is disposable where family values and heterosexuality are called upon to be defended, to the point of foregoing a child's best interests.[58]

M.(D.) v. D.(M). involves a custody dispute over two children between two applicants; one being the children's (lesbian) aunt, the other the children's biological (heterosexual) mother.[59] This decision is interesting in its demonstration of the judicial tendency to approve of a lesbian third-party where there are no other suitable individuals able to accept custody rights. In this case, the children had remained in the custody of their aunt for approximately four years, who had presumably been responsible for the primary caregiving of both children who were under the age of seven.[60] Although MacLeod, J. ordered custody of the children to their aunt, the order was made without reference to the past and present provision of care to the children.

Despite the blatant disregard for the issue of primary caregiving, the judgment was saturated with references to the issue of sexual orientation. According to MacLeod J., the aunt and her partner were appropriate caregivers for children of a young age because of their "discreet and dignified way" as embodied by their discreteness with respect to their choice of lifestyle. MacLeod J. implies that in spite of the fact that these women are in a lesbian relationship, they have wisely chosen not to reflect this fact overtly, and thus, custody should not be out of the question:

> ...I might say that for all practical purposes, the two of them must be considered as a couple who share the application and who are willing to share the responsibilities of custody. I found these two women to be very straightforward. Their relationship does not meet with the approval of all members of society in general. They were neither apologetic nor aggressive about their relationship. *They are very discreet. They make no effort to recruit others to their way of living. They make no special effort to associate with others who pursue that lifestyle.* In short, D. and H. mind their own business and go their own way in a discreet and dignified way.[61] (emphasis, my own)

N. v. N. is a recent unreported case in which the issue of primary caregiving and the presence of a lesbian caregiver collectively play such a minimal role as to be rendered almost invisible as factors influencing the ultimate decision.[62] This, however, may be ascribed to the fact that both parents worked both before and after the separation, and because of the fact the lesbianism was perceived by the Judge as "discreet", so as to accord with traditional judicial expectations regarding traditional heterosexual mothers.[63] Thus, in terms of any emphasis upon the mother's primary caregiving, it seems to be more during the period after separation, as opposed to during the marriage.

This case involved a custody dispute over three children, all under the age of seven, where the parties had been married for approximately seven years.[64] During the course of the marriage, both parents worked; however, upon the separation of the parties, and based upon a consent order, the children resided with their mother, with extensive access exercised by the father.[65] In ascertaining the issue of custody, Warren, J. utilized the best interests standard. However, in doing so,

he examined evidence, pursuant to the appropriate legislation, to determine the "conditions, means, needs and other circumstances of the children."[66] This was done implicitly, and appears to have played a large role in his awarding custody to the mother; however, it was weighed closely with the following characterization of the mother's relationship:

> There was no evidence whatsoever that the lesbian relationship was in any way notorious in the community or in the school nor was there any evidence that the children were being affected by the relationship their mother had established with Constable B...When I consider the conditions, means, needs and other circumstances of the children, I am satisfied that their best interests will be served in awarding custody of them to their mother, M.N.[67]

This characterization appears to leave no question that had the scales been more evenly balanced between the mother and father in terms of "conditions, means and needs", and had the mother been "open" with respect to her lesbianism and relationship, the primary caretaking might have taken a second place behind the "other circumstances".

Finally, the decision in the case Adams v. Woodbury reflects yet another example of judicial insensitivity and ignorance; however, it is reflected within the context of adoption.[68] In this case Lamperson, J. was called upon to determine several issues, the relevant one involving an order to dispense with the biological mother's consent to the adoption of her child by the parents with whom the child was presently living. After an extremely turbulent childhood, and in spite of being encouraged to have an abortion, the mother gave birth to a daughter. Although the mother attempted to care for her child, it proved extremely difficult:

> The mother tried to take an upgrading course at Cariboo College and also had a part-time job as a janitress. During this time, the mother's relationship with her parents had its ups and downs. The mother was doing her very best to make a life for herself and her child in a situation that would try a mature and experienced person.[69]

When the child was approximately two years old, the mother moved to Ontario, in the hopes of having a fresh start and providing a new life for both herself and her child; unfortunately, despite her best attempts, the situation was a failure.[70] Apparently, the stresses faced by the mother were exacerbated by her realization that she was lesbian.[71] The mother voluntarily gave up her child for a period of three months, after which time she returned to British Columbia with the child. Despite her parents' extreme disapproval, the mother was open about the fact that she was indeed lesbian, and became involved in a lesbian relationship. After a great deal of pressure, she contacted a lawyer regarding having the child placed for adoption and executed a document to that effect.

The child was placed into the custody of Mr. and Mrs Woodbury, where she resided until the trial date, for a period of approximately 15 months. Upon consenting to the placement of her child with adoptive parents, the mother was advised about programs available to assist people in coming to terms with their sexuality; after attending counselling, the mother concluded that, "...there was nothing improper in a lesbian raising a child and that this could be done without the child coming to any harm."[72] Therefore, approximately one month later, the mother attempted to regain de facto custody of her child. The Woodburys would not

relinquish custody, and the mother was forced to begin a civil action. There were several contentious interim custody applications regarding custody and access, and the mother was still denied custody of her daughter. Thus, the child remained with the Woodburys until the date of trial, where the Woodburys were seeking to obtain an order dispensing with the mother's consent to the adoption of the child. Lamperson, J., dispensed with the need for her consent regarding the adoption, although he repeatedly relayed her attempts to care for her child.[73]

This decision is disturbing for many reasons, most of which can be linked to Lamperson, J.'s attempts to ensure the court that sexual orientation played no role in the ultimate decision:

> Her lesbianism does not bear directly on the custody issue and the consensus which emerged during the trial was that this, in itself, was not a factor.[74]

This comment is particularly insensitive for many reasons: first, it is somewhat ironic that Lamperson, J. expects the public to derive comfort from his assurances regarding an apparent consensus that sexual orientation was irrelevant. All that is clear is that a young and confused mother temporarily relinquished the child whom she was the primary caregiver of, and the child was not returned. Secondly, be it directly, or indirectly, lesbianism, and all of its corollary issues, is clearly relevant, both to the mother, and to the Judge. Lamperson, J. raises the alleged lack of stability in the mother's life, after discussing the number of lesbian relationships; it seems unlikely that this would have been a factor had these relationships been of a heterosexual nature.[75] Furthermore, this reflects his insensitivity towards the issue, in his failing to

appreciate the difficulty faced by a young person dealing with her sexuality in a predominantly heterosexuality society. In essence, by denying the influence of sexual orientation, he is denying the role it played in this young mother being more vulnerable to the pressure to give up her child.

**Potential for Reform?**

As the cases examined in the previous section suggest, there are different approaches which may be utilized by the Canadian judiciary when confronted with factors to be assessed during a custody resolution. The multiplicity of approaches is reflected where the factor in the spotlight involves the sexual orientation of one of the litigants. Perhaps, the differences typified by these characterizations may be best understood as differences in the lenses through which the actors are looking:

> Those who observe the custodial children of gays and lesbians through the lens of homophobic fear, see them as victims trapped in a nightmare. Those whose vision is not thus clouded see them as normal children growing up in a normal, if atypical environment.[76]

Despite the differences in the way one's perception impacts upon one's vision, certain similarities are reflected in the current judicial discourse with the best interests standard remaining as the common denominator. Above all, however, what remains consistent is that the past relationship with the child(ren), and the caregiving which this entails, is downplayed, while the issues related to sexual orientation and lifestyle are elevated, so as to be determinative. This dynamic fluctuates depending upon the extent to which the lifestyle of the mother corresponds with that of a heterosexual mother, and, ultimately, how suitable the other party seeking custody is as a parent.

Certainly, case law indicates that where no other alternative exists, a lesbian mother willing to deny most aspects of her sexuality will be characterized by the legal system as an acceptable mother.

Reforms directed at obtaining the same treatment for lesbian mothers in the custody realm as that currently experienced by other mothers may be equated with taking one step forward and four backwards. As discussed, many mothers who deviate from certain expectations of motherhood face difficulties in maintaining custody of their children. Thus, an approach emphasising the common ground between lesbian mothers and heterosexual mothers would serve only to highlight the same problems confronting many mothers. In most cases, however, a mother attempting to reinforce her custody rights will choose not to use an approach which attempts to challenge the definition of "family", for strategic and economic reasons. Certainly such an approach would be expensive in terms of gathering evidence, and risky, given the uncertainty of judicial attitudes. Challenging traditional definitions of family, instead of attempting to appear similar to a traditional family, would go further towards constraining the influence of homophobic attitudes in custody disputes. The real strategy lies in finding the appropriate cases within which to launch such an offensive.

For now, however, a partial solution may be found in the legislative enforcement of a strict nexus requirement, in which "until and unless a nexus is established between lesbianism and its effect on the child, the mother's sexual activity shall be irrelevant." [77] One answer lies in the formation of a standard which

emphasises caring for children,[78] and which empowers the primary caregiver, so that the sexual conduct of all women will be irrelevant to their fitness as mothers:

> Lawyers and clients have to realize that many judges harbour irrational fears about homosexual parents. Because judges cannot even acknowledge these fears, the onus is inversely and unfairly thrust upon individual parents. Legislative amendments to human rights codes, statutes relating to child custody, and the equality provisions of the Charter of Rights should protect children and their homosexual parents against irrational prejudice. However, none of these measures will be sufficient until judges can free themselves of the homophobic attitudes that prompt them to make discriminatory orders.[79]

## ENDNOTES - CHAPTER THREE

1. Due to methodological difficulties encountered in researching this subject, at times I will use judicial pronouncements with respect to male homosexuality in addition to lesbianism. Theoretically, however, the experience encountered by homosexual fathers should in no way form a substantial part of any analysis involving the development of a lesbian legal theory. The impact of sexual preference and discrimination based upon sex is such that one can not group those who live with homophobia together, without considering how various discourses impact specifically upon men and women. It is my submission that relying too much upon the experience of homosexual fathers will obscure the role of patriarchal ideologies in the oppression of all mothers involved in custody disputes. Also, women are located differently in the relations of reproduction than men are.

2. There are many methodological problems encountered by those attempting to analyze the issue of lesbian custody using traditional modes of legal research such as case law and legal journals. There are many reasons for this, including state attempts at maintaining confidentiality where children are involved. For a discussion of this see Arnup, supra, note 12, Ch. Two at 20, where the author states:
"Only a small number of the cases which appear before the courts are reported in legal journals. These 'reported cases,' which the editors of the journals deem to be noteworthy or precedent setting, become accessible to lawyers and judges for their uses in future cases. In cases in which lesbianism is an issue, family courts often seal records, ostensibly to protect the children. Thus many cases in which lesbianism or homosexuality has been a factor remain unreported. This presents a serious problem for researchers in the area of lesbian custody."

This strongly suggests the need to look to outside sources; however, such a study is outside the scope of this thesis. Despite this barrier, an analysis based upon both reported and unreported cases, as well as research by others in this area, reveals certain common denominators with respect to the treatment of lesbian mothers by legal systems both inside Canada and throughout western society.

3. This includes those factors which may be present in the lives of the parents.

4. Even where the legal system is utilized the results are often detrimental to women. See R.F. Cochran, "The Search for Guidance in Determining the Best Interests of Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences" (1985) 20 U.Rich.L.Rev. 1 at 14:
"Those cases in which the case-by-case rule results in a child going into the custody of the father rather than the mother are the close cases in which judges are unlikely to be able to determine which choice is in the best interests of the child."

5. See supra at 41 - 42, Ch. Two. For a discussion of some of these expectations of motherhood, see, for example, M. Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's L.J. 305 at 310-16.

6. Boyd, Investigating Gender Bias, supra, note 21, Ch. One at 175.

7. See Elliott v. Elliott (15 Jan. 1987), Richmond 57-83 (B.C.S.C.), MacKinnon J. [unreported].

8. See Arnup, supra, note 12, Ch. Two at 21, where the author states:
"The discrimination was very blatant. The judges would ask questions about what the women did in their homes and in their beds and then make rulings about why it was not good for the children to be in such sick and perverse settings."

9. See, for instance, Sheppard, supra, note 96, Ch. Two at 187.

10. Ibid. at note 5 and accompanying text. The description is "individuals who are either disturbed by, in conflict with or wish to change their sexual orientation,... and "This diagnostic category is distinguished from homosexuality which itself does not necessarily constitute a psychiatric disorder."

11. See Sheppard, supra, note 96 at note 18 and accompanying text.

12. See Arnup, supra, note 12, Ch. Two at 21.

13. See Sheppard, supra, note 96, Ch. Two at note 22 and accompanying text.

14. This is not to say that legal theorists have not always had to look behind the reasons for a decision. As documented, judicial bias has always formed part of judicial decisionmaking; this is not a new concept.

15. See Hunter and Polikoff, supra, note 16, Ch. One at 696 and note 13.

16. See S.(I.J.) v.S.(G.E.) (5 April 1989), Vancouver Registry No. 597 (B.C. Co. Ct.), Wetmore, J. [unreported]. Homosexuals and lesbians continue to be denied substantive rights, and thus, I am not arguing that sexual preference is not a bar to equality. What I am saying, however, is that this issue has grown in scope, and as such, we are beginning

to see the emergence of many discourses. One such discourse is that the state eliminate discrepancies between the treatment of homosexual, lesbian, and, heterosexual couples.

17. See, for instance, Kline, supra, note 23, Ch. One at 395-96, where the author considers the way certain dominant ideologies impact on First Nation mothers and children in the child welfare realm.

18. See Note, C.R. Baggett, "Sexual Orientation: Should It Affect Child Custody Rulings", (1992) 16 Law & Psy.Rev. 189 at notes 2 and accompanying text. Even if this issue was not important in substance, if one looks at the statistics alone, they reflect that gay parents are everywhere. See Costello, supra, note 29, Ch. One at notes 315 - 319 and accompanying text:
"Gay families are, indeed, everywhere in America. There are an estimated 22 million lesbian and gay Americans, and a larger number of bisexual Americans. 'Couplehood' is as strong among gay people as among heterosexuals...An estimated one-quarter of openly gay men and one-third of openly lesbian women in America are parents. The number of children being raised in lesbian households around the nation is estimated as between 6 and 14 million." Not only will decisions involving gay and lesbian individuals and families reflect the treatment they may expect, it demonstrates the strategies which may be utilized by those confronting gay and lesbian issues.

19. See Hunter and Polikoff, supra, note 16, Ch. One at note 13 and accompanying text. See Costello, supra, note 29, Ch. One at 151, where the author discusses how the heterosexual parent often claims sole custody, based on the reasoning that the child would be harmed by exposure to the gay parent:
"Former spouses of bisexual, gay, and lesbian parents often seek sole custody of the children, claiming that the children would be hurt by contact with the queer former spouse. Sexual orientation can be a formidable weapon in the hands of a bitter spouse. Judge often agree, primarily because of the 'best interests of the child' standard leaves the decision-makers free to draw on their own beliefs and prejudices in making custody determinations."

See also Sheppard, supra, note 96, Ch. Two at 195, where the author describes the changes in the views regarding the impact of homosexuality and its impact upon children. In effect, such changes may require the judiciary to make decisions regarding the impact of homosexuality; such a decision can not help but be influenced by personal bias:
"...medical-psychological views on the nature of homosexuality and its development in or impact on children are in the process of change. When the testimony of experts is in conflict, the court has the option of choosing one expert view over another, a task for which it is ill-equipped by training or experience, or falling back on its own perceptions and intuitions."

20. See Gross, supra, note 59, Ch. Two at 505.

21. See Meyer, supra, note 14, Ch. One at 239-41. Admittedly, it is possible to find statistics to support most statements; however, it does appear certain that the more reputable statistics indicate there are positive results from being raised in a lesbian household. In fact, as compared to children being raised by heterosexual single mothers, the difference in atmosphere appears marked:
"Lesbian mothers did make more substantial efforts to provide their children with a variety of social contacts and demonstrated greater concern for providing male figures for their children than their heterosexual counterparts. In fact, lesbian mothers repeatedly attempted to strengthen their children's relationships with their fathers, a trend not found among their heterosexual counterparts." (at footnotes 43-44 and accompanying text)

22. The rationalization underlying *per se* denials of custody is a belief that a homosexual environment is not as good for a child as an environment which is heterosexual. This rational permits denying the value of any other factor which may be present or absent, such as an abusive father.

23. See Baggett, supra, note 18 at 190.

24. Ibid. at note 6 and accompanying text.

25. Arnup, supra, note 12, Ch. Two at 21.

26. See supra, note 41, Ch. Two, sections 24 (3) and (4).

27. See Gross, supra, note 59, Ch. Two at 505.

28. N. Hunter & N. Polikoff, "Custody Rights of Lesbian Mothers: Legal Theory and Litigation Practice," (1976) 25 Buffalo L.Rev. 691 at 705. See, for instance, S.(I.J.) v. S.(G.E.) supra, note 16 at 9, where the judge reasons that where a child is placed with a lesbian mother (or homosexual father) it is only because the parent has minimized the potential for his or her sexual choice to be seen as a role model:
"The courts have on occasion found, in given circumstances, the best interests of the child are served by placing custody with a homosexual father or lesbian mother. In those cases, however, the children have usually been older, but more importantly the parent has exercised great restraint in minimizing the sexual choice of that parent as a role model for the child."

29. Through reading cases involving both lesbian and heterosexual custody issues, it often appears judges require more intimate details where sexual preference is involved.

30. See King and Leopold, supra, note 17, Ch. One at 173. The reason why these decisions may be harming children is not the focus of the paper; it is more how the judiciary are not properly applying the current standard by not requiring the establishment of an evidentiary nexus between lesbianism and a child's best interest. It is, however, my opinion that when a judge does not recognize the importance of maintaining continuity

in a child's life, through ensuring the presence of the primary caretaker, the child is put in danger psychologically.

31. See Gross, supra, note 59, Ch. Two at 506, where the author examines cases involving lesbian mothers and finds that within this realm, judges have ignored principles of custody law as enunciated by statute and precedent, so as to have developed a specific precedent which harms lesbian mothers. Further, she states:
"Notwithstanding the law, judges have denied custody to gay and lesbian parents with alarming consistency, on the bases that it is rarely, if ever, in t he child's best interests to live in such a household...[A]lthough) the research makes it clear that children who are raised by lesbian or gay parents are no more disturbed, unhealthy, or maladjusted than children who are raised by a heterosexual parent."

32. See, for instance, Boyd, supra, note 5, Ch. One at 87. See also Kline, supra, note 5.

33. For example, some of the attributes expected of "mother" is that she be white, middle-class, employed within the home, monogamous and heterosexual.

34. In terms of the relevance of analyses involving the impact of dominant ideologies upon certain mothers, one insight of postmodernism regarding such methods of analyses finds that this serves to exclude the experiences of many types of mothers. See, for instance, Boyd, supra, note 5, Ch. One at notes 51 and 52 and accompanying text:
"For instance, work such as mine on child custody law has been criticized in the past for ignoring ideologies of black motherhood. Some authors would argue that a postmodernist perspective may be more receptive to a wider range of discourses, for example of womanhood." According to the author, this insight is valuable, in that the various diverse discourses contained within the custody realm should be kept in mind; however:
"...in order to understand their relationship to one another, we need to retain a sense of which discourses are dominant in particular sites and this process arguably requires an understanding of ideological formations." (at 106-107)

35. I in no way wish to imply that the cases presented in this section provide an entire picture of this issue; however, they are illustrative in many ways of judicial treatment of lesbian mothers. Please see the following cases, for further insight into the judicial treatment of the issue of custody and sexual preference. These cases demonstrate how the nexus requirement may be interpreted in practice: Barkely v. Barkely (1980), 16 R.F.L. (2d) 13 (Ont.Prov.Ct.); Bernhardt v. Bernhardt (1979), 10 R.F.L. (2d) 361 (Ont.C.A.); Boucher v. Boucher (29 May 1986) Queen's Bench FDB-57-86 (N.B.) [unreported]; Case v. Case (1974), 18 R.F.L. 135 (Sask.Q.B.); Children's Aid Society of Halifax v. A.(M.) (1986) 76 N.S.R. (2d) 18 (Fam.Ct.); Daller v. Daller (1989), 18 R.F.L. (3d) 53 (Ont. S.C.); E.(A.) v. E. (G.) (22 September 1989), Divorce Registry 87/3288 (Nfld.S.C.-Unified Fam. Ct.) [unreported]; Innis v. White (30 June 1987), Nanaimo SC8135/SC7194A (B.C.S.C) [unreported]; K. v. K. (1975) 23 R.F.L. 63 (Alta.Prov.Ct.); P.-B (D.) v. P.-B. (T.) (6 April

1988), North York D2060/86 (Ont.Prov.Ct.) [unreported]; Re B. (L.A.) (14 December 1989), Vancouver 87-6079 (B.C.Prov.Ct.) [unreported]; ; Templeman v. Templeman (22 December 1986), Victoria 16031 (B.C.S.C.) [unreported]. For a review of several of the above cases see Arnup, supra, note 12, Ch. Two.

36. Supra, note 7 at 12-13.

37. Ibid. at 3.

38. Ibid. at 8. Two other Exhibits attested to the impact of the lesbian relationship upon the child of the marriage. According to Ms. Helen Millard, Family Court Counsellor, Richmond Unified Family Court:
"(1) that there is no indication that Mrs. Whittle constitutes a negative influence on the children, but rather that they are comfortable with her and enjoy the security of having two compatible 'mothers' around; (2) that Susanne Elliott and Sandra Whittle appear to complement one another insofar as their approach to parenting is concerned, and the children's evident well-being and behaviour substantiates they are doing a better than average job; (3) that because the two women are committed to privacy insofar as their sexual relationship is concerned and their 'public' life is both conventional and discrete, a presumption that the children might be harmed socially, psychologically or morally, appears unfounded; (4) that there is substantial evidence that the children's strongest ties, emotional, physical and intellectual are to their mother, and that enforced separation from her would cause trauma for them;...
Accordingly, it is recommended: (1) That the children, Anita and Jacqueline, remain in the custody of their mother, Susanne Elliott; (2) that the father, Paul Elliott, have continued liberal access to the children of the marriage." (at 7-8)

In addition, a further report was filed, by Mr. Charles John Cannon, Family Court Counsellor, Richmond, who was called as a witness. He stated, *inter alia*:
"In conclusion, I must point out that I am concerned about the relationship between Mrs. Elliott and her partner that could affect the children at a later date. However, at this point there is no indication that the children are being threatened emotionally or psychologically. It must be made quite clear that this situation should be closely monitored, and if there is any indication of a change in the children's behaviour then this case should be reviewed. In view of the above, it is recommended that,
(1) That the children, Anita and Jacqueline, remain in the custody of their mother, Susanne Elliott..." (at 13-14)

39. Ibid.

40. Ibid. at 11.

41. Ibid. at 12.

42. See, for instance, King and Leopold, supra, note 17, Ch. One at 171, and Gross, supra, note 59, Ch. Two at 527-29. It should be noted, however, that according to some

examinations of lesbian custody decisions in the United States, it is incorrect to assume that:
"...lesbian mothers who keep their sexual relationships separate from their lives with children will be more likely to win custody struggles than those who involve their children by establishing domestic relationships with lovers."

See Sheppard, supra, note 96, Ch. Two at 200. According to Sheppard, and based on her study of custody decisions, the living arrangement is not necessarily pivotal to the resulting denial of custody:
"Eleven out of the fourteen winning mothers were living with lovers. Nine of these had domestic arrangements wherein mother, lover and children lived in one household. Only half of mothers who lost custody were living with lovers, and of these, only five were living with lover and children." In fact, Sheppard states that where a judge is not fundamentally anti-gay, the fact of the openness and "monogamous stability" of the relationship may be characterized as a positive factor.

43. See Costello, supra, note 29, Ch. One at 79, where the author discusses the detrimental impact of according the individual certain fundamental rights, while simultaneously, denying that person the right to a relationship:
"I posit that if a person is granted each of these individual rights but denied the right to enter relationships, that person's happiness is likely to be impaired radically."

44. See Bala and Miklas, supra, note 26, Ch. Two at note 15 and accompanying text, where the authors state:
"Among the strongest proponents of the importance of continuity of care are Joseph Goldstein, Anna Freud and Albert Solnit, the authors of three books on the subject. They drew their clinical experience to describe young children's sense of time and their inability to understand cope with periods of delay which to an adult would see relative short. When young children are exposed to disruption or separation from the adults on whom they are psychologically dependent, they can become anxious and fearful, and may suffer from behaviourial and emotional problems." And at 85-86:
"Infants are totally dependent on the adults around them to satisfy their needs; and they feel safe and secure with familiar faces and voices. It is their intense attachment to a primary caregiver which serves as a pattern for later relationships...Psychoanalysts such as Sigmund Freud were of the view that separation would make children fearful of placing their trust in a subsequent caregiver and thus hamper their normal development."

45. Supra, note 7 at 13.

46. Ibid. at 23.

47. Ibid. at 23.

48. S. v. S. (30 November 1992), Cranbrook 02278 (B.C.S.C.) Melnick, J. [unreported].

49. See ibid. at 18, where according to Melnick, J.:
"For some time after separation, the parties were able to make reasonable joint parenting arrangements. Mr. S., like Ms.S., had always been a very active parent. In particular, he had always done the larger share of shopping for food and the children's clothing, as Ms. S. did not enjoy the task... Ms. S., I find, also spent a considerable amount of time with the girls, notwithstanding Mr. S.'s expressed discontent with the amount of time that she was engaged in preparation for lectures, obtaining her M.A., extra-curricular activities such as French immersion, and so forth." It is interesting to note the way Melnick, J. appears to condone Mr. S.'s attitude with respect to Ms. S.'s activities.

50. See ibid. at 16, where Melnick, J. does not note that the reason the parties did not live in Vancouver initially was due to her acquiescing to his wishes that they move to the interior.

51. See ibid. at 30.

52. See ibid. at 32.

53. Ibid. at 36. This also demonstrates the tendency of the judiciary to ignore how a parent's happiness impacts upon the well-being of a child. This operates detrimentally for mothers, for the dominant ideology of motherhood creates the expectation of the self-sacrificing mother, who denies her happiness for her child's.

54. Ibid. It is interesting to note that Melnick, J. does not consider which parent will be able to ensure the children deal comfortably with Ms. S's lesbianism. Although speculative, it is a very real possibility that Mr. S. will not assist the children in educating them about lesbianism; whether or not this may be the case, it seems that Melnick, J. was acting without foresight in ignoring this factor.

55. Saunders v. Saunders (1989), 20 R.F.L. (3d) 368 (B.C.Co.Ct.).

56. Ibid. at 1.

57. Ibid. at 5-6.

58. See, for instance, ibid. at 8, where Wetmore, J. states:
"A judge has a responsibility to assess community standards as reflected by thinking members of society. Given all the circumstances here, and the stability of a sexually orthodox environment being available for this child, Judge Davis concluded that extended access would not properly reflect to and for that child currently accepted standards."

59. M.(D.) v. D.(M). (13 July 1991), Queen's Bench 221 (Sask.Q.B.) [unreported]. Please note, however, that even where there is no viable alternative, the lesbian applicant was still required to practice her lesbianism in a way which the court deemed non-threatening, both to community standards, and to the best interest of the children.

60. Ibid. at 4.

61. Ibid.

62. See N. v. N. (2 July 1992), Vancouver D076135 (B.C.S.C.) [unreported]. For a recently reported case involving a lesbian mother, in which primary caretaking was considered a factor, see Robertson v. Geisinger (1992), 36 R.F.L. (3d) 261 (Sask. Q.B.). In this case, both parents were involved in same-sex relationships which began after the date of separation. At issue, was the custody of their daughter, who was under the age of seven at the time of the hearing of this matter. According to Barclay, J.:
"After Curtis left Katerine when Alison was 11 months old, she became the primary care-giver and custodian...Although I am concerned as to what effect the sexual preferences of both Katherine and Curtis may eventually have on Alison, I was comforted when Katherine made it very clear that Alison will always be her first priority." (at 264) Accordingly, custody was awarded to Alison's mother. In light of the preceding comment, it is difficult to ascertain what the result would have been had the judge not been faced with a choice between a mother and father, each involved in a homosexual relationship.

63. Ibid.

64. Ibid. at 1.

65. See ibid. at 4. In the course of relaying the facts, the judge found worthy of notice the fact that a frequent visitor to the mother's home did not see signs that Mrs. N and her partner were lesbian:
"She had been a frequent visitor for over a year at their home and had never seen anything that would indicate an overt sexual relationship between. This aspect is important because it addresses a concern expressed by the father through his counsel about the children living in a lesbian relationship." (at 3)

66. Ibid. at 6.

67. Ibid. at 7.

68. Adams v. Woodbury (26 June 1986), Vernon 8500197 (B.C.S.C.) [unreported].

69. Ibid. at 4.

70. Ibid. at 4. According to the decision, the mother, once again, made valiant efforts to change her situation:
"While in Ontario she worked in restaurants, as a waitress and cook, and for some time held two jobs. Miss Adams was doing her best to free herself from being dependent on welfare and others. She tried to create a satisfactory life for both herself and her child. The unfortunate result, however, was that she exhausted herself physically and emotionally and, to outsiders it became apparent that the child, Brandice, was being neglected."

71. Ibid. at 5

72. Ibid. at 6-7.

73. Ibid. at 17, where the judge states:
"The evidence, even if interpreted most favourably to the mother, shows that she has encountered nothing but problems and that these have been visited on the child. That is not to say that the mother has not tried her best against great odds considering her youth, her lack of skills and earning capacity and her isolation from her family and the problems which she has with her sexuality.

74. Ibid. at 17.

75. Ibid. This is particularly ironic considering that one relationship lasted 4 months, another one year, and the current relationship for one year. These lengths of time are by no means shorter, and in many instances, are longer than those of a typical heterosexual relationship.

76. See, for instance, Sheppard, supra, note 96, Ch. Two at 185.

77. See Hunter and Polikoff, supra, note 16 at 715.

78. Smart, supra, note 80, Ch. Two.

79. See Gross, supra, note 59, Ch. Two at 531.

## CHAPTER FOUR

## THE PRIMARY CAREGIVER PRESUMPTION[1]

Criticisms regarding the present standard utilized in Canadian custody disputes are abundant; what is unclear is which alternative offers a way to recognize the gendered nature of caring for children.[2] At one time, many feminists argued against a standard in which custody would be determined by gender-based assumptions regarding primary caregiving of children in society.[3] Eventually, feminists were "rewarded" with the enactment of a standard certain to ignore any difference between the sexes, that of the "best interests of the child" and its gender-neutral formula.[4] Instead of being a solution to the many problems associated with a maternal preference, this gender-neutral standard served to exacerbate the oppression experienced by women during custody disputes.[5] For instance, Susan Boyd considers how feminist theorists have described the ways in which the departure from gendered-based standards has subverted any value found in women's primary care, and thus, harmed women involved in the process of negotiating custody and support after separation:

> They have shown that because of differential societal expectation of mothers and fathers, *any* childcare efforts shown by fathers carry more weight in judges' eyes than those of mothers, especially when combined with the usually greater economic stability of fathers after family breakdown.[6]

As the law of custody evolved, theorists begin to appreciate the difficulty of finding a standard which would recognize the gendered pre-separation pattern of childcare while still retaining sufficient flexibility to respond to and not discriminate against behaviour departing from the norm:

> Any focus on perspectives that assert as a basic premise that there are significant differences between women and men which must be addressed in law is fraught with potential pitfalls. On the other hand, given that male defined and controlled notions of law systematically disadvantage women in a variety of contexts, it seems essential that legal feminists affirm the need for law to respond to what women experience in their gendered lives.[7]

With the pronouncement of a presumption operating in favour of the parent primarily responsible for meeting the day-to-day needs of the child, the West Virginia Supreme Court developed a viable alternative to both a maternal preference and a gender-neutral standard:

> ...in the interest of removing the issue of child custody from the type of acrimonious and counter-productive litigation which a procedure inviting exhaustive evidence will inevitably create, we hold today that there is a presumption in favour of the primary caretaker parent, if he or she meets the minimum, objective standard for being a fit parent...regardless of sex...[8]

However, the endorsement of a primary caregiver presumption may in turn raise difficulties for some mothers who have not been at the centre of feminist analysis, for

example First Nations mothers and mothers with disabilities. Any viable alternative considered for use in the custody realm must take these concerns into account.

In this chapter, the primary caregiver presumption will be developed as a way to address some of the oppression currently experienced by women in the custody context. In order to effectively combat women's oppression, however, the presumption must operate in favour of the primary caregiving parent, as opposed to merely adding primary caregiving as a factor which may be considered in determining the best interests of the child. If primary caregiving is expressly listed as one of several factors which can be considered in making a custody determination, judicial bias may continue to operate thus neutralizing any emphasis upon primary caregiving in favour of another factor which is deemed worthy of consideration. Therefore, what is required is the enactment of a primary caregiver presumption. This presumption must be rebuttable only where there is evidence that the primary caregiver parent is unfit. The criteria necessary to meet the definition of unfit must also be clearly articulated to avoid false accusations by the non-primary caregiving parent for strategic reasons (hereinafter the "unfitness exception").[9] It is further suggested that the enactment of a primary caregiver presumption and a clearly defined unfitness exception will force the judiciary to specifically address the conduct which is raised by a litigant attempting to establish the primary caregiving parent is unfit. The potential for direct judicial consideration may operate so as to deter false accusations. Furthermore, it may assist legal professionals and those dependent on the legal system to identify judicial reasons for accepting or rejecting what is being postulated

as unfit behaviour.

One approach which has been utilized by the United States Supreme Court in determining how an inter-racial relationship relates to a child's best interests may reflect a parallel analysis worthy of consideration in terms of the operation of homophobic attitudes in custody decisions. The use of this American approach in a Canadian context involves arguments constructed through the application of protections afforded by the Canadian Charter of Rights and Freedoms.[10] It is suggested that at least theoretically, such arguments may be applied in association with the current custody standard, or any other reform which may be implemented in the future. It is further suggested that utilizing a Charter challenge in association with a traditional custody argument enables a litigant to challenge existing stereotypes while emphasizing the importance of primary caregiving, yet does not endanger immediate custody rights if the Charter challenge fails.

Along with some other authors in the custody realm, I make any endorsements in light of much scepticism regarding the ability of law to lead to fundamental social change.[11] Such endorsements are also made in light of the fact that some mothers have unique concerns. This presumption should therefore not be implemented without addressing as many of these concerns as is practicable. In the next chapter, I will focus on the specific experiences of First Nations and disabled mothers, and specifically, the way in which these mothers participate in caregiving of children. It will be suggested that although the primary caregiver presumption recognizes the reality of many women's lives, specific groups of women must be

consulted on their own terms, in order that their voices and experiences are encompassed in custody reform.[12] In spite of this need for further research and consultation to determine the impact of laws on different groups of women, feminist analysis should not be precluded from consideration in the process of reforming laws:

> We need not, however, wait until endless 'definitive' studies have been made in the Canadian context to discuss strategies for addressing the problems relevant to gender bias in family law.[13]

Only with ongoing debate and discussion will feminists be able to ascertain which areas require further study, and shape those studies in a realistic context.

**The Presumption**

Since 1981, the primary caregiver presumption has become the operative standard in custody disputes in West Virginia,[14] and from 1985 until 1989, was implemented in Minnesota; likewise, it has been expounded in some form, often a diluted one, in Alabama, Alaska, Arizona, Delaware, Florida, Illinois, Iowa, Louisiana, Missouri, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, New York , North Dakota, and Utah.[15] According to Judge Richard Neely of the West Virginia Court of Appeals, it would be difficult to list all the possible factors a court might consider when deciding which parent is the primary caregiver. Despite such difficulty, Judge Neely was able to assemble such a list:

> (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends'

> houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. to bed at night, attending to child in the middle of the night, waking child in the morning;...(8) disciplining, i.e. teaching general manners and toilet training; (9) educating; (10) teaching elementary skills, i.e., reading, writing and arithmetic."[16]

The decision-maker will not only be called upon to determine who performed the above duties but, at times, will have to ascertain who arranged for the performance of these duties.[17]

In Canada, legislation pertaining to custody of children deems that any factor related to the best interests of the child is relevant for consideration in a custody dispute, including past conduct where it is relevant to parenting ability. Primary caregiving may thus be raised by either litigant. However, even in those cases in which primary caregiving is emphasized, the courts have not characterized caregiving in the form of a presumption.[18] In the decision of Levesque v. Lapointe, the British Court of Appeal allowed a mother's appeal from a decision prohibiting her from removing the children from the jurisdiction because of a joint agreement between her and the children's father.[19] In allowing the appeal, the British Columbia Court of Appeal referred to a policy of affirming primary caregiving.[20] In fact, the Appeal Court found that the Trial Judge erred in emphasizing the mother's desire to further her career to the exclusion of all other factors, specifically, the mother's role as the children's primary caregiver.[21] Although the ultimate decision was in favour of the mother, the initial decision demonstrates the danger of utilizing a best interests standard with a scope so large as to allow for the mistake made by the Trial Judge.

Although it was not specifically enunciated, the Supreme Court of British Columbia may well have been applying a weaker primary caregiver policy in the highly publicized decision of Tyabji v. Sandana.[22] This decision involved a high profile custody dispute between a mother actively involved in politics and the father of their children. In the British Columbia Supreme Court decision, Spencer, J. disturbed the interim award of custody to the mother and awarded custody to the father. According to Spencer, J., a custody decision must be made according to the paramount consideration of the child's best interests; furthermore, stereotypes regarding gender cannot form part of the decision-making process.[23] Although the reasons appear inconclusive, the evidence presented in the reasons suggests that the father was primarily responsible for the children's care, especially given the mother's busy political schedule.[24]

On one level, this decision appears problematic, for once again it demonstrates that where women devote time to their careers, they will be penalized through a denial of custody; however, the facts as presented appear to be consistent with the principles of primary caregiving. The concerns centering around this decision may well be with the way the court characterized the mother's career while in the process of determining preference for the father as the provider of more continuity for the children:

> The mother's attention as a custodial parent would be, to a degree, sidetracked by her career agenda...I have tried to reverse the parents' situations in my mind as a test of this decision. If the facts as they relate to the mother related instead to the father, and *vice versa*, I have no doubt at all that she would be awarded

> custody. As it is, I am satisfied that custody should be awarded to him.[25]

Finally, recent discourse of the Supreme Court of Canada reflects support for the primary caregiver presumption.[26] In Young v. Young, the court considered the rights of an access parent regarding the issue of religious education.[27] At the court of first instance, the mother was awarded custody of her three children, and the father subjected to court imposed restrictions regarding permissible religious education to his children during visitation. The British Columbia Court of Appeal, however, set aside these restrictions, based on the finding that it was in the children's best interests to know all aspects of their father's life. According to a majority of the Supreme Court of Canada, the restrictions placed on access by the Trial Judge should be removed; in making this decision, L'Heureux-Dube, J. discussed the present role of the access parent:

> The Act envisages contact between the child and each of his or her parents as a worthy goal which should be in the best interests of the child. Maximum contact, however, is not an unbridled objection and must be curtailed wherever the welfare of the child requires it...The legislation makes it quite explicit that only the best interests of the child as it is comprehensively understood should be considered in custody and access orders. The role of the access parent is that of a very interested observer, giving love and support to the child in the background. *He or she has the right to know but not the right to be consulted.*[28] (emphasis, my own)

And further, L'Heureux-Dube, J. states:

> *The most common presumption now governing the best interests test is the primary caregiver presumption.* It explicitly restores the values of

> commitment and demonstrated ability to nurture the child and recognizes the obligations and supports the authority of the parent engaged in day to day tasks of child rearing.[29] (emphasis, my own)

Although this declaration is hopeful, the relevant legislative schemes regarding children must be amended, and, a strong primary caregiver presumption enacted, in order to give effect to this statement. Without the enactment of a strong presumption, other factors can operate so as to override the emphasis upon primary caregiving.[30] Additionally, such a presumption must be drafted so as to be flexible enough to apply in differing ways depending upon the parties to the dispute. For example, in cases of custody disputes between non-biological and biological caregivers of First Nation children, an emphasis upon primary caregiving should not operate so as deny First Nation claims to a child. This type of dispute occurs when First Nations' children are placed with foster parents who may perform a primary caregiving function, and the biological mother or other relative seeks the return of her children. If the emphasis in a custody dispute was who performed the most recent primary caregiving role, the biological mother's claim would be doomed, for that individual would be the foster parent with whom the child was temporarily placed. The specific context within which First Nation mothers and children are operating must be considered, and distinguished, when drafting legislation which seeks to promote the role of a child's primary caregiver. This is necessary to prevent the permanent removal of First Nations' children from their communities, and from their biological mothers, who should not be penalized because their children have been removed from their care.

Canadian courts have not moved far towards an acknowledgment of primary caregiving as a determinative factor in custody disputes, although it has been argued that recently there has been a greater recognition of primary caregiving in the analysis associated with the application of the best interests test.[31] Despite the claims that the Canadian judiciary is enunciating a discourse of primary caregiving, if we look to the significance of informal dispute resolution in this context,[32] we see that the discourse which is being articulated is one of joint custody and shared-parenting, a discourse in which the primary caregiver's rights can easily be subsumed.[33]

There are obvious problems inherent in the growing articulation of a discourse of shared-parenting, such as the notion that a male presence is presumed necessary for the best interests of the child. A strong presumption in favour of the primary caregiver, with a corresponding clearly defined "unfitness" rebuttal, may be one means to protect the rights of mothers who fail to meet the expectations inherent in the dominant ideology of motherhood.[34] In the following section, a theoretical analysis of this presumption and the use of the unfitness exception will be presented, as well as case law from the United States, in order to demonstrate that this presumption, and its corresponding "unfitness" rebuttal, may assist in the minimization of the significance of sexual conduct and sexual orientation as determinative factors in custody disputes.

**Form of the Primary Caregiver Presumption**

A primary caregiver presumption might potentially take many different

forms.[35] Some argue, however, that in order to be effective and meaningful in practice as well as theory, the primary caregiver presumption (1) must be formulated as a strong presumption; and (2) must be accompanied by an "unfitness" exception which is clearly defined by legislatures in explicit terms.[36] According to Laura Sack:

> Trial court judges in particular have effectively transformed the exception into a gaping loophole by repeatedly finding primary caretaking mothers 'unfit' on the basis of their sexual conduct (usually characterized as 'sexual misconduct'),...without establishing any connection between these factors and their fitness as parents. In short, the vagueness of the unfitness exception reintroduces unfettered judicial discretion into the primary caretaker standard.[37]

Without a clearly defined "unfitness" exception, the primary caregiver presumption might only recreate the types of kinds of discriminatory results now observed with the best interests standard.[38] However, even assuming that the rebuttal is used so often as to render ineffective the operation of the primary caregiver presumption, a primary caregiver rule may benefit women and children in that it may operate to encourage direct consideration of the behaviour being utilized to raise the presumption.[39] An example of the operation of the unfitness rebuttal occurs in the hypothetical case of a parent being accused of emotionally abusing a child who is the subject of a custody dispute. In such a scenario, the accusor would bring forward evidence to establish the alleged abuse thereby forcing the accused to rebut this evidence. It can be said that the unfitness rebuttal, at least notionally, places the alleged unfit conduct at the forefront of judicial consideration. Although caregiving is thereby pushed to the background, direct judicial consideration of any alleged abuse will potentially weed out

any false accusations. At a minimum, it may also allow the parties to a dispute some insight into the reason for an "unfitness" allegation succeeding or failing, and perhaps thereby facilitate an appeal in appropriate cases.

Gary Cippen, in an assessment of the presumption, summarizes the nature of the debate:

> ...opponents of the caretaker preference criticize the standard's inevitable emphasis on the past. They believe that in some situations, the past should be discounted to properly look ahead, because of the opportunity for new or changed relationships. They also challenge the utility of past conduct as a predictor of future behaviour.[40]

In contrast, at least in its application by the Canadian judiciary, the best interests of the child standard tends to pertain to who *would be* better able to provide for the child. This attempt to accurately undertake such a complex psychological prediction may be nearly impossible, especially in light of the lack of consensus about the benefit or detriment created by exposure to certain variables.[41]

If this is a realistic depiction of the nature of the struggle between appropriate standards, it raises several contradictions, the resolution of which may reinforce arguments in favour of the presumption. For instance, is there a quality unique to custody disputes which calls for a departure from the past fact-finding nature of the judiciary?[42] It is difficult to call to mind many other legal realms where the judiciary may discount the value of past evidence, if it is clearly relevant to the determination at hand, and it is difficult to see why the custody realm should call for a fundamentally different scope of inquiry. Furthermore, if, as proponents of the best

interests of the child standard argue, the welfare of the child should be the sole consideration, how can they then argue that the opportunity for new or changed relationships with the child should be a consideration? In custody cases continuity is often stressed as one factor that will contribute to the future wellbeing of children. Certainly, a child may benefit from the development of new relationships, or the enhancement of relationships which previously exist. However, it will take the passing of time in order to determine whether the relationships have actually developed into something of value for a child. In contrast, is the certainty inherent in maintaining a factor which has already proven itself to be to the advantage of a child:

According to Susan Boyd:

> ...judges tend to emphasize current and future participation in child care, often with an overly generous evaluation of any fatherly participation in parenting and good intentions for the future, and an overly punitive evaluation of any motherly deviation from full time mothering including those in the past.[43]

The struggle between past, present, and future happiness has served not only to dilute the importance of primary caregiving, but also, to obscure the interdependency which has been cultivated by the parent-child relationship.

In early 1993, the Canadian federal Department of Justice published a Public Discussion Paper which considered the current Canadian custody regime and potential reforms to the system as part of a project to inform the public and solicit feedback.[44] As stated previously, the CACSW participated in this consultation process and prepared a response.[45] One issue considered by the Department of Justice in the Public Discussion Paper and responded to by the CACSW was

reforming the current regime through enacting some form of a primary caregiver presumption.[46] Prior to responding to the Department of Justice's Paper, the CACSW held a workshop wherein issues relating to child custody and access were discussed.[47] There were several different interest groups involved in this process, including lawyers practising in family law, representatives of women's groups, social workers, community activists and feminist researchers.[48]

According to the notes prepared as a result of the workshop,[49] certain steps must be taken before the federal Department of Justice enacts any form of a primary caregiver presumption. First more research and thought is required into enacting a primary caregiver presumption. This research may indicate that the emphasis upon primary caregiving should be in the form of a presumption, or may demonstrate that it should be as part of the current or a new standard.[50] The difference between these two options is that with the enactment of a presumption in favour of the primary caregiving parent, the judicial inquiry is essentially limited to who performed the primary caregiving. Once this issue is determined, custody is no longer at issue. In contrast, if primary caregiving is deemed to be one of a list of factors to be considered, the judicial scope of inquiry would be much larger, and primary caregiving would be considered along with other factors. For example, in Washington State, where "parenting plans" are utilized, primary caregiving is relevant upon a sliding scale basis depending upon whether a temporary or permanent plan is being implemented.[51]

In its response to the Federal/Provincial/Territorial Family Law Committee

the CACSW endorses the use of a primary caregiver presumption as the best method of achieving two objectives: one, meeting the best interests of the child; and two, controlling the negative consequences felt by some women in the family law context:

> The CACSW believes that a primary caregiver presumption provides the most effective means proposed to date to ensure continuity and quality in the nurturing of children, and control over at least some of the negative consequences for women of the power imbalances between men and women in family law disputes.[52]

The CACSW expressed uncertainty regarding the most effective way of ensuring that the presumption operates in a manner which meets the above objectives. In part, this uncertainty is due to the American experience with the primary caregiver presumption, as described in an article by Laura Sack.[53] Every expression of a primary caregiver presumption in the United States has included an exception where the primary caregiver can be denied custody if proven to be unfit; however, the meaning of "unfit" has not been clearly articulated by the American courts.[54] Accordingly, the issue of which parent is the primary caregiver has instead become a battle in which each parent attempts to prove that the other is unfit.[55] According to Sack, the failure of the courts and legislation to define "unfit" has resulted in a void. This void allows for trial court judges to repeatedly deny custody to mothers based on an allegation of "unfitness". This characterization as "unfit" is typically based on "sexual conduct (usually characterized as 'sexual misconduct'), their survival of domestic abuse, or their paucity of economic resources, without establishing any connection between these factors and their fitness as parents."[56] The solution, says Sack, is in a narrowly defined unfitness exception.

In its brief, the CACSW discusses how the problem of vaguely defined standards is also reflected in the Canadian child protection context, and how this vagueness has allowed courts to utilize class and racial bias in determining whether to restrict or terminate parental rights.[57] According to the Brief, the similar effect of vagueness in the child custody and child protection realms may point to the need for standardization in these areas of law. However, the CACSW also recognizes that different issues might arise for different groups of women depending upon the context. As such, they recommend further analysis of the impact of vagueness and other issues in the child protection and child custody realm prior to considering any standardization of principles.[58]

Ultimately, the CACSW endorses the use of a strong primary caregiver presumption in Canada, with a narrowly described unfitness exception which would include such circumstances as "imminent risk of death, or risk of physical or sexual abuse."[59] Moreover, in light of the problems which have emerged with the application of the current best interests standard, any articulation of the presumption must state that the presumption shall not be rebutted because of the parent's:

- being lesbian, gay, or bisexual, whether overtly or not
- having more than one sexual partner
- working in the paid labour force on a full-time basis
- relying on an extended family or support network for assistance in parenting
- having less financial stability than the other party claiming custody

- having a physical disability

- having received psychiatric care.[60]

The CACSW's analysis of the feasibility of a primary caregiver presumption being implemented in a Canadian context reflects the problems inherent in attempting to address the concerns of the various individuals and groups who may be implicated by custody reforms. Furthermore, the CACSW's recommendations address the problems which have been faced in the United States, and attempt to ensure that such problems do not arise in a Canadian context. In this way, the CACSW has addressed the problems which have arisen, and may continue to arise, with the enactment of a primary caregiver presumption and has suggested a solution to these difficulties based upon actual experience. The only shortfall in the recommendations is the failure of the CACSW to take their recommendations and various concerns one step further and actually provide draft legislation. However, perhaps further consultations with various interests groups are needed prior to the drafting stage.

## Primary Caregiving: Potential for Lesbian Mothers[61]

The West Virginia case of Garska v. McCoy in which the primary caregiver standard was articulated was heard in 1981.[62] This section will contain a consideration of cases arising predominantly in West Virginia in which the primary caregiver presumption and/or the unfitness exception to the primary caregiver presumption are applied. Many of these cases do not involve the issue of lesbianism

*per se*, for few reported cases involve the interplay between sexual orientation and primary caregiving. Many of these cases centre around allegations regarding a mother's sexual misconduct even though the mother is the child's primary caregiver, and how such allegations operate so as to render ineffective the operation of the presumption. As clearly demonstrated, the primary caregiver presumption alone will not dissolve the many structural barriers to women's equality whose operation is typified in a custody conflict. Despite this, it is suggested that through forcing direct judicial consideration on primary caregiving in an atmosphere where the focus is not diluted by corollary factors, dominant discourses and ideologies may be challenged which may serve to empower the development of alternative discourses.[63]

In the case of Rowsey v. Rowsey, the West Virginia Supreme Court of Appeals overruled a modification to a final divorce decree made by the Wayne County Circuit Court.[64] The divorce decree granted custody of the two infant children to the mother with several conditions, including one in which the mother was prohibited from associating with Brenda Mayhew or her relatives.[65] According to the divorce commissioner's findings, Brenda Mayhew was a lesbian and the mother and her children had lived with Brenda for some time following the separation of the parties. Upon the violation of this condition, the father petitioned for sole custody claiming substantial change of circumstance.[66] The Circuit Court duly removed the children from their mother's care, after emphasizing the "stern warnings" she received regarding the afore-mentioned association.[67] On reversing the Order of the Circuit Court, the Appellate Court referred to the lack of evidence establishing any detrimental

impact upon the children from being in the company of a lesbian:

> The fact that a custodial parent and her children are in the presence of a women who is reputed to be a lesbian is not a ground for changing custody to the non-custodial parent. ...The record is devoid of evidence showing an adverse impact on the children caused by contact with Brenda, by the appellant's continued association with Brenda,...[68]

The Appellate Court, in reversing the Circuit Court's Order, affirms the significance of caring for children, and the need to preserve this role through requiring evidence of actual harm prior to displacing the custodial parent.

On the surface, this decision appears somewhat positive in its treatment of the issue of sexual orientation and custody rights; however, there are several aspects in which it is problematic. The Court of Appeal retreat from making any substantive stand regarding the issue of lesbianism and its impact upon a child's welfare, in contemplating that a different decision may have been possible where there is evidence that the children are being harmed. At a minimum, the Appellate Court should have clearly stated that the role of judiciary in the custody realm is not to second-guess decisions made by custodial parents where the issue does not involve the risk of harm to a child. The courts must be clear in sending a message to access parents that the person who is in day-to-day care and control of a child should not be unduly scrutinized.

In the custody dispute of M.S.P. v. P.E.P., the West Virginia Supreme Court reversed a lower court's decision in which custody was denied to the primary caregiver mother; this occurred even though the mother was not deemed unfit.[69]

According to the court of first instance, the conditions in the mother's home were unsuitable, based on the potential negative impact of exposure to friends of non-dominant different sexual orientations:

> That the moral atmosphere which exists in the home of M[. ] S[. ] P[. ], resulting from visits of her close friends, who are bi-sexual or homosexual, does not appear to be a fit and proper place for the children to reside. *There is also an unstable moral atmosphere at the home of the parents of M[. ] P[. ].*[70] (emphasis, my own)

In following the decision of Bickler v. Bickler,[71] the Supreme Court found that before characterizing a primary caregiver parent as unfit, evidence must be presented which demonstrates that the children have been harmed by the behaviour as indicated by the allegations of the other party.[72] Yet, in order to establish this fact, an appeal was required. If instead, legislation was drafted clearly and effectively, it would allow for the clear enunciation of the law, and thereby prevent undue hardship such as that which occurs when parents are unable to legitimately exercise their legal authority over their children. This reinforces the need for a primary caregiver presumption to be enacted with a list of scenarios in which the "unfitness" exception cannot be activated.

In Bickler v. Bickler, the West Virginia Trial Court denied custody to a mother, despite the fact that she was found to be the primary caregiver of the minor child who was the subject of the dispute.[73] This denial was based on a determination that although being the primary caregiver, the mother was "engaged in an adulterous relationship", and exposure to such a precarious situation would be at the expense of the child's welfare.[74] This decision was reversed by the West Virginia Supreme

Court of Appeal, which stated that sexual misconduct may not be the sole reason for a denial of custody; a point the Appellate Courts in West Virginia had made several times:

> Even if we assume that the adulterous relationship did, in fact, exist,* *we have repeatedly held that a circuit court may not base a finding of parental unfitness solely on the ground that the parent is guilty of sexual misconduct.* [*We note, that the evidence that a sexual relationship existed between the appellant and Carpenter was far from convincing. Moreover, the circuit judge indicated at the hearing a predisposition to disbelieve any assertion that a man and a woman would share living quarters without engaging in sexual relations.][75] (emphasis, my own)

This decision reflects the danger of utilizing a standard in which too much leniency is given to decision-makers. It also exemplifies that without removing some flexibility, decision-makers will continue to make decisions which reflect their moral beliefs. Finally, this decision is disturbing in that the Judge mentions that Trial Courts have been instructed many times about abstaining from utilizing sexual conduct as the sole grounds for removing custody from a parent. In light of the financial resources required to appeal a decision, it would seem that the Appeal Court, in not finding a way to ensure that lower courts heed the precedent established by the Courts of Appeal in West Virginia, merely facilitates the behaviour of Trial Judges in appearing indifferent as to whether their decisions are successfully appealed.

Maddox v. Maddox involves an appeal from a Circuit Court decision of the Oregon Trial Court, in which custody was granted to the father, despite the fact that he had not been the primary caregiver of the two children who were the subject

of this dispute.[76] In this case, the mother had been the primary caregiver of the children, while the father attended law school at night and worked during the day.[77] The wife alleged that as both she and her husband were equally able to provide for the best interests of the children, the fact that she was their primary caregiver should have been determinative. Despite her argument, the Court found that in actuality, the two parents did not possess an equal ability to provide for the children. The discrepancy between the mother and father was grounded in evidence of alleged sexual indiscretion such that the mother was deemed to be lacking in stability:

> The evidence demonstrates that the same level of stability is not found in wife's new household....Mother's sexual indiscretions in front of the children is another factor we consider.[78]

On appeal, this decision was upheld, based on the Court of Appeal's finding that it was in the children's best interests to be placed in the care of the father.

It is interesting that in the decision of Maddox v. Maddox, the court is quick to find, and then develop, a link between sexual indiscretion and an instable household, without evidence establishing this positive correlation. The court then develops this unsubstantiated correlation in order to ground the assertion that this household would detrimentally impact upon the children. By virtue of these unsubstantiated links, the mother has been tried and loses, without the benefit of evidence which she could develop in order to detract from these alleged indiscretions. The only way around such rulings is to establish, through legislation, which evidence may be utilized to substantiate allegations of unfitness based upon sexual misconduct.

In David M. v. Margaret M., the West Virginia Supreme Court of Appeals

reversed a decision of the lower court which denied the primary caregiver mother custody based on a finding of unfitness.[79] This unfitness label arose because the mother had committed adultery twice during a period of three years.[80] According to Neely, J. of the Appellate Court:

> *We have noted that our very narrow exception to the primary caretaker rule has of late developed a voracious appetite* which, if left unchecked, will allow it to eat the rule.[81] (emphasis, my own)

The Supreme Court proceeded to articulate a new standard by which to determine parental unfitness:

> To be a fit parent, a person must:,,,(5) refrain from immoral behaviour under circumstances that would affect the child. In this last regard, restrained normal sexual behaviour does not make a parent unfit. The law does not attend to traditional concepts of morality in the abstract, but only to whether the child is a party to, *or is influenced by*, such behaviour. (emphasis, my own)[82]

In applying this newly enunciated standard, Neely, J., did not articulate what a court would constitute as the permissible influencing of a child. Despite Neely, J.'s failure to expand on the meaning of this term, he stated:

> The circuit court was clearly wrong in its position that the three instances of sexual misconduct, occurring over two years, warranted a finding of unfitness, without evidence establishing that the child was harmed or that the conduct *per se* was so outrageous, given contemporary moral standards, as to call into question her fitness as a parent.[83]

Through this enunciation, Neely, J. was relaying a message to lower courts regarding the permissible factors for consideration. However to be effective such instructions should be

embodied in legislation.

Certainly, it would be naive to assert that the use of a primary caregiver standard has the capacity to alleviate the difficulties experienced by many women both during, and after, a custody dispute. It is doubtful that the enactment of a strong primary caregiver presumption by itself would be able to combat the operation of judicial bias, for the failure of law to lead to social change continues. However, some of these cases reveal certain similarities with respect to the judicial treatment of women's sexual conduct and lifestyle choices. Significantly, in many cases the Appellate Court seems to be insisting on an evidentiary nexus between certain alleged behaviour and its harmful consequence. In part, this is attributable, to the scope of the judicial inquiry being severely curtailed with this primary caregiver presumption. It is optimistic that the various Appellate Courts are enforcing the need for a nexus between alleged unfit behaviour and detriment to the child; however, it is necessary for trial judges to also require a nexus because it is dangerous to assume that the litigants involved will have the various resources required to launch an appeal.

The Maddox v. Maddox decision demonstrates what occurs where lower courts fail to require evidence as to the existence of a nexus between the alleged sexual indiscretion and the children's best interests. In Oregon, primary caregiving is only utilized as a consideration when all other factors are deemed to be equal and as reflected in this case, such an approach is essentially ineffective for it diminishes the significance of primary caregiving. Instead, the denial of custody to the mother, even though she was the children's primary caregiver, was articulate as being beneficial to the welfare of the

children. This signifies the ineffectiveness of a diluted emphasis upon primary caregiving currently used in many states, such as Minnesota, and shows why primary caregiving should be viewed as a determinative factor in and of itself, not merely a factor to be utilized assuming all else is equal. Therefore, the denial of custody to the mother as not being in the children's best interests in Maddox v. Maddox epitomizes the result where the judiciary is empowered with too much discretion.

It appears that the primary caregiver presumption has the potential to force the judicial consideration of certain issues which might otherwise be ignored by certain members of the judiciary, such as the relationship between a parent's lifestyle and the impact upon a child. In addition, it is argued that the enactment of a strong primary caregiving presumption will alleviate some of the oppression which is experienced by women and children in the custody realm because it allows primary caregiving to be recognized and awarded. However, the possibility exists that such an enactment will never occur. It is therefore necessary to consider other methods by which some of this oppression may be reduced while ensuring that the value of caregiving is not ignored. One such approach involves challenging the manner in which some custody disputes are resolved, that is through blind speculating as to the future. It is suggested that the use of such methods is devastating to women and children because it departs so far from considerations of the past and the value of past caregiving.

**Charter and Constitutional Challenges in Custody Litigation: Public Policy Considerations**

In the United States, the same overriding factor is utilized in determining issues of custody as is used in Canada: decisions regarding child custody shall reflect

a child's best interests.[84] Any difference in the development of custody law in both jurisdictions may well be rooted in the contrast between the protection accorded by the American Constitution and that accorded under the Canadian Charter. A decision which reflects the practical difference between the two is that of Palmore v. Sidoti involving a custody dispute over a couple's infant daughter.[85]

On the couple's divorce, custody of the child was awarded to the mother; subsequently, the father filed a petition for modification of custody, based on the mother's cohabitation with a black man (whom she subsequently married).[86] The application of the best interests of the child test by the Court of First Instance resulted in an award of custody to the father. According to the court, the child should be removed from the mother because her choice of lifestyle could lead to the child facing pressure at school. Yet, the trial court had found that the only substantial difference between the home of the mother and that of the father was the racial factor.

> ...[t]he wife [petitioner] has chosen for herself and for her child, a life-style unacceptable to her father and to society...[t]he child...is, or at school age will be, subject to environmental pressures not of [the child's] choice,...[87]

On appeal, this decision was affirmed without accompanying reasons;[88] however, in due course, *certiorari* was granted by the United States Supreme Court.[89] The issue to be determined by the Supreme Court involved the permissibility of a court considering the fact of the subsequent inter-racial marriage of a custodial parent when ordering custody pursuant to the equal protection and due process clauses of the fourteenth amendment.[90]

According to the decision of the United States Supreme Court, the fourteenth amendment's equal protection clause prohibits a court from speculating as to the potential future effect of racial bias when determining whether a custody order should be modified:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect:[91]

And further on in the decision:

> Whatever problems racially-mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody it its natural mother found to be an appropriate person to have such custody.[92]

The Supreme Court found that based on the facts of Palmore v. Sidoti, the Circuit Court's decision as to the harm the child would face, was merely speculative in nature. Absolutely no evidence was presented demonstrating that the child had, or would, suffer psychological or emotional harm due to the interracial marriage of her mother:[93]

> No psychological test results, doctor's reports or evidence regarding Melanie's adaptation to her mother's home, her school, or her neighbourhood were presented to the circuit court. There was also no indication that Melanie was likely to be harmed by racial prejudice present in her environment. The record discloses no evidence of neighbourhood racial disputes, teasing, or any other form of discrimination which might have resulted in physical or psychological injury to Melanie.[94]

This decision is clearly positive in its strong statement as to the impact of speculating as to a child's well-being. However, because of the inherent ambiguity, this judgment is also problematic, in so far as the difficulty in ascertaining its future applicability. A main objective of the Fourteenth Amendment is to eradicate governmentally imposed racial discrimination.[95] Typically, for a governmental racial classification to be deemed constitutional, that classification must be rationally related to a legitimate governmental purpose; however, where the classification relates to race, the classification must be required in order to meet a compelling governmental interest.[96] According to the decision in Palmore v. Sidoti, making custody decisions which are in a child's best interests is a substantial governmental interest; however, meeting this objective does not warrant denying a parent custody only because of the race of the parent's partner.

The ambiguity resulting from this decision arises because of the difficulty in ascertaining the potential success of applying the enunciated principles to other realms.[97] The broadest interpretation possible would preclude any consideration of race, even if there was evidence before the court that harm had actually befallen the child. In contrast, a narrow interpretation would see the permissibility of considerations of race where evidence of the child suffering actual harm is presented to deter from speculative arguments.[98]

Although it is difficult to state the effect of the Palmore v. Sidoti decision, it is clear that with the use of the best interests standard the following trends have been seen in the United States after the decision of Palmore v. Sidoti: (1) some courts

have found racial considerations to be completely irrelevant;[99] (2) some courts have considered the issue of race to be a factor which may be examined;[100] and (3) other courts have characterized race as a factor, but not one which is determinative in a custody proceeding.[101] It appears that since the decision of Palmore v. Sidoti, courts have become increasingly careful to relay that if the issue of race is being considered in a custody dispute, it is but *one* factor relevant to the proceeding. This is reminiscent of the lesbian and gay custody cases, where the judiciary is quick to point out that lifestyle is but one factor which influences a custody decision. Despite this judicial discourse however, it is still probable that race may be determinative in custody proceedings, without the courts explicitly stating so for the record.

One suggestion which has come forth regarding the application of Palmore v. Sidoti in the United States involves the argument that the Fourteenth Amendment requires that courts use a test of heightened scrutiny when considering presumptions finding that custody or access to a parent involved in a same-sex relationship is not in a child's best interests.[102] Briefly, one would argue that the issue is not the status of the parent which is at issue, but the fact of the parent's involvement in a same-sex relationship:

> In fact, the fear behind the four rationales for denying gay parents' custody of their children -- potential stigmatization or harassment, moral development, the child's sexual orientation, and presumed sodomy state violations -- are much more likely to be realized when the parent openly engages in a same-sex relationship.[103]

Heightened scrutiny would be required because: firstly, it can be argued that

homosexuals fall within what is referred in this realm as a suspect class due[104] to the history of discrimination against them; secondly, any presumption denying custody to parents in a same-sex relationship infringes upon the right to intimate association.[105]

In the United States, approximately 25 states have statutes deeming non-marital and extra-marital sex criminal behaviour, and given that in the United States, homosexual marriages are not legally recognized, this effectively deems homosexual sexual conduct illegal.[106] If the United States Supreme Court recognized the right to engage in non-marital and extra-marital relationships under the right to privacy, it would create a grounds from which to attack the existing statutes criminalizing this behaviour. Through an examination of the treatment of heterosexual non-marital and extramarital sexual issues under the Constitutionally protected right to privacy, it becomes clear however, that any optimism about the future treatment of lesbian and gay issues in the wake of Palmore v. Sidoti is premature, and further, that this line of precedent has no relevance in a Canadian context. In the decision of Jarrett v. Jarrett, a husband applied to have the custody of his children removed from their mother, who was living in a loving, albeit, unmarried heterosexual relationship, and under the authority of Illinois anti-fornication laws.[107] The Trial Judge removed custody of the children from their mother;[108] the Illinois Supreme Court reaffirmed the decision of the Trial Court;[109] and, the United States Supreme Court denied the mother's certification.[110] The majority decision of the United States Supreme Court indicates agreement with the state court's characterization of non-marital sexual relations as

criminality deserving of custody disentitlement.[111] According to A.T. Sheppard, this decision is particularly devastating for homosexuals and lesbians attempting to obtain constitutional protection:

> The constitutional claims of lesbians and gay males in general and lesbians mothers in particular are hostage to that outcome. If the state can proscribe and penalize heterosexual intercourse outside of marriage, it can proscribe and penalize homosexual intercourse outside of marriage...For lesbian mothers, it amounts to the power to take their children from them if they are sexual in the ways dictated by their sexual orientation or, indeed, at all outside of heterosexual marriages.[112]

As stated previously, a Supreme Court recognition of the right to engage in non-marital and extra-marital relationships under the right to privacy would create a grounds from which the existing statutes criminalizing this behaviour could be attacked.[113] Homosexual men and lesbians are excluded from Constitutional protection, primarily based on the reasoning that one's sexuality is freely assumed.[114] An expansion of the right to privacy would enable arguments attacking the many civil and criminal penalties presently existing for the punishment of homosexual behaviour.[115]

In Canada, the issue of race has been confronted more in the context of child welfare than that of child custody.[116] In a number of decisions involving children, the Canadian judiciary has been quick to articulate the objective of ensuring a multicultural society.[117] The issue of adoption was considered by the Supreme Court of Canada in the decision of Racine v. Woods; specifically, the court examined the impact of inter-racial adoption upon a child's tie to the community and

unequivocally supported inter-racial adoption.

> Much was made in this case of the inter-racial aspect of the adoption. I believe that inter-racial adoption, like inter-racial marriage, is now an accepted phenomenon in our pluralist society. The implications of it may have been overly dramatized by the [natural mother] in this case.

Once again, it appears that despite there being no specific policy regarding the issue of inter-racial adoption, "judges have articulated a policy of promoting a multicultural society."[118] This type of policy may play a role in custody and welfare decisions, such as that of Racine v. Woods, where First Nation children are removed from their biological mothers and placed with caregivers outside of the community not sharing a similar culture. However other judges have referred to this "reprehensible" removal of children, and emphasized the objective of promoting First Nations culture and identify.[119] Thus, it appears that the judicial discourse to the effect that it is in a child's best interests to be "raised in a Native Indian home, surrounded by his extended family and the band beyond",[120] is restricted by the impact of liberal ideology:

> ...the individual and abstract focus of the best interests criterion makes such recognition difficult, and is usually tenuous. At best, the retention of First Nations culture and identity by a First Nations child plays an ambiguous role in judicial application of the best interest standard. It is not surprising then that even the most legally authoritative description of the meaning of 'best interests' fails to even mention the importance of retaining a child's First Nations culture and identity or to indicate the weight to be accorded to this factor.[121]

Certainly, the objective of promoting a multicultural society may be valid in regards to

some issues, however, this objective cannot be viewed as necessarily valid or neutral in the custody realm given its detrimental impact upon First Nations culture.

In custody cases involving mothers who may deviate from that of the traditional, yet, idealized, norm of the heterosexual stay-at-home mother, the Palmore v. Sidoti decision could be utilized to argue that it is a violation of the Charter to directly or indirectly restrict custody rights based on a parent's homosexuality. However, prior to such arguments being utilized, the Canadian Charter must be proven to be applicable to the family context.[122] This barrier may prove too difficult to overcome, given the view of some that there is no role for the Charter in the regulation of private familial relations:

> I find the use of 'rights' language within the family setting quite inapposite, given the complex interweaving of dependency, altruism and autonomy in family relationships.[123]

Section 15 of the Charter provides that

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour religion..."[124]

Section 15 of the Charter does not include sexual orientation as an enumerated ground; however, sexual orientation has been read into section 15 as an analogous ground.[125] According to section 1 of the Charter, this right may be limited where the state establishes that such a limit is reasonable.[126] The issue would therefore involve balancing the best interests test against the rights afforded by section 15 of the Charter.[127] As shown previously, in some cases where courts are faced with a

custody disputes involving a lesbian mother, some judges may be treating the presence of a same-sex relationship, or, of a parent's sexual orientation, as determinative, and as a bar to custody.[128] This may be occurring in some cases despite the fact that the psychological data available shows that the presence of same-sex parents has no negative impacts upon a child's welfare.[129]

If one applies the narrowest interpretation of Palmore v. Sidoti, that one's race cannot be used as a grounds to deny custody rights, and if the argument can successfully be made that s. 15 of the Charter applies to sexual orientation and to custody decisions, the analogy may be made that lesbianism, as well as race, cannot be used as a bar to custody.[130] Theoretically, there is little difference between the impact of race and sexual preference in this realm, for the reports of helping professionals are certainly not conclusive, and, at a minimum, are speculative in their ability to predict future outcomes. Even if a child faces unique difficulties through being raised in a lesbian household, it should be inconsistent with judicial policy for the law to be utilized to validate intolerance.

Regardless of the procedure established to resolve child custody disputes, the most important objective is to ensure that children are placed with the most appropriate caregiver, and that such a transition is made with as little disruption as possible to all involved. Another crucial factor is that primary caregiving be recognized as crucial to the best interests of children. It is suggested that a child's best interests and primary caregiving are linked. However, it is further suggested that prior to the enactment of reforms based on the link between primary caregiving and

a child's best interests, the relevance of primary caregiving for all mothers needs to be considered. This task will be undertaken in the next chapter.

## ENDNOTES - CHAPTER FOUR

1. See Boyd, supra, note 7, Ch. One at note 1 where the author explains her use of the term "caregiver" as opposed to "caretaker".
"My choice of the term 'caregiver' rather than 'caretaker' was guided by my colleague Renate Mohr's suggestion that women who care for children do not consider themselves to be 'caretakers'. See also Bala and Miklas, supra, note 26, Ch. Two at 133, and note 1, where the authors state, in part:
"The term 'primary caregivers', 'primary caretakers' and 'primary parents' are used more or less synonymously by judges and commentators."

For the purpose of this paper, I am not proposing to present the advantages and disadvantages of such a presumption. As such, I will be referring to this presumption on a more theoretical level. My focus will be on the viability of a version of this presumption for the limitation of judicial bias and prejudice in cases involving lesbian mothers. Much of this analysis, however, is applicable to all mothers whose lifestyles have or may be deemed "alternative" by the judicial system and society.

Please note that this rule has been suggested by many as a means by which to alleviate custody being utilized by fathers to extort lower child support payments. See, for instance, R. Neely, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" 3 Yale L.Pol'y Rev. 168 at 171, where the author states that due to the uncertainty created by the best interest test, and the growth of presumptions based upon shared parenting, many fathers might threaten a custody fight. See also Bala and Miklas, at 138, and note 4, in which they cite D. Poirier & M. Boudreau, "Formal Versus Real Equality in Separation Agreements in New Brunswick", April 1991, Canadian Association of Law Teachers, where the authors state that a large number of agreements were executed by mothers agreeing to settlements of property or support in order to be assured of receiving custody. Given that mothers, as primary caregivers, have more to lose if a case went to court, they will be more prone to bargain financial entitlements for custody rights. For a lesbian mother whose spouse has knowledge of her sexual preference, and presumably his lawyer, the ability to extort increases, given the treatment of homosexual parents in custody disputes. Given the number of custody disputes settled without recourse to the legal system, but in its shadow, a rule which favours the primary caregiver implicates all mothers. For an explanation and analysis of the impact of legal

rules upon those who ultimately settle out of court, see Mnookin and Kornhauser, supra, note 95, Ch. Two.

2. This is not to say that it would be permissible to find an alternative which would be detrimental to the interests of fathers. My use of the term "mother" is in recognition that as a society, we cannot separate the interests of children from those of their primary caregivers who are more often than not mothers. See Boyd, supra, note 69, Ch. Two at note 47 and accompanying text:
"Children may also be disempowered in these processes, but their interests cannot be severed arbitrarily from those of their primary caregivers. Historians have shown the extent to which children's interests are linked with those of their parents, and more often their mothers than their fathers."

3. See Bala and Miklas, supra, note 26, Ch. Two at 9 - 11, where the authors discuss the operation of a rule of maternal preference. This standard emphasized the benefits derived by children up to the age of seven being cared for by their mothers. This presumption was particularly strong for girls of a "tender age"; however, in many cases, it was extended to older children of any age, especially girls. According to the authors, at 10:
"The tender years doctrine appears, to more modern eyes, to be gender biased, while the exception to the rule for 'unfitness' seems highly moralistic and in many cases discriminatory against women. However, these rules were based on the belief that they served the promotion of the welfare of children,..." See also ibid. at 3, where the author states:
"Due to a wish to enhance the ability of society and employers to think of women apart from the biological imperatives of reproduction, feminists and others engaged in reform measures in the 1970's tended to de-emphasize and 'special' connection between mothers and children." Ibid. at notes 40 - 43 and accompanying text where the author states:
"Many people, including many feminists, were supportive of these efforts to diminish the perception of any 'special' connection between mothers and children, with the accompanying problematic expectations that women would necessarily wish to have children and necessarily assume primary responsibility for them. Considerable optimism prevailed that gender neutral legal provisions on disputes concerning children would encourage the assumption by men of more childrearing responsibilities and also free women's energies for activities in the 'public' sphere. Like many initiatives of the 1970's, however, this optimism has not been borne out in terms of actual results."

4. See Boyd, ibid at note 5 and accompanying text.

5. Boyd, supra, note 7, Ch. One at notes 8 - 11 and accompanying text.

6. See Boyd, supra, note 5, Ch. One at 4.

7. See Fineman, supra, note 3, Ch. One at 668 - 69.

8. See Garska v. McCoy, supra, note 8, Ch. One. According to Neely, J., for the West Virginia Court of Appeal:
"While it is difficult to enumerate all of the factors which will contribute to a conclusion that one or the other parent was the primary caretaker parent, nonetheless, there are certain obvious criteria to which a court must initially look." See infra, note 12 and accompanying text, Ch. Three, for a list of the factors deemed relevant by the West Virginia Court of Appeal. In the majority of cases, this individual is the mother, see supra, note 5, Ch. One; however because this presumption is grounded in gender-neutral language, it allows for custody rights to be ordered to fathers in those families in which he is the primary caregiver of children.

9. See infra, notes 36 - 39 where the "unfitness" exception is defined further.

10. Canada Act, 1982 (U.K.), 1982, c. 11 Part 1 of Schedule B (hereinafter the "Charter").

11. See Boyd, supra, note 7, Ch. One at 3:
"I examine arguments in favour of and against the presumption, discuss its potential in Canada, and raise questions about the ability of the legal presumption to alter in any *fundamental* fashion the problematic social relations surrounding childcare in the late 20th century." (emphasis, the author's) See also Boyd, supra, note 54, Ch. Two at note 103 and accompanying text, where the author states:
"I have argued previously that it is 'beyond the scope of family law radically to transform structural differences in child care. It is also largely beyond the power of statutory language to make parents behave better or cooperate in child custody disputes." In light of law's limited power, Boyd encourages laws which "recognize current patterns (e.g. primarily female caring *for* children),...(emphasis, the author's)

12. The need for a consultation process is particularly strong given that in child custody cases, as well as in other areas of law, the race of a particular litigant is not typically disclosed. See Boyd, Investigating Gender Bias in Canadian Custody Law, supra, note 21, Ch. One at 183 - 84, where the author discusses how considerations of race are invisible in reported cases:
"In focusing on child custody cases, where the race of parents and children is very rarely identified, issues of race and their connection to the ideologies of (white) motherhood which I explored, remained invisible."

13. See Boyd, ibid at 169.

14. See Department of Justice, supra, note 52, Ch. Two at 31.

15. See L. Sack, "Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases" (1992) 4 Yale J.L. & Feminism 291 at 292, and note 5, where the author states:

"Courts in a number of states have adopted a 'hybrid' approach in which the primary caretaker is one of several factors to be considered in determining custody." In 1989, the primary caretaker presumption was replaced by the Minnesota legislature and primary caretaking is now one of several factors relevant to a determination of custody. See MINN.STAT.518.17, subd.1 (Supp.1992). See also Bala and Miklas, supra, note 26, Ch. Two at 141.

16. See supra, note 7, Ch. One.

17. This difference becomes crucial where both parties work outside of the home. Statistics indicate that even where both parties work outside of the home, it is typically the mother who arranges for alternative care. See supra, note 5, Ch. One.

18. See Custody Workshop Summary Notes, supra, note 119, Ch. Two at 48.

19. Levesque v. Lapointe (8 January 1993), Vancouver CA016090 (B.C.C.A.) at 17 [unreported].

20. Ibid. According to the British Columbia Court of Appeal, at para. 51:
"The interests of the children are best served by being with the parent who has been primarily responsible for their care. The evidence supports the view that the appellant will ensure the continuing involvement of the respondent and his wife in the children's lives."

21. Ibid. at para. 40. According to the British Columbia Court of Appeal:
"From the reasons for judgment it appears that the chambers judge either placed no importance on the mother's role as the primary caregiver, or misapprehended the evidence of the children's day-to-day care. The chambers judge appears to have focused on the mother's wish to further her career to the exclusion of other considerations, particularly her role as the primary parent. In that respect we think he was plainly wrong."

22. Tyabji v. Sandana (3 March 1994), Kelowna Registry 20722 and 16458 (B.C.S.C) [unreported].

23. Ibid. at 3.

24. Ibid. at 6:
"It shows the children were in their father's care for 49 days and with their mother for 25 days. I have no doubt at all that since the mother's election in October 1991, the children were more used to being in the family home with their father and the nanny than with their mother and that it was of assistance to the mother in her career that they be there."

25. Ibid. at 35.

26. See Young v. Young [1993] 4. S.C.R. 3. Despite this apparent support, theorists should avoid concluding that this indicates any type of statistical trend.

27. Ibid.

28. Ibid. at 4.

29. Ibid. at 5 - 6.

30. See, for instance, Custody Workshop Summary Notes, supra, note 119, Ch. Two at 48.

31. See, for instance, Bala and Miklas, supra, note 26, Ch. Two at 145, where the authors state:
"These recent Canadian appellate decisions all appear to be premised on the rationale of awarding custody of young children to the primary caregiver, especially at the interim stage, in the absence of strong evidence that this is not in their best interests. It is unfortunate that the appellate courts have not more explicitly adverted to this rationale, in order to provide guidance to lower court and legal advisors who settle cases." See Boyd, supra, note 7, Intro. for an evaluation of a primary caregiving discourse within a Canadian context.

32. See, for instance, M. Shaeffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 U.Toronto Fac.L.Rev. 162, in which the author summarizes the growing recognition of mediation, and the support it has received. Legislation in most Canadian provinces now specifically makes it necessary for lawyers to advise their clients about the availability of mediation, for use as an alternative to, or in conjunction with, the courts.

33. See Boyd, supra, note 55, Ch. Two at note 3 and accompanying text:
"In my view, Bala and Miklas overstate the extent to which the primary caregiver presumption has become a main trend. This is true in a few American states, but elsewhere emphasis on primary caregiving has remained quite non-explicit and is often overruled by other considerations." See also Boyd, supra, note 7, Ch. One at 18, where the author states:
"The seemingly greater attention being paid to primary caregiving in judicial discourse on custody, while interesting and significant, *does not necessarily indicate a transformation within child custody law towards recognition of the gendered dynamics of parenting in modern Canada*." (emphasis, my own)

34. According to Sack, supra, note 15, in jurisdictions which utilize a primary caregiving test, the issue of "fitness" has taken a central role. In these jurisdictions, the issue of fitness has become crucial, because the argument will not centre around who was the primary caregiver, but rather, should the primary caregiving mother be denied custody rights because of an allegation of "unfitness". Therefore, very specific definitions of unfitness are required to prevent the presumption from being utilized to deny custody rights based on allegations of unfitness.
See also Boyd, What Difference Does Difference Make?, supra, note 21, Ch. One at 49.

35. The primary caretaker standard has many different forms; ranging from (1) a preference for the primary caregiver when factors are otherwise equal; (2) a burden of persuasion upon the non-primary parent to demonstrate that custody would be in her or her best interest; (3) a burden of persuasion upon the non-primary parent upon greater than a preponderance of evidence that custody would be in his or her best interest; and (4) a strong presumption operating in favour of the primary caregiver which can only become overcome by the non-primary parent through demonstrating the primary caregiver is "unfit". See Cochran, supra, note 4, Ch. Three, note 73, at notes 48 - 53, and accompanying text. I will refer to any rule which emphasizes the primary caregiver as a primary caregiver presumption; however, I am arguing for the enactment of the fourth form of this presumption.

36. See Sack, supra, note 15 at 292. However, see also Cochran, supra, note 4, Ch. Three at 59, where the author states:
"Under those preferences that place the heaviest burdens on the party opposing the preference, i.e., showing the unfitness of the other party,...the party opposing the preference is least likely to overcome the preference and therefore is least likely to litigate custody." And further, at 61,:
"...the stronger the preference for a preferred custody arrangement, the less the danger of unfair bargaining, parental conflict, and litigation over custody, *but the greater the danger that the custody placement will not be in the best interests of the child.*" (emphasis, my own)

37. Sack, ibid. at 292-93. See also 325-27, where the author describes the way in which she would adopt the primary caregiver presumption. To summarize, the author would only allow an exception for unfitness, to include: (1) physical, sexual or psychological abuse of the children by or with approval of the primary caregiver; (2) inadequate care by the primary caregiver resulting in serious physical or developmental harm to the child; (3) serious delinquent acts by the children as a result of pressure from the primary caregiver; and (4) the physical or emotional abuse of the non-primary caregiver parent by the primary caregiver parent.

38. Ibid. at 303, where the author states:
"In particular, the cases show a disturbing pattern of accusations of sexual misconduct against the female primary caretaker. For the purpose of determining parental fitness, it seems that judicially defined 'sexual misconduct' is treated as wholly irrelevant when perpetrated by a man, but entirely relevant (and often sufficient 'proof' of unfitness) when committed by a woman."

39. An examination of case law considering the best interests standard where one litigant is lesbian reflects that the judiciary may be avoiding addressing how lifestyle choice relates to the ability to parent because so many other factors may legitimately be considered pursuant to the best interests standard. If, instead, a clear "unfitness" test were utilized where on litigant was lesbian, there is the potential that even if custody was denied, the judge would have to articulate how the sexual conduct relates to the child's

best interest. In essence, by limiting the issue in a custody dispute to the sexual conduct *per se*, and thus, avoiding the consideration of other factors, a judicial discourse may develop in which these fears are challenged.

40. See Cippen, supra, note 69, Ch. Two at 490.

41. See Mnookin, "Child-Custody Adjudication: Judicial Functions in the Fact of Indeterminacy" (1975) 39 Law & Contemp.Probs. 226 at 229.

42. See Fineman, supra, note 75, Ch. Two at 772:
"The primary caretaker rule is particular susceptible to legal analysis because it involves past fact-finding, an inquiry traditionally performed by courts. It has the advantage, therefore, of being a rule that judges can comfortably apply and that lawyers can easily understand and use."

43. See Boyd, supra, note 5, Ch. One.

44. See Department of Justice, supra, note 52, Ch. Two at 1.

45. See supra, notes 137 - 142 and accompanying text, Ch. Two.

46. See Custody Workshop Summary Notes, supra, note 119, Ch. Two at 62. See Department of Justice, supra, note 52, Ch. Two at 32, where the primary caregiver presumption was discussed:
"A legal presumption favouring a specific custody arrangement provides the court with an express directive to follow. It can be rebuttable to lessen the danger of being applied arbitrarily. Many statutes in the United States contain a presumption in favour of joint custody. Generally, do you favour the use of statutory presumptions to determine custody and access? Should a primary caregiver test be used to determine custody? Would you support its use in a narrower context, for example, to determine primary residence?"

47. Ibid. at 1.

48. Ibid. The goal of the CACSW in holding the workshop was to solicit a response from various community groups:
"...the CACSW's goal was to provide an opportunity to identify their concerns, directions, priorities, and solutions on custody, access, and related issues. The CACSW believes this is the basis upon which change can and should proceed."

49. Ibid. at 56. Some, but not all of the following recommendations, which were proposed during or after the workshop, were discussed by the participants. Furthermore, no attempt was made to reach consensus regarding these recommendations:
"There was not attempt made to reach consensus on the recommendations. While there is much common ground, there are also differences and even a few inconsistencies; these are reflected in this text. The recommendations are, therefore, not necessarily

endorsed by all of the participants or by the Canadian Advisory Council on the Status of Women."

50. Ibid. at 62 - 63. The Workshop Notes do not indicate what type of research should be undertaken; however, based upon the stated objectives of the workshop (supra), it would appear that integral to research is the need to consider the various experiences of all different types of women who may be effected by any custody reform.

51. Ibid. at 63.

52. Ibid. at 13.

53. See supra, notes 36-39 and accompanying text. See ibid.

54. See Custody Workshop Summary Notes, ibid.

55. Ibid.

56. Ibid.

57. Ibid. at 14.

58. Ibid.

59. Ibid.

60. Ibid. at 15.

61. The cases discussed in this section were originally referred to in Sack, supra, note 15.

62. A case heard three years earlier began the pronouncement of the unfitness rebuttal based upon parental unfitness. See ibid. at 303, where the author traces the development of this parental unfitness exception in West Virginia, and other states. In J.B. v. A.B. 242 S.E. 2d 248 (W. Va. 1978), the state supreme court reversed a lower court finding of unfitness against a mother, despite the then operation of a maternal preference. The lower court based the finding of unfitness upon an act of fellatio allegedly performed by the mother in a parked car. According to the state supreme court, at 255, the incident was "totally unrelated to the mother's relationship with her child," and "[e]xcept for this one incident, the record is devoid of any evidence that the [mother] is an unfit parent." In conclusion, the court found that in order for unfitness to be found against a parent based upon sexual conduct, "the conduct must be so outrageous that reasonable men cannot differ about its deleterious affect [sic] upon the child." (at 256)

63. If one assumes that the creation of an alternative discourse requires that the group in question be empowered politically, than this approach may be seen as a way to side-track the power of the legal system towards said creation. Focusing attention on demonstrating that a requirement that a nexus must be established between sexual preference and unfitness, may contribute towards providing an incentive for the judiciary or policy-makers to initiate new studies.

64. Rowsey v. Rowsey, 329 S.E.2d 57 (W.Va. 1985) at 59. It is difficult to ascertain if the primary caregiver presumption was in operation in this case.

65. Ibid at 59

66. Ibid.

67. Ibid. at 60.

68. Ibid. at 61.

69. M.S.P. v. P.E.P., 358 S.E. 2d 442 (W. Va. 1987) at 444.

70. Ibid.

71. Bickler v. Bickler 344 S.E. 2d 630 (W. Va. 1986)

72. Ibid. at 445.

73. See supra, note 71 at 630.

74. Ibid. at 631. And further:
"The appellant and Carpenter both testified that they had entered into this living arrangement for purely economic reasons and that there had never been any romantic involvement or sexual relationship between them."

75. Ibid. at 632. And further:
"In this case there is nothing to indicate that the appellant was guilty of such gross immorality as would overcome the primary caretaker presumption or that her relationship with Carpenter had a deleterious effect on the child...even the appellee admitted that the appellant was a good caretaker, and that his daughter had always appeared well-fed and well-groomed,..."

76. Maddox v. Maddox, 641 P.2d 685 (Or. App.). The mother was granted custody of the youngest child, who was one year old at the time of the hearing before the circuit court. Please note, that at this time the court operated according to a best interest standard. [ORS 107.-137(2); however, the court states:
"When other factors bearing on the parties' ability to provide for the best interests of the

children are relatively equal, we give considerable weight in a custody decision to which parent was the primary caretaker." (at 667)

77. Ibid. at 666.

78. Ibid. at 667.

79. David M. v. Margaret M., 385 S.E. 2d 912 (W. Va. 1989).

80. Ibid. at 914.

81. Ibid. at 915.

82. Ibid. at 924.

83. See Sack, supra, note 15 at 309, where the author states:
"By stating that particularly 'outrageous' conduct could, by itself, warrant a denial of custody to a primary caretaker, without identifying which conduct would be sufficiently 'outrageous' to meet this standard, the court preserved the connection between sexual behaviour and parental fitness."

84. See Note, supra, note 32, Ch. One at note 40 and accompanying text. See also Note, supra, note 31, Ch. One at notes 2 - 4 and accompanying text, where the author states:
"Many states have adopted this best interests doctrine by statute. A statute typically lists factors that the judge may consider but usually also allows significant judicial discretion to examine any other relevant factors. The best interests doctrine requires the courts to exercise wide discretion because of the doctrine's emphasis on the individual child's interests. Public opinion has accepted risk of judicial bias in return for the flexibility and child-centered nature of the approach."

85. See Palmore v. Sidoti, supra, note 34, Ch. One at 430.

86. Ibid. at 431.

87. Ibid. The court quoted a counsellor's recommendation for a change in custody based on the social consequences of an interracial marriage. See Note, supra, note 32, Ch. One at 500.

88. See Palmore v. Sidoti, Fla. Ct. App. (2d Dist. 1982), *cert.* granted, 52 U.S.L.W. 3304 (U.S. Oct., 18, 1983)(82-1734).

89. See Palmore v. Sidoti, supra, note 34, Ch. One at 432. See also L. Jonas and M. Silverberg, "Race, Custody and The Constitution: Palmore v. Sidoti" (1984) 27 How.L.J. 1549 for a lengthier analysis of the effect the lower court decision may have had, if allowed to stand.

90. See Note, ibid. at 1550. See also Note, "Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis" (1989) 102 Harv.L.Rev. 617 at notes 4 - 5 and accompanying text.

91. See Palmore v. Sidoti, supra, note 34, Ch. One at 1882. According to this clause, discrimination on the grounds of race is prohibited by a state:
"[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, 1. See also Note, supra, note 31, Ch. One at note 12 and accompanying text, where the author states:
"When a state classifies people by their race, however, the Constitution requires that the state act pursuant to a *compelling* state interest and that the classification used be *necessary* to accomplish the government's purpose." (emphasis, my own)

92. See Palmore v. Sidoti, ibid., quoting Palmer v. Thompson, 403 U.S. 217, 260-61 (1971) (White, J., dissenting).

93. Ibid.

94. See Note, "Domestic Relations - Racial Factors in Change of Custody Determinations: Palmore v. Sidoti" (1985) 15 N.M.L.Rev. 511. See also note 23 and accompanying text, where the author states:
"A court counsellor prepared an environmental study, but the circuit court did not use any evidence contained in the report to support its opinion. The court merely quoted the counsellor's prediction that Melanie was sure to experience 'environmental pressures not of choice' because of her mother's 'unacceptable' life-style. Palmore, 104 S. Ct. at 1881."

95. See C. Davies, "Racial and Cultural Issues in Custody Matters" (1992) 10 C.F.L.Q. 1 at 26.

96. See Note, supra, note 90 at note 5 and accompanying text. According to the author, where the classification relates to quasi-suspect classifications, such as those relating to gender, the test to be met is that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives". The test utilized by the courts is one of strict scrutiny in which it must be established that the classification must be required to accomplish a legitimate objective.

97. See Jonas and Silverberg, supra, note 89 at 350, where the author's find:
"This last sentence of the opinion, as well as the strong language and tenor of the entire opinion, indicates that if other factors are not sufficient to modify custody then race cannot be used to justify a modification. *Race cannot be considered at all in modifying custody.*" (emphasis, my own) This, however, leaves open the question of whether considerations of race are permissible at first instance.

Perhaps the answer lies in applying the "spirit" of the decision, which would entail indirect and direct denials of custody to avoid discrimination.

98. See Note, supra, note 94 at 518 - 21, where the author states, at 518: "The Court stated that '[t]he effects of racial prejudice, however real,' could not justify removing a child from her natural parent's custody. 'Effects' is an ambiguous term. It could include prejudice directed toward the child herself which presents a threat to her physical or psychological well-being, or it could even extend to include actual injury resulting from such threats. If either is the case, the significance of Palmore will be very broad indeed."

99. In the following reported cases, race was held, in light of the circumstances, to be an irrelevant consideration: in Jennings v. Jennings (1986, Ala App) 490 So 2d 10, the court affirmed the decision of the trial court that it was beyond the court's discretion to allow differences as based upon race to control custody awards. In Holt v. Chenault (1987, Ky) 722 SW2d 897, the court found that custody could not be modified based upon a subsequent biracial marriage, although if there was evidence of a significant adverse reaction to the interracial marriage, the court might have allowed for this to be considered. In Re Marriage of Brown (1985, Ind App) 480 NE2d 246, the court found that they were prohibited from considering the possible injury which may be faced by a child due to being raised by grandparents of a different race, on equal protection grounds. See also Re Custody of M.A.L. (1990, Minn App) 457 NW2d 723 and Re Custody of Temos (1982) 304 PA Super 82, 450 A2d 111.

100. In Tubwon v. Weisberg (1986, Minn App) 394 NW2d 601, the court awarded custody of two children to their father, rather than their biological mother, and in doing so, reflected their consideration of the protection of the racial and ethnic heritage of the children. In Re Davis (1983) 502 Pa 110, 465 A2d 614, the Appeal Court found that the Trial Court erred in not taking into consideration the racial background of contestants to a child placement. The court found that although the issue of race is properly irrelevant to issues of custody between natural parents, it must be considered where a decision is being made as to the "better" atmosphere for a child of mixed race.

101. For instance, in the case of Farmer v. Farmer (1981) 109 Misc 2d 137, 439 NYS2d 584, the court ordered custody to a mother, based upon her role as the children's primary caregiver, however, the court considered the issue of race along with several other issues. See also Re Marriage of Mikelson (1980, Iowa) 299 NW2d 670 and Re Davis (1983) 502 Pa 110, 465 A2d 614.

102. See Note, "Equal Protection Encompasses the Consideration Given to Race in Child Custody Proceedings: Palmore v. Sidoti" 104 S.Ct. 1879 (1984)" (1985) 26 S.T.L.Rev. 600 at 617.

103. See ibid. at 636.

104. See supra, Note, note 90 at 626.

105. See, however, ibid. at note 35, and accompanying text, where the author notes that to date, courts have not expressly enunciated the scope of the right to intimate association.

106. See Sheppard, supra, note 96, Ch. Two at note 49 and accompanying text.

107. Jarrett v. Jarrett, 78 Ill. 2d 337, 400 N.E.2d 421 (1979), cert. denied, 449 U.S. 927, reh'g denied, 449 U.S. 1067 (1980).

108. See Sheppard, supra, note 96, Ch. Two at note 51 and accompanying text.

109. Ibid. at note 52 and accompanying text.

110. Ibid.

111. Ibid. at 193.

112. Ibid.

113. Ibid.

114. Ibid. at 191. According to Sheppard, the impact of this assumption for lesbian mothers embroiled in custody battles is devastating. Many lesbian mothers were previously involved in heterosexual relationships which produced children; therefore, because these women have voluntarily left these relationships, they are particularly vulnerable of "being perceived as wilfully and immorally adopting an interdicted mode of sexual expression, to the detriment of society and their children."

115. Ibid. at 193. According to the author:
"Constitutional recognition of a right to be heterosexually active will certainly signal the Court's acknowledgement that sexual relations are a valuable from of personal express independent of their procreative potential. In that picture, it will be quite impossible to justify the continued interdiction of homosexual acts on the ground that such acts lack a procreative potential." Despite any optimism existing in this regard, clearly, a lesbian mother struggling to assert custody rights would be hard-pressed to find the funds, and/or time, to engage in the type of legal battle even attempting such an argument would entail.

116. In Canada, the overriding factor utilized when interpreting child welfare legislation is that of the child's best interest. In jurisdictions where the best interests test is not the overriding legislative test, the courts utilize this factor through reliance upon their *parents patriae* jurisdiction. See Kline, supra, note 23, Ch. One at note 57 and accompanying text.

117. See Bala and Miklas, supra, note 26, Ch. Two at 57 and note 76, where the following case is discussed:

"...Drummond v. Lane (1986), 76 N.S.R. (2d) 430 (N.S. Fam. Ct.) where Daley J.F.C. refused to order immediate access for the black father of a 6 month old child because of the 'extreme and almost hysterical reaction' of the prejudiced white maternal grandparents, who lived with the child and mother. However, the court seemed to indicate that access would ultimately be ordered, regardless of the grandparents' attitudes and their effects on the child."

118. Ibid. at 57.

119. See, for instance, the case of A.L.J. v. S.J.M. (7 October 1994), Vancouver F940246 and 4580 (B.C.S.C.), where Boyd, J. rejects the removal of native children from their families: (at 30):
"I have the deepest respect for Mr. Williams and his Nation's historical struggle. I acknowledge there were reprehensible practices in the past, when native children were forcibly separated from their families and placed in residential schools and foster homes with no regard for what would today be considered the best interests of the child. I acknowledge the terms of the Provincial Government's moratorium concerning Ministry placements and its standing guidelines concerning private adoptions." However, in the end, Boyd, J. states: (at 30):
"That being said, I must record that I am neither statutorily nor otherwise bound to follow those policy guidelines in the exercise of my discretion as a trial judge."

120. See ibid. at 27.

121. See Kline, supra, note 23, Ch. One at 400. See also note 102 and accompanying text, where the author discusses how some recent decisions reflect "some willingness on the part of courts to presume and judicially notice retention of First Nations identity and culture as a relevant factor in determining best interests".

122. See supra, note 10.

123. S.J. Toope, "Riding the Fence: Courts, Charter Rights and Family Law" (1991) 9 Can.J.Fam.L. 55 at note 2 and accompanying text. According to the author, the decision of Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd. [1986] 2 S.C.R. 573 (hereinafter "Dolphin Delivery") could be read to preclude the use of the Charter in family law cases. In Dolphin Delivery McIntyre states that as the purpose of the Charter is to protect individuals against the power of the state, one must first establish governmental action in order to invoke the protection of the Charter. As courts are supposed to be independent of the government, a court order is not the same as a government action. Therefore, it is difficult to envision the Charter being applied in the family law context unless a statute is being challenged.

124. Supra, note 10, section 15.

125. See Veysey v. Canada, [1990] F.C. 321 (T.D.) (Dube, J.) and Brown v. B.C. (Minister of Health) (1990) 42 B.C.L.R. (2d) 294 (S.C.).

126. Ibid., section 1.

127. In Young v. Young, supra, note 26, the Supreme Court of Canada considered many constitutional questions including whether Divorce Act provisions stating that decisions regarding custody and access must be made in the best interests of the child, violated section 15(1) and (4) of the Charter (at 16). In R.B. v. Children's Aid Society of Metropolitan Toronto (27 January 1995) S.C.J. No. 24 (S.C.C.), the Supreme Court of Canada considered whether Child Welfare Act provisions allowing children to be made temporary wardships and undergo treatment prohibited by the parents' religion, violated various provisions of the Charter (at 1).

128. According to Note, supra, note 90 at notes 6 - 11 and accompanying text. The denial of custody to a parent where sexual ordination is at issue results not because of the sexual orientation *per se*. The denial is more accurately understood because of the presence of a same-sex relationship:
"A parent's homosexuality generally becomes an issue in a child custody case only if the parent is in a serious intimate relationship with a person of the same gender. Although both courts and litigants tend to couch the issue in terms of the parent's sexual orientation, custody denials or restrictions almost always turn on the existence of a same-sex relationship, rather than on the parent's sexual orientation in the abstract."

129. See, for example, Baggatt, supra, note 18, Ch. Three at 73 - 74 and accompanying text, where the author states:
"A common fear of our society is that children reared in a homosexual environment will have to endure disapproval and social stigma, which society and courts fear will emotionally damage the child. Studies show this fear to be unjustified. Interviews with children of homosexual and lesbian parents show their remarkable adaptability to the parent's lifestyles." This is not altogether surprising: other studies indicate that lesbian and heterosexual mothers are remarkably similar, and in fact, the difference lies in the "greater self-reliance and better self-image displayed by avowed lesbians, *and this despite the extraordinary social pressures to which they are subject*". (emphasis, my own) See also Sheppard, supra, note 96, Ch. Two at note 24 and accompanying text.

130. See B. Ryder, "The Province of the Judiciary": The Implications of Mossop v. A.-G. Canada" (1993) 13 Windsor Yearbook of Access to Justice 3. According to the decision in Haig v. Canada (Minister of Justice) (1992), 94 D.L.R. (4th) (Ont.C.A.), (hereinafter "Haig") where the Ontario Court of Appeal held that sexual orientation is analogous to an enumerated ground of discrimination and is therefore included in section 15 of the Charter, and the fact that Haig was not appealed by the Minister of Justice, the Canadian Human Rights Act must be read by "Canadian Human Rights Commission, tribunals and lower courts" in such a way as to include sexual orientation as a prohibited ground of discrimination (at 9). Therefore, it appears that Lamer C.J.'s denial of family status to the

relationship in Mossop v. A.-G. Canada [1993] 1 S.C.R. 554 (hereinafter "Mossop") is based on his not finding that sexual orientation is a grounds of discrimination pursuant to the Human Rights Act. According to Ryder (at 9), Lamer C.J. based his decision on the fact that the complaint was brought in 1985, and the Haig decision was in 1992.

Section 15 came into effect in April, 1985, and guarantees both sexes equal rights under the laws of our country; discrimination on the grounds of sex is prohibited. Although promised, the explicit extension of the enumerated grounds in section 15 to include sexual preference has not occurred. See Canadian Advisory Council on the Status of Women, Work in Progress: Tracking Women's Equality in Canada, (Ottawa: June 1994) at 32:

"In 1986, the federal government acknowledged that the equality guarantees in the Charter should be extended to *sexual orientation* and promised to 'take whatever measures necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction. This promise has not been kept. In addition, the Canadian Human Rights Act must be amended to include sexual orientation as a prohibited ground of discrimination; and all federal laws, regulations, and practices must be reviewed for direct and systemic discrimination against lesbians and gays." (emphasis, my own)

According to Ryder, it is possible that in the future, the Supreme Court of Canada might hold that s. 15 does not require sexual orientation be read into the Canadian Human Rights. If this occurs, and s. 15 is not amended by Parliament, Lamer C.J.'s judgment in Mossop would effectively prevent gay and lesbian couples from using the CHRA to successfully confront laws which did not recognize their relationship:

"The combination of these two events is a fairly unlikely scenario, but nothing can be taken for granted given the dismal record of both Parliament and the Supreme Court on gay and lesbian rights issues." (at 10)

## CHAPTER FIVE

## COMPLICATIONS FOR THE PRIMARY CAREGIVER PRESUMPTION

It is important to consider the potential impact of the primary caregiver presumption on groups other than lesbian mothers, to see if there are drawbacks to its use. This is particularly important given that feminists and others have often failed to consider the impact of reform suggestions on groups other than white, middle class women. Feminist theorists must be particularly aware of the existence of certain disempowered groups of women in society who are unable to participate in activities which can result in reform. This vulnerability may be founded in the lack of resources possessed by these women; however, it may also be due to fact that some women are involved in the struggle to protect immediate rights, such as the right to custody, and as such, are unable to participate in other relevant causes.[1] Feminist activists must keep different cultural norms in mind when analyzing or evaluating the advantages and disadvantages of custody reforms, to ensure that the resulting analysis does not impact detrimentally upon groups of women who are already in a vulnerable position, such as the following groups of women.

### First Nation Mothers

One of the primary concerns of First Nation people involves the removal

of children from First Nation communities and their placement into the child welfare system.[2] In Canada, the child welfare system continues to have a destructive and disproportionate impact on First Nation communities because First Nation women are statistically more likely than other groups of women to have their children removed and placed in the control of child welfare agencies.[3] The removal of these First Nation children restricts the effective transmission of First Nations culture and traditions, which is a concern to all members of the community;[4] however, it is the mothers, grandmothers and aunts who will be most directly and immediately affected by the loss of their children. First Nation men are typically absent in child welfare proceedings, which in part, may sifnify that First Nation men do not play a significant role in the primary care of children in the community:

> Fathers are almost always noted by judges as absent or disinterested in the proceedings, and very few appear as parties in the cases.[5]

And further:

> The low incidence of father involvement in child welfare proceedings affecting First Nation children may reflect the central role played by First Nation women in caregiving.[6]

Therefore, some First Nation women may be more concerned about engaging with state welfare agencies and protecting their immediate right to parent, as opposed to engaging with a private individual during the course of a custody dispute.[7]

Although there are several parallels between the oppressive natures of the child welfare and child custody regimes,[8] these are distinct systems which require

distinct analyses.[9] In the child custody realm, the standard utilized in resolving a dispute is that of the best interests of the child.[10] In the child welfare realm, a form of the best interests standard has been used since the 19th century, when the state became formally involved in protecting the rights of children; however, in most jurisdictions, the best interests standard only becomes applicable after a child is determined to be in need of protection.[11]

Although the child welfare and child custody realms operate towards different ends and for different purposes, courts in both proceedings utilize an analysis which is conducted within a framework where the mothering at issue is compared to a pre-determined idealized depiction of what constitutes "good" mothering.[12] A premise of the dominant ideology of motherhood is an understanding that motherhood is, and should be, the inherent goal of all women who are fit.[13] The determination of fitness is based on a particular women's social location; the acceptability of a particular location continues to differ depending upon the historical context.[14] For those whose locations deems them "unfit" to procreate, the ramifications of becoming pregnant may involve facing pressure to undergo abortions, or, pressure to adopt the child upon birth.[15] Women failing to abort or adopt may have to face the daunting task of meeting "the societal image of the 'good mother'".[16] When this image and its concurrent expectations are applied in First Nation child welfare decisions, the result is not only a rejection of dominant cultural norms, but a denial of the many social ills experienced by First Nation communities. In the end, not only are a disproportionate number of children removed from First Nation mothers,

but due to the individualistic nature of the best interests test, custody decisions are made to appear "natural, necessary, and legitimate, rather than coercive".[17]

In the article, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women", Marlee Kline examines the way in which the notion of liberal individualism forms part of the characterization of the dominant ideology of motherhood imposed upon First Nation mothers.[18] The implication being that the collectivist culture of First Nation caregiving is ignored, and mothers are seen as blameworthy for not assuming the primary responsibility for the caretaking of children.[19] According to Kline:

> In child protection cases, however, the involvement and commitment of extended family members to caregiving is often insufficiently recognized by courts... Even when a First Nation mother is receiving ongoing help from extended family members, that contribution is often ignored or regarded negatively. In such cases, the mother's individual skills and capabilities remain the primary subject of judicial scrutiny with little, if any consideration of the role and contributions of extended family members.[20]

This expectation regarding what constitutes "good" mothering, that "'[t]he individual mother should have total responsibility for her own children at all times", has been referred to as the "primary care requirement".[21] Individual mothers are expected to take primary responsibility for their children in a manner that ignores the different cultural contexts in which child rearing might occur.[22] This is particularly ironic if one looks at child custody cases, where the courts seem to pay particular attention to the presence of "mother substitutes", such as a father's extended family members able to supplement the need for reliance upon paid child care.[23] For example, in a

decision of the Alberta Court of Appeal, custody of a young girl was given to her father where the paternal grandmother would be able to take care of the child while the father was working, whereas the mother would have to rely on day care while at work.[24]

This emphasis on the individual, as encompassed by the best interests standard and utilized in both child welfare and child custody proceedings, results in a label of "selfish" and "self-interested" to anyone who disagrees with a custody decision.[25] This is especially problematic for First Nation bands, who may contest the removal of a child from the community. Typically, it is in the band's, and arguably, the First Nation child's interest, to keep children within the community in order to give effect to the collectivist nature of child care and problem solving.[26] According to Kline, courts are not prepared to give effect to these collective concerns because of the individualistic framework of the best interests ideology:

> In particular, as noted above, the individualistic structure of the best interests ideology supports a presumption that the collective interests of First Nations are 'inevitably antagonistic' to the individual interests of the child in question. As a consequence, court cases have tended to presume that, if the interests of the First Nations community are met, the child's interests must necessarily be forgone.[27]

The result of this primary care expectation where caregiving is shared amongst community members is a mother who is made to appear as if she is ignoring her sense of responsibility for her child. This is exacerbated through the application of the "psychological parent theory", which is grounded in the premise that it may benefit a child to remain with the person who has had the most influence on the

child's psychological development. In child apprehension cases, where the child is removed from his or her caregiver and placed with foster parents, the psychological parent theory has been used to ground the denial of custody to the biological mother. The argument is that harm will ensue to the child if the bond between the child and his or her foster parent is broken.[28] This psychological parent theory detrimentally impacts upon First Nation children who are placed in the care of foster parents more often than children from other backgrounds.[29] These children may remain unnecessarily in the care of foster parents for an extended period of time, such that a psychological bond forms, and will rarely be broken by a judge considering the case:

> A social worker who feels more at ease with the white middle-class foster parents than with the less-educated, less well-off, minority or Native natural parent puts off returning the child to the mother, feeling that the child will be better off with the foster parents on a permanent basis. *She knows by deferring the return of the child, ultimate permanency with the foster parents is more likely.*[30] (emphasis, my own)

In addition, due to a belief that they are powerless to do much, members of First Nation communities may be more disposed to accede to the authority of case workers, and other child welfare authority figures, instead of demanding the return of the children.[31]

This psychological parent theory is being applied in such a manner as to recognize only those singular attachments which form between a child and his or her individual caregivers, such as the parents, or alternatively foster parents. However as pointed out previously, many First Nation people utilize a kin system of childcare

in which multiple attachments between children and others are formed, and respected. This type of attachment is typically on time spent with the child performing primary caregiving tasks, as well as the time which is spent in activities associated with transmitting cultural values. Such a system of attachment is "rarely understood and characteristically ignored by child welfare authorities" operating according to their own agendas.[32] As such, the psychological parent theory is not applied to extended family members, so that the children are removed from the care of these individuals. However, once the children are placed within the care of adoptive or foster parents, the psychological parent theory begins to operate with the result that children remain away from their natural parents and with their psychological parents, particularly if some time has passed. Yet, the relationship between children and extended family members is crucial for other valid reasons; specifically, as an additional means of comfort and support for the child which the child may rely upon in the future, and for the transmission of culture occurring through family gatherings during which traditional holidays are celebrated.

Another problem reflected in the First Nation child welfare realm is the characterization of a mother's alcohol and drug abuse or even her subjection to violence as a "personal problem" or a "lifestyle" problem.[33] This reinforces that there may be a judicial tendency to ignore the cultural context which may have resulted in the behaviour for which the mother is being penalized. The application of this distorted individualistic ideology is misleading, for it implies the presence of "choices". Where an individual takes one path over another, it is seen as personal choice and any

cultural context informing that "choice" is overlooked.[34] Even more alarming is the judicial use of a "traditional lifestyle justification" to explain the removal of First Nation children from their mother:

> When one Aboriginal woman alleged sexual abuse of her children, the judge said he did not want to interfere with the traditional lifestyle. Incest and sexual abuse of children is not part of the Aboriginal traditional lifestyle.[35]

This justification is grounded in negative stereotyping of First Nation women although these women have traditionally been the teachers of cultural values.[36]

The application of the dominant ideology of motherhood in the operation of the child welfare system has had severe ramifications for First Nation mothers; in many instances, it has resulted in a denial or limitation of parental rights. The essence of the problem appears to lie in a process where those making the decision implicitly rely on dominant expectations about mothering, without considering how these expectations inherently reject those whose lives differ from the norm. Much can be learned from the oppression which has resulted because of a procedure which focuses upon the experience of dominant groups of women. Certainly, for feminists theorists who are currently involved in the process of custody reform, the experience of First Nation mothers in the child welfare realm stresses the importance of considering the experiences of different groups of women prior to implementing any changes to the system.

Although ideological conceptions of motherhood, such as the dominant ideology of motherhood, operate in both the child custody and child welfare realm,

child welfare proceedings are involuntary such that the primary caregiver is placed in an oppressive forum where a judge must ultimately make a determination as to where the child should be placed.[37] First Nation women and children are the ones most seriously affected by this significant difference:

> Recent data demonstrates that provincial child welfare authorities have tended to rely upon court orders to apprehend First Nations children rather than on the provision of supportive or foster care services to families on a *voluntary* basis. (emphasis, the author's)[38]

In addition:

> First Nation children are more likely to be removed from their homes statutorily (and thus through judicial order) than placed 'voluntarily' into state care."[39]

Those who participate in a child custody dispute do not typically welcome this involvement, however the ultimate resolution as to custody is often made by consent as opposed to court order.[40]

Due to certain similarities regarding the treatment of First Nation people regardless of the context, it is possible to apply insights regarding the treatment of First Nation women in the child welfare system to the forum of child custody disputes. One common theme indicates that regardless of whether participation within the legal system is voluntary or involuntary, the lack of resources available to challenge legislation means that First Nation communities are forced to rely on a legal system which values mainstream cultural norms, rooted in terms of individual rights and needs to the exclusion of cultures which articulate rights and needs through a more

collectivist approach.[41]

An application of these tendencies indicates that a First Nation woman involved in a custody dispute with a non-First Nation individual may be in danger of having her custody rights limited or foregone altogether. This danger exists because of a judicial tendency to ignore the specific cultural context within which a decision is being made, as is reflected in the child welfare realm. Therefore, a First Nation women's method of caregiving as removed from its cultural context may be characterized as deficient as compared to the method utilized by a non-First Nation individual. Where, for example, a First Nation mother relies on extended family members to educate her child about community standards of behaviour, this may be characterized by the courts as the First Nation mother failing in her individual responsibility to care for her child:

> First Nation women are particularly vulnerable to being constructed by courts as 'bad mothers' because, as a consequence of colonialist oppression and different cultural norms, they do not always meet the dominant cultural and middle class expectations that constitute the ideology of motherhood.[42]

Even where the custody dispute is between two First Nation individuals, it may still prove difficult for First Nation women to obtain custody rights based on a primary caregiver presumption, because of the ideological conception of the dominant ideology of motherhood. In the First Nation child welfare realm, the participation of extended family members in childcare is often ignored or used against the mother.[43] Despite the fact that for many First Nation women, concern about the child custody system pales in comparison to concern regarding the operation of the child welfare

system, it remains important to consider how a primary caregiver presumption in the custody realm will ultimately play out for First Nation women.

Some of the difficulties experienced by First Nation women and children in the child welfare system are reflected in the CACSW Brief, and appear to form part of the CACSW's impetus in calling for the need to specify in which circumstances the primary caregiver presumption will not be rebuttable.[44] In addition, the CACSW recommends a specific definition for "unfit" behaviour prior to the enactment of a primary caregiver presumption, due to the way in which vague standards have allowed for the operation of racial and class biases in the child welfare realm.[45] The CACSW ultimately recommends the adoption of a primary presumption which should:

> - be defined so as to take into account all of the physical, emotional, social, and relational tasks of parenting. The 'list of tasks approach' adopted by the West Virginia Court of Appeal in Garska v. McCoy is limited because... it may also undervalue the mothering work of women who rely on others, for example, paternal grandmothers, to do much of the physical work of caring for children while the mother works outside the home or in the family business.[46]

In terms of the relevance of the primary caregiver presumption for First Nation women involved in a custody dispute, this notion of considering the emotional, social and relational tasks of parenting may enhance the position of mothers who rely on extended family members to complete the physical aspects of childcare. However, this emphasis may also enhance the position of fathers not directly involved in a child's physical caregiving or the supervision of such caregiving by stressing the importance of these other aspects of caregiving. This emphasizes the need for further

discussion regarding caregiving patterns of different groups of women, in order to ascertain a way for feminist theories to encompass the various forms of primary caregiving which may depart from those of the idealized norm.

**Disabled Mothers**

In assessing the potential impact of the primary caregiver presumption, it is also important to consider the way the standard might impact on women with mental and physical disabilities. Although most women share the common experience of oppression based on gender, women with disabilities must cope with certain circumstances which are unique.[47] For example, the presence of a physical disability may further entrench the oppression experienced by disabled women through an increased need to rely on the social welfare system in addition to other individuals. Women with disabilities are particularly vulnerable to abuse by their partners, because of the dependency their situation often involves. This means, therefore, that when recommending reforms which will impact upon women with disabilities, theorists must be careful to ascertain how a reform will impact upon the vulnerability which already exists.

For example, women living with disabilities may not directly perform the physical tasks inherent in primary caregiving due to their dependency on their partner or on others to assist with caregiving.[48] The dependency which may be faced by women with disabilities is a factor which has been ignored in assessing the advantages and disadvantages of utilizing a standard which emphasizes primary care of children. This means that a disabled mother may be penalized where she is

involved in the primary care of a child, but such involvement involves supervising other persons executing the performance of services associated with child rearing, such as bathing or feeding a child.[49] This unequal treatment occurs because regardless of the context, women are expected to perform all child rearing activities independently. The same unequal treatment may be absent where a disabled father stays at home and relies upon paid child care. In such a case, the courts appear to view positively the increased time spent with the children.[50] This is another example of the judiciary penalizing mothers who utilize paid child care through restrictions in custody rights.

As in other areas of the law, a double standard exists as between women with disabilities and men with disabilities who rely on others as a means of providing caregiving:

> So there is a different standard. If the primary caregiver is a woman, she is supposed to provide direct services. If the primary caregiver is a man, he is not expected to provide direct services.[51]

Avoiding an emphasis upon primary caregiving will not necessarily eliminate this problem, for judges may already be using the fact that the disabled mother does no direct primary caregiving as a means of denying this mother custody. The problems faced by women with disabilities in being forced to rely on others for the performance of many of the physical aspects of caregiving does not necessarily mean that attempts to legislate a strong primary caregiver rule should stop. Instead, the legislation must encompass the different features of the lives of disabled women, through, for example, emphasizing any supervisory role taken in child care and re-defining what is meant by caregiving. In addition, as opposed to the way primary

caregiving has been defined in the United States cases, care should be taken to avoid utilizing lists of primary caregiving functions. The CACSW specifically recommended rejecting the use of specific lists of tasks, not only because of the problem it creates for women who must rely on others to do most of the physical work of childcaring, but in light of women with disabilities:

> The 'list of tasks approach' adopted by the West Virginia Supreme Court of Appeals in Garska v. McCoy is limited because it risks undervaluing the mothering work of women with disabilities who may manage but not physically carry out many of the tasks listed.[52]

Utilizing a 'list of tasks approach' may impact on women whose participation in primary caregiving is on an organizational or supervisory basis by establishing a norm which these women are unable to meet.[53] The following suggestions may also relieve some of the disadvantages faced by women with disabilities while also emphasizing the primary caregiving function of mothers:

> A definition of primary caregiving should include the emotional, social, and relational issues of child rearing as well.
>
> One definition might be, not only 'who organizes the children's lives?', but also 'who organizes his or her life around the children's lives'.
>
> The definition should not disadvantage mothers who do not provide direct care - such as women with physical disabilities who use homemakers.[54]

These suggestions are important from both practical and theoretical standpoints, for they indicate that there are many different aspects of caregiving which may be performed by a primary caregiver apart from activities involving physical

interaction with the child or his or her environment. These other aspects, such as the emotional and social issues related to caregiving must be further considered for they demonstrate that the value of caregiving may often be difficult to quantify. Emphasizing these other aspects of caregiving may be a way to recognize the caregiving performed by disabled and First Nation mothers without simultaneously imposing a dominant cultural norm. Conversely, however, it may be difficult to ascertain a method of expressing these aspects of caregiving without enhancing the position of fathers who are usually the non-primary caregivers, and who wish to equate the financial and emotional contributions of childcare without actual primary caregiving. Where the father performs a minimal proportion of the caregiving, and the mother supervises the care of an employed worker, it may be extremely difficult for her to establish that she is the primary caregiver of the child.

## ENDNOTES - CHAPTER FIVE

1. In certain cases, where a woman is involved in the day-to-day struggle to assert her individual custody rights, she may be unable to participate in the struggle to assert the custody rights of her particular group. This is not to say that both of these struggles are exclusive of one another; however, in certain cases, because of a lack of resources, a mother may have to choose her immediate, albeit, individual struggle over the struggle of her group.

2. Kline, supra, note 23, Ch. One at 376.

3. See Family and Child Service Act, S.B.C. 1980, c. 11, section 9(1):
"Where the superintendent considers that a child is in need of protection, he may, without warrant, apprehend the child." According to Liberating Our Children, supra, note 22, Ch. One at 1 - 2, children in British Columbia may become ward's of the Province by two means: (1) the voluntary agreement of the parents and (2) court order. The statistics indicate that in 1992, 13.5% of children in care on a voluntary basis were Aboriginal. Aboriginal people compose less than 4% of British Columbia's population, thus, this represents 0.5% of all Aboriginal children in the province whereas non-Aboriginal children composed only 0.29%: (at 1)
"The relative economic poverty of Aboriginal people in relationship to the non-Aboriginal population probably accounts for most of the difference."

In terms of children in the care of the Province on an involuntary basis, approximately 51.6% of these children are Aboriginal, which is particularly harsh given the criticisms relating to the arbitrary power granted to the government under the provisions of the Family and Child Service Act regarding apprehending children in need of protection. This authority was the impetus grounding the review by the Community Panel, Family and Children's Services Legislation Review in British Columbia in October of 1992. According to this Report, at ix, one purpose of the review of child protection legislation was:
"To ensure that legislation relating to the protection of children serves the best interests of *all* children and their families." (emphasis, my own) See Kline, ibid. at notes 5 and 6 and accompanying text, where the author states:

"Such effects have been long known to First Nations, and several studies have demonstrated empirically that vastly disproportionate numbers of First Nations children end upon the custody of child welfare authorities."

4. See Kline, ibid. at 376 - 77.

5. See Kline, supra note 5, Ch. Three at note 44 and accompanying text, where the author states that men were rarely present in Kline's study of 240 reported and unreported child welfare cases in the Canadian context.

6. Ibid. at note 44.

7. I am not suggesting that First Nation women do not become involved in disputed cases of custody. I am suggesting that for many First Nation women, the detrimental impact of the child welfare system may be a more immediate concern at this point in time.

8. See supra, notes 37 and 38 and accompanying text, Ch. Four.

9. Ibid.

10. See supra, note 41 - 44 and accompanying text, Ch. Two.

11. See Kline, supra, note 5, Ch. Three at 317 - 18. In British Columbia, a two-prong test is utilized to determine if a child should be removed from his or her primary caregiver, who is typically the child's mother. This test involves a determination as to whether the child is in need of protection.

12. Ibid. at 310.

13. Ibid.

14. Ibid. at 312.

15. Ibid. at 313.

16. Ibid. at 314.

17. See, for instance, Kline, supra, note 23, Ch. One at 382 where the author discusses how the "best interests ideology" uses the reference point of, and is submerged with, "the basic tenets of liberal legality-individualism, abstraction, universalism, and impartiality,..."

18. Kline, supra, note 5, Ch. Three.

19. See Kline, supra, note 23, Ch. One at notes 65 and accompanying text, where the author discusses how with the best interest test, judges are forced to consider the

individual child outside any cultural context, which in fact, has "rendered judicial decisions impartial and objective and, thereby, unassailable".

20. See Kline, supra, note 5, Ch. Three at 331 - 32. See also supra, note 24. See also Liberating Our Children, supra, note 22, Ch. One at 9, where they discuss how responsibility for children is shared amongst extended family members. For example, in so far as teaching certain life skills, extended family members are the teachers, based on the belief that parents cannot always be objective where their children are concerned. This approach applies when problems within the family arise, so that the entire family joins together in attempting to find a viable solution.

21. Kline, ibid. at 310.

22. See ibid.

23. See Bala and Miklas, supra, note 26, Ch. Two at 51, where the authors state: "A related concern is that some judges have displayed some antipathy towards mothers who seek employment after separation and are forced to rely on daycare while seeming to have a quite positive attitude towards fathers who make alternative child arrangement, for example involving their own mothers." See also S.B. Boyd, "Child Custody and Working Mothers", in S.L. Martin & K.E. Mahoney eds., Equality and Judicial Neutrality, Toronto Carswell, 1987, 168.

24. See R. v. R. (1982) R.F.L. (2d) 277 at 281 (Alta.C.A.). See the discussion of this decision in Bala and Miklas, supra, note 26, Ch. Two at 52. Note that the authors state that this bias against day care may also work to the detriment of fathers, citing the decision of Doe v. Doe (1990), 28 R.F.L. (2d) 356 (Ont. Dist. Ct.), affd (1990), 29 R.F.L. (3d) 450 (Ont. C.A.).

25. See, for instance, Kline, supra, note 23, Ch. One at 407.

26. See Kline, ibid. at notes 148 and accompanying text:
"Within the individualistic structure of the best interests ideology, however, courts tend not to acknowledge, nor act on, such collective concerns. In particular, as noted above, the individualistic structure of the best interests ideology supports a presumption that the collective interests of First Nations are 'inevitably antagonistic to the individual interests of the child in question."

27. Ibid. at notes 148 - 49 and accompanying text.

28. See Davies, supra, note 84, Ch. Four at notes 3 and 4 and accompanying text. According to the author, this psychological parent may be a foster or adoptive parent. See also A.L.J. v. S.J.M., supra, note 107, Ch. Four, where Boyd, J. rejects the removal of native children from their families: (at 34-35):

"The evidence, in my view, supports the conclusion that the bonding process between M. and the M.s is well advanced. I am convinced at this stage, to remove M. from his secure environment, where he has bonded to and is cared for by his two adoptive parents, would be both traumatic and harmful to him."

29. See supra, note 3.

30. See Davies, supra, note 84, Ch. Four at note 13 and accompanying text.

31. Ibid. at note 17 and accompanying text.

32. Ibid. at 7. According to Davies, further difficulties arise because of the policies held by the relevant child welfare authority regarding the placement of children: (at 14):
"The policy will generally have been developed in light of prevailing political as well as child-related considerations. The implementation of this policy may or may ox be in the interests of an individual child who becomes subject to it." In the United States, one policy which has changed is that regarding the adoption of Black children by non-Black parents. In 1958, the relevant agency which decides uniform standards for state agencies stated that it is in a child's best interests to be the same colour as his or her adoptive parents. By 1968, this same agency determined that it would not necessarily be detrimental if a child was adopted by parents of a different colour. In 1972, after the National Association of Black Social Workers "condemned transracial adoption", the same state agency responded by stating that all things being equal, transracial adoption should not occur. (see 14-15) According to the author, the same situation has occurred in Canada in regards to First Nations children.

33. See Kline, supra, note 5, Ch. Three at 321. Other problems involving, for example, alcohol abuse, are termed as a "personal problems", which serves to reinforce the blaming of individual mothers for problems involving child neglect (at 322):
"...and obscures the roots of the difficulties First Nation mothers face in more systemic oppressive relations including historical and continuing colonialist and racist practices."

34. See, for instance, Kline, supra, note 23, Ch. One at 329, where the author discusses how this implicates First Nations Mothers who may see the choice of adoption as viable because these mothers believe themselves to be unfit due to the construction of the expectations of motherhood informed by the liberal ideology.

35. See Custody Workshop Summary Notes, supra, note 119, Ch. Two at 25, (discussion of issues facing Aboriginal Women led by Winnie Giesbrecht of the Native Women's Association of Canada).

36. Ibid.

37. See supra, note 3.

38. Kline, supra, note 23, Ch. One at 382.

39. Kline, supra, note 5, Ch. Three at note 38 and accompanying text.

40. See Boyd, "What Difference Does Difference Make?", supra, note 7, Ch. One.

41. See, for instance, Boyd, supra, note 1 at 73, where the author states:
"Individual successes in litigation related to women's poverty, or lesbian and gay family rights, must be seen in the light of less apparent state trends towards privatization of economic responsibilities and avoidance of a more communally based approach to care for those who are dependent." According to Liberating our Children, supra, note 22, Ch. One at 7, Aboriginal development is so distinct from other cultures because of the emphasis upon developing consensus regarding social responsibilities:
"Social consensus is based upon a shared agreement of individuals to exercise a variety of responsibilities...These attitudes extended into our families and our methods of teaching our children. Children are taught primarily by example, rather than being told abstractly what to do and what not to do."

See Kline, supra, note 5, Ch. Three at notes 7 - 15, and accompanying text, where the author discusses the various approaches which have been when analyzing the impact of the child welfare system on First Nations children. In particular, she discusses the comments of Patricia Monture:
"She argues that child welfare law is racist in that it applies standards 'which are not culturally relevant' to First Nations and that merely 'reinforce the status quo'."

This is not to say that First Nations are the only group in Canada who are detrimentally affected by the operation of the legal system, however, First Nations are perhaps disproportionately affected in so far as the operation of the child welfare system based on the number of First Nations children placed in need of care.

42. See Kline, ibid. at 309. Furthermore, see note 30 and accompanying text, where Kline acknowledges that the expectations of the ideology of motherhood also detrimentally impact upon the "white middle-class women"; "for reasons inherent in the ideology, however, it is more difficult for women who are poor or working class and/or First Nations and/or Black and/or lesbian, and so on, to meet the domination expectations of motherhood."

43. Ibid.

44. See CACSW Paper, supra, note 132, Ch. Two at 14:
"Canadian commentators have also written about the ways in which race and class biases operate in the application of child protection laws, underscoring the pervasive nature of the ideology of motherhood." And further, at 14:
"In view of the serious problems which have emerged

45. Ibid.

46. Ibid. at 15.

47. For examples of problems specific to women with disabilities, see, for instance, Custody Workshop Summary Notes, supra, note 119, Ch. Two at 19. For example, in order for disabled persons to obtain social services, they are required to obtain a doctor's certificate regarding unemployability. At the same time, this same certificate may be used against mothers with disabilities in the context of a custody dispute, by demonstrating that they may be incompetent of caring for their children. Similarly, welfare may be required for disabled women to obtain support services. The fact that a disabled mother is on welfare may be used against her when a judge is assessing which parent is more able to provide for a child's best interest.

48. Ibid. at 16 -17. In addition to the problems implicit in the dependency upon their partners, women with disabilities are sometimes dependent on, for example, translators, interpreters.

49. Ibid.

50. Ibid. According to the Discussion group, the response to disabled women staying at home and caring of children is the opposite.

51. Ibid. at 18.

52. Ibid. at 15.

53. Ibid. at 48:
"It is important to shift the focus to direct and indirect supervision of these tasks. The issue is 'who is taking the overall responsibility for ensuring that the care is provided'. It is not necessary that mothers do all of the physical tasks themselves.'

In addition, in some cultures the father may be the family member who appears at some events, as teacher-parent conferences, regardless of the role the father actually plays in caring for the day to day educational needs associated with education.

54. Ibid. at 63. My point, however, is not to solve the unique problems faced by women with disabilities. Instead, it is to direct attention to the way feminist legal theorists may indirectly harm women facing these difficulties by ignoring their unique situations in analyzing potential solutions.

# CHAPTER 6

## CONCLUSION

The elimination of the oppression currently faced by women involved with, or affected by, the resolution of private child custody disputes is inextricably linked to the legal recognition of the unequal and gendered division of household labour. In part, the solution lies is first finding, and then enacting a standard for dispute resolution which values, above all, the caregiving which was performed prior to the separation of the child's parents. Feminist theorists must also recognize and communicate that this problem does not lend itself to simplistic solutions: there are many other structural barriers relevant to the custody realm which will continue to operate even if an appropriate standard for dispute resolution is enacted. Despite this, theorists must continue working to improve custody decisionmaking, for every day women are threatened with losing their children, and therefore do not have the luxury of retreating from the legal system.

An essential component to the oppression faced by mothers in this context is the current custody standard applied in Canada. The best interests of the child standard is guided by certain premises which remain unsubstantiated, such as the belief that both parents contribute equally to child care both before and after a

separation. In addition, the best interests standard allows the judiciary to de-emphasize certain factors which have been demonstrated to be in a child's best interests, such as maintaining the role of the child's primary caregiver. Furthermore, the current standard allows judges to choose a situation which they believe is in a child's best interests, despite the fact that such a decision may be based on that judge's individual biases. The underlying problem can be attributed to the lack of direction contained in the current standard regarding how to weigh the various competing factors in a child's life.

As long as the judiciary is able to ignore the harm caused by breaking a bond between a child and his or her primary caregiver, through denying the importance of this relationship in the past as well as the future, primary caregivers will suffer, as will their children. In addition, for those caregivers who fail to meet certain expectations of motherhood, such as being heterosexual, providing the child with a father and directly performing childcare, the result may be a restriction of custody rights. Reforms which result in the denial of the value of primary caregiving, such as those premised on a model of shared parenting, further exacerbate the oppression of women, for these reforms ignore the reality of the gendered division of household labour.

What is needed, as opposed to reforms which may result in denying the value of caregiving, is a presumption in favour of the primary caregiver. Through drastically limiting the scope of a custody dispute, such a reform will assist in reducing judicial bias from permeating a decision. This bias is ever present, as reflected in

custody decisions in both the Canada and the United States, although at times, it is difficult to point to in a decision, and thus difficult to challenge. At a minimum, the enactment of a strong primary caregiver presumption, and a clearly defined unfitness exception, will prevent judges from denying custody to a mother without articulating the reason for the decision. This may allow for a more efficient appeal process, or at least, will give mothers, such as lesbian mothers, who are perceived as failing to meet certain expectations of motherhood a tangible reason for the denial.

To date, much of the feminist literature in which primary caregiving is discussed, fails to analyze the presumption as it impacts upon groups of women who may be disempowered in society because of their inability to participate in reform efforts which may reshape the legal system. Therefore, any conclusions regarding the feasiblity of enacting a primary caregiver presumption drawn in this literature has not been challenged by considerations of race, religion, sexual preference and/or physical ability. This omission may result in the further oppression of women who are already vulnerable, for it denies that primary caregiving may occur in several different ways depending upon the context, and thus, does not endaevour to protect these variations.

First Nation women are one group of women who may be restricted in their ability to fully particate in the process of reforming private custody legislation due to the immediate struggle to protect their parental rights in the child welfare system. However, an examination of the treatment of First Nation women in the child welfare realm has resulted in several insights which are valuable and relevant to custody

reform. It demonstrates the danger of utilizing a custody standard which allows for those involved in custody decisionmaking to ignore the context in which caregiving is taking place. This context is extremely wide in scope, and ranges from the collectivist aspect of First Nation caregiving to the history of oppression, and includes a lack of financial resources and poor access to the legal system. As the current best interests standard, as applied in the child welfare system, fails to consider the backdrop of First Nation culture and history, it results in many women losing their parental rights.

Upon a close examination of trends which emerge in the child protection realm in terms of First Nation caregiving patterns, it becomes clear that any emphasis on primary caregiving must be drafted carefully. First Nation caregiving is often performed on a more collective basis such that there is more than one individual who is responsible for the care of a child. Although a primary caregiver presumption could be drafted so as to emphasize the importance of these various contributions to a child's best interests, there is a risk that such an emphasis may enhance the argument of fathers' rights groups regarding the equal contributions fathers make to raising their children apart from actual daily physical care. However, the need for any suggested reforms to the current child custody legislation to be drafted carefully does not take away from the fact that these reforms are necessary.

Disabled mothers are another group of women who have faced disempowerment in Canadian society because of the way in which physical restrictions are rarely considered by able-bodied individuals. The failure to consider

the situation of disabled people has resulted in their being denied access to justice, in that buildings are not physically accessible for those in wheelchairs. This failure has also resulted in a failure to consider physical limitations when drafting legislation which may indirectly depend upon physical performance. The situation of disabled women and First Nation women must be emcompassed into any reform suggested in the custody realm. Certainly, this complicates the analysis, for theorists must find a way in which to emphasize the notion of primary caregiving while also allowing for the situation of childcare being performed by more than one person.

At this point, it would be difficult to come to firm conclusions or to make any predictions: as stated repeatedly, research is required within many realms of custody law, and even then, the issue of which approach to take looms. However, perhaps the first step is to accept that this area of law continues to be suffused with controversy, for notions of "the family" have always been held close to people's hearts and minds, and evoke strong emotional responses. In light of this, perhaps the next step should involve the education of those involved, both directly or indirectly, in making custody decisions. This education should entail focusing upon notions of continuity and its impact upon a child's life, for this remains one area of relative consensus.

In terms of lesbian mothers, the group that has provided a focus for this thesis, one American feminist theorist suggests that in part, judicial education programs on lesbian and gay parenting may assist in reducing heterosexist attitudes that may impede decisions in the best interests of children.[1] Nancy Polikoff correctly

points out that placing the requirement of educating the judiciary upon each individual litigant involved in a custody dispute is both a costly and inefficient means of education.[2] In contrast to the individual approach, Polikoff suggests that judicial education programs would fulfil two objectives: firstly, they would redress the ignorance of a large number of judges outside the scope of an individual case; and secondly, such programs would meet a much needed demand:

> From the first articles written to assist lawyers handling such cases, it has been understood that judges labouring under ignorance, prejudice, homophobia, and heterosexism would need to be educated, both to dispel widely held myths and to recognize and overcome prejudice.[3]

The main objective of judicial education programs, framed in accordance with the best interests standard, involves ensuring that sexual preference does not become a factor which is determinative in a custody dispute:

> ...it is to discourage judges from viewing a parent's homosexuality as inherently inconsistent with the best interests of the child and to encourage judges to focus on a best-interests-of-the-child determination based upon all facts relevant to that child's life.[4]

This result is obtained through the simulation of a custody dispute as between a lesbian or gay party and a heterosexual party attempting to restrict custody rights, utilizing some, or all, of the same materials normally utilized during a custody trial.[5] Although this approach is not a panacea to problems within this realm, it should be seen as integral to any reform effort in order to confront the various factors leading to oppression and may succeed because of its systemic method.[6]

According to a report prepared by the Canadian Bar Association's Task Force on Gender Equality, certain gender bias courses which are attended by some Canadian judges have assisted in raising sensitivity to the issue of gender bias:

> Indeed, the program prepared by the Western Judicial Centre has been rated by Professor Norma Wickler, a sociologist at the University of California and a pioneer in this field, as the bast of its kind available anywhere.[7]

In Canada, judges are not required to attend judicial education programs, although the Task Force recommended such courses be mandatory:

> The Task Force recommends that sensitivity courses for judges on gender and racial bias be made compulsory not only for newly appointed judges but for all judges.[8]

Despite the fact that attendance at these programs is on a purely voluntary program, several initiatives involving judicial education have been ongoing for the past few years.[9] In Canada, judges were first introduced to the subject of gender bias in the courts during a national interdisciplinary conference which was held in Banff in 1986.[10] The first systematic treatment of the subject of gender bias in a judicial educational forum was at the Western Workshop, presented in 1989 by the Western Judicial Education Centre.[11] An examples of ongoing programs supporting judicial education is the Canadian Judicial Centre for the Education Committee of the Canadian Judicial Council.[12] Although some insist that these programs should be mandatory, some argue that these programs are bound to fail because the term gender bias is based on the false assumption that bias can be removed from the law and that there is such a person as an "unbiased decisionmaker."[13]

According to Dean Lynn Smith, of the University of British Columbia Law School, judicial education will result in an increase of judicial emphathy and understanding of those individuals appearing before the judiciary; however, this increase in empathy will actually result in judges becoming more objective:

> Without the exercise of empathy, decisions rest implicitly upon the assumption that the persons affected are like the decision makers. The empathetic decisionmaker, by taking into account relevant differences between the people involved and himself or herself, leans toward a more impartial decision. In short, unrelenting detachment is not invariably the best way to be objective and impartial. In effect, it leaves the decision maker alone with his or her own perspective on the world.[14]

Finally, the argument has been made that judicial education programs will only result in judges using language which is "safe" and "acceptable", but these judges will retain the same fundamental approach regarding women's issues.[15] Furthermore, once a judge takes a program, they may be inclined to dismiss arguments pertaining to women's issues, based on the fact that they have heard it before:

> ...some judges may claim that we have heard that already, whether or not it has been understood. This concern is a very real consideration in a legal system which often confuses due process and substantive fairness. The same problems arise whenever such a course is given.[16]

Although there is optimism in terms of the potential for such programs, the literature on judicial education programs in Canada discusses these programs in terms of gender bias. Instead, a judicial education program should confront oppression based

on all grounds, including race, religion, physical disability and sexual orientation.

In addition to judicial education programs, it is time for feminist legal theorists to stop polarizing the differences between lesbian and heterosexual custody concerns, and First Nation women's concerns and those of disabled women, and instead, attempt to draw out how vastly connected are our struggles. We are connected in so far as the denial of the value of all women's primary caregiving and its impact on custody. This unity remains although caregiving may be performed in different ways depending upon culture, disability, religious and race. It is time to unite in terms of efforts to obtain protection under state legislation. This includes enlarging the consultation process, so that the various forms of childcare are respected and embodied. This process will result in a reform which is capable of protecting the long term interests of all women:

> Women's right of sexual choice can come the same route, but only if heterosexual women join lesbian and gay men in their quest for full scale, across-the-board constitutional protections, as large numbers of white ultimately joined the small and embattled ranks of black civil rights activists whose freedom campaigns made Palmore a constitutional reality. For their own more complete liberation, it is in the long range interests of heterosexual women to do so.[17]

## ENDNOTES - CHAPTER SIX

1. See N.D. Polikoff, "Educating Judges About Lesbian and Gay Parenting" (1991) 1 Law and Sexuality at 176 - 79. According to the author, the adoption of a *"Model Code of Judicial Conduct"* by the American Bar Association, in 1990, in which bias and/or prejudice on the grounds of sexual orientation, may work towards justify the need for judicial education programs.

2. See ibid. at 175:
"It places the burden on individual litigants whose cases go to trial to muster the resources to compensate for a huge social problem. The effort, even when successful, educates only one judge. It must be constantly repeated."

Placing the burden on the individual is another result of liberal ideology. In many ways, it ensures that controversial issues will rarely be confronted, for it requires a great deal, both financially and administratively, to form organizations willing to confront these issues en masse.

3. Ibid. at note 6, and accompanying text. According to Polikoff, at the time of the article the author was aware of only two judicial education programs in the United States to date which have addressed the issue of lesbian and gay child custody and visitation disputes.

4. Ibid. at note 18 and accompanying text.

5. Ibid. at 182. This approach enables the sexual preference to be viewed as only one aspect of an individual's life. In addition, it takes the focus away from an individual litigant, and as such, may allow for more judicial flexibility where there is nothing to lose. According to Polikoff, it is difficult to ascertain the success of this program, although success cannot be measured by the eradication of homophobia. (at 197)

6. See supra, note 63, Ch. Two at 191 - 92.

7. Ibid. at 191.

8. Ibid. at 192.

9. See J. Brockman & D.E. Chunn, "Gender Bias in Law and the Social Sciences" in J. Brockman and D.E. Chunn (eds.) Investigating Gender Bias: Law, Courts and the Legal Profession (Toronto: Thompson Educational Publishing, 1993) 3 at 11. Such intitatives have largely been "in-house", in that judges and lawyers are studying themselves and typically, the judges and lawyers are examining the issues from their own perspective.

10. See N.J. Wikler, "Researching Gender Bias in the Courts: Problems and Prospects" in J. Brockman and D.E. Chunn (eds.) Investigating Gender Bias: Law, Courts and the Legal Profession (Toronto: Thompson Educational Publishing, 1993) 43 at note 1 and accompanying text. Such intitatives have largely been "in-house", in that judges and lawyers are studying themselves and typically, the judges and lawyers are examining the issues from their own perspective.

11. Ibid. at 49.

12. Ibid at note 45 and accompanying text.

13. Supra, note 9 at 3 - 4.

14. Ibid. at 4.

15. See S. Razack, "Emploring the Omissions and Silences in Law Around Race" in J. Brockman and D.E. Chunn (eds.) Investigating Gender Bias: Law, Courts and the Legal Profession (Toronto: Thompson Educational Publishing, 1993) 37 at note 42 and accompanying text.

16. Ibid. at note 42.

17. Supra, note 79, Ch. Four at 620.

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