INCREASING THE EMPHASIS ON THE CHILD
IN THE RESOLUTION OF CUSTODY DISPUTES

by

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LL.B (Hons.) University of Adelaide, 1972

A thesis submitted in partial fulfillment of
the requirements for the degree of
Master of Laws

in

The Faculty of Graduate Studies
(Department of Law)

We accept this thesis as conforming
to the required standard

The University of British Columbia
September, 1979

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The problem which is confronted in this paper is a perennial one; the resolution of child custody disputes. However, it is not the aim of the paper to provide a quick and easy solution, even if such were possible. Instead, it is contended that a much more satisfactory result can be achieved if there is more emphasis placed on the person who is the most affected by a court's decision, namely, the child himself.

A detailed examination of the principles used in the traditional method of determining child placement indicates that there is a decided lack of input from the child. Unfortunately, the blame can be laid at the feet of not only the courts and the lawyers, but also legislatures and the public generally. Traditional methods of adjudication are employed without an appreciation of the special nature of the problem at hand.

Fortunately though, the solution is not far away, and it is the major contention of this paper that a more effective use of the methods and proceedings already at our disposal will provide the input necessary to inform a decision on this most difficult of issues.
The methods of providing input from the child can be divided into two categories. There can be either direct or indirect input. The former category comprises evidence from the child and interviews by the judge, while the latter consists of independent representation by legal counsel and the utilisation of behavioural scientists. These methods are examined in great depth, and guidelines are suggested, as well as pitfalls identified.

Finally, as a concession to those who would chance the system of child placement entirely, this paper looks at suggested alternatives, but concludes that there is in fact no better system than one involving adjudication by a court, as long as the same becomes less parent orientated and more child orientated.
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CHAPTER 1

INTRODUCTION

The time-worn adage that children should be seen and not heard is an apt description of their treatment by the law. For too long now children have been deprived of any involvement in the ordering of their future, particularly where legal proceedings are concerned.

This attitude of the law is premised on the assumption that parents know what is best for their children, and therefore the law should not interfere in the parent/child relationship. It is certainly true that families are not legal institutions. They are moulded by society and do not necessarily bend with changes in the law. However, in crisis situations the pressures in society cannot cope, being tuned to an integrated family. Accordingly, the law must step in and take over from society as the instrument for ordering family relationships, but, most importantly, it must do so on other than traditional precepts. It is totally inappropriate to allow the parents to speak and act for the child when the family unit disintegrates and child placement becomes the issue. Yet, in fact, the law proceeds on this basis, and there is very little emphasis on the child as an individual.

The law's method of dealing with the highly emotive issue of child placement is to thrust it on a court steeped in the
traditions of criminal and/or civil jurisdiction, and one deceptively simple guideline is provided; the children shall be placed in accordance with their best interests. The adversary process is then set in motion with the children as the prize or reward for the successful parent.

The question can validly be raised as to whether this is the ideal setting for a determination of child placement. I suggest not. Admittedly, the legislative guideline is there, and the facts can generally be ascertained with a relatively high degree of certainty, but the important step is linking up the facts with the best interests of the child. The court is provided with a discretion that is extremely wide, but that in itself creates difficulties. Rarely do two judges view what is in the best interests of the child in the same fashion, and judgements are as varied and as diverse as there are children from broken homes. Yet, the judge hearing the matter is the sole arbiter as to what will enhance the welfare and happiness of the children before the court. The comment can be made that if a judge is to be placed in this position, then it is essential that he be apprised of the entire spectrum of psychological influences at play when children are rudely awakened from the stability of a two parent household. Thus, the court needs to be receptive to evidence from the behavioural sciences and recognise the inadequacies of a strict legalistic approach to the issue of child placement. The court must feel satisfied
that all the available evidence has been placed before it. Unfortunately though, this cannot be achieved within the traditional adversary system. Each parent, through counsel, views the proceedings as a battle ground, the aim being to convince the court that the other parent is unfit to have the care and control of the children while establishing his or her own suitability in that regard. It is within the power of the parties themselves to determine the extent of the information that will be presented to the court in order to achieve this purpose. Thus, the evidence presented can be very stilted and partisan; not at all what the court requires in order to base a decision designed to promote the interests of the children. Accordingly, there is a need for a counterbalancing factor and I suggest that this should be independent information concerning the child itself, particularly the views, feelings and thoughts of the child.

The entire future of the children is at stake when a family unit dissolves, and it is not unreasonable to suggest that they, as the persons most affected by the decision, should have an independent voice in the proceedings. It is entirely unsatisfactory to rely on the squabbling parents to promote the welfare of the children in an unbiased fashion. Apart from the fact that children might have opinions and interests separate and different from those of the parents, the motives of the latter in urging claims over children sometimes
comprise revenge against, and/or punishment of, the other of them, and it is common for the children to be viewed merely as chattels to be bargained with.\(^3\) Nor should the court itself be relied on as the sole protector of the children's best interests, although this has been the traditional approach. I suggest that it is unwise for the court to descend into the arena of the proceedings in order to look beyond the interests of the parents. The danger is that the judge will take on the role of advocate for the child and place his objectivity in question. Yet, this has been necessary given the limits of the adversary system.

Clearly though, the adversary system is here to stay, at least for the present,\(^4\) and therefore it is necessary to look primarily at how best the trappings of such a system can be utilized to provide the required input. The obvious response is for the children to be independently represented in court,\(^5\) and for them to be treated as parties to the action in the fullest possible sense. Indeed, it seems to me that a right to be heard in this context is as fundamental a right as any.\(^6\) But it does not stop there because separate representation is not necessarily the panacea that it seems. It still must be realised that custody determination differs markedly from the recognised model of adjudication. Thus, other devices, foreign to the traditional approach of courts need to be utilized; e.g., the interviewing of children by the judge, and the extensive use
of evidence from the behavioural sciences, to mention just two matters. There also needs to be a general recognition by the court and the litigants that the court room is to be used only as a last resort. Liberal use of pre-trial conferences, and even conferences prior to the institution of proceedings is essential to soften the traumatic effect of the disintegration of the family unit.

Simply stated, courts dealing with this difficult question of child placement must become less parent-orientated and more child-orientated. In other words:

"The child's point of view, what's fair to him, not merely the mens rea of the one who wields the rod must be taken into account." 7

To illustrate this need for input from the child this paper examines the existing method of resolving custody disputes, particularly in divorce proceedings, being as it is the ultimate destruction (apart from death) of the family unit. However, it is easy to assume that input from the child is a feasible concept, and accordingly the capacity of a child is briefly considered. This review provides reason for optimism as to the potential for direct input from the child, but it is also evident that this input can sometimes only be what a third party perceives as the needs of the child. Thus, there can be both direct and indirect input from children into the decision-making process, and the major portion of this paper is
concerned with investigating the methods for ensuring this. However, it will be seen that these methods differ according to whether there is direct or indirect input. In respect of the former, the methods comprise interviews by the judge and evidence from the child itself, whereas the latter comprises methods such as representation by independent counsel and the utilization of behavioural scientists.

The paper then concludes with a discussion regarding the retention of judges as the sole arbiters of custody disputes.
FOOTNOTES, CHAPTER 1

1. "It is not the benefit to the infant as conceived by the court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can". *In Agar-Ellis* (1883), 24 Ch. D. 377, at PP. 337-338. Also see *Chisholm*:
   "Obtaining and Weighing the Children's Wishes; Private Interviews with a Judge or Assessment by an Expert and Report" (1976), 23 R.F.L. 1

2. Bersoff feels that children are most affected by divorce because they stand to lose the salutory effects of an intact family. *Bersoff, Representation for Children in Custody Decisions - All that Glitters is not Gault* (1976), 15 J. Fam. L. 27, at PP. 36-37.

3. e.g., see the comments of a New Jersey Family Court Judge in *Devine, A Child's Right to Independent Counsel in Custody Proceedings: Providing Effective 'Best Interests' Determination Through the Use of a Legal Advocate*, (1975), 6 Seton Hall L. Rev. 303, at P. 312. Also see *Chisholm*, supra, footnote 1.

4. Indeed, Mnookin, after an exhaustive examination of the alternatives, concluded that the abandonment of adjudication for the resolution of private custody disputes was unlikely. Also see *Foster, Trial of Custody Issues and Alternatives to the Adversary Process*, in Baxter and Eberts (eds.), "The Child and the Courts" (1978), 55.

5. In the words of *Foster and Freed*:
   "This matter of independent representation by counsel, so that children have their own lawyer when their disposition or welfare is at stake, is the most significant and practial reform that can be made in the area of children and the law. Given our predilection for the adversary format and the small likelihood that it will be abandoned in the foreseeable future ... it is clear that reform should be directed at making the process functional, and to permit all interested parties - including children - to have independent counsel ..."
   *(Foster and Freed, "A Bill of Rights for Children" (1972), 6 Fam. L.Q. 343 at P. 356).*
6. The British Columbia Royal Commission on Family and Children's Law in its Fifth Report, Part iii, "Children's Rights", (1975) at P. 8, recommends that children should have "the right to be consulted in decisions relating to guardianship, custody and a determination of status", and "the right to independent adult counselling and legal assistance in relation to" such decisions.

7. Foster and Freed, supra, footnote 5, at P. 345.
CHAPTER 2
HISTORICAL BACKGROUND AND THE APPLICABLE STATUTE LAW

As in all areas of family law, the custody of children commences with the dominant position of the father. At common law the father had the right to the custody of all of his legitimate children,¹ such right being correlative to his duty to protect the same. This right was such that it was of a quasi-proprietary nature. It was absolute against all the world including the mother,² and she could not even establish priority after the death of the father if the latter had appointed a testamentary guardian in the meantime.³

However, in its usual fashion equity intervened to soften the impact of the common law. Initially though, such intervention only occurred where there was a danger to the child's life, health, and morals, or where the common law rights of the father were being exercised in an unreasonable and arbitrary manner.⁴ It was not until much later that equity established the principle that the welfare of the child was the dominant consideration.

The jurisdiction permitting equity to intervene originated from the prerogative power of the Crown as parens patriae to protect any person who was not fully sui juris.⁵ Accordingly, equity thought nothing of disregarding the common law rights of the father if such was necessary in the interests
of the child. In the words of Lord Esher M.R. in *R v Gyngall*:

"The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of the child, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate, and careful parent would do. The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate, and careful parent would not do. The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right. The Court must exercise this jurisdiction with great care, and can only act when it is shown that either the conduct of the parent, or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but - I will not say 'essential', but - clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded; but where it is so shown, the Court will exercise its jurisdiction accordingly."

Equity even went as far as granting an injunction to restrain an application for a writ of *habeas corpus*, and preventing a person who had already obtained a writ from interfering with the child.

It did not, however, provide the mother with positive rights to the custody of her children. This was left to Parliament, and since the middle of the nineteenth century in England there has been a mass of legislation enacted affecting
the rights and duties of parents. Yet, it was not until the Guardianship Act, 1973,\(^9\) that the process of assimilating the parents' legal position was completed by providing that in relation to the custody of a child the mother had the same rights and authority as the father.

It should now be apparent why it has been so difficult for the law to shift its focus from the parents and concentrate on the children. Initially the law talked solely in terms of the father's rights, and then later, in terms of affording the mother equal rights and authority. This emphasis, together with society's conception of the child's place in the home, effectively kept children in the background.

All Canadian jurisdictions have followed England in the development of their child adjudication laws.\(^{10}\) Unfortunately though, the relevant legislation is fragmented and exists at two levels, the Federal level and the Provincial level. This is ostensibly because of the arrangement of powers under the British North America Act, 1867 (Imp.), pursuant to which the Dominion Parliament has legislative authority over "marriage and divorce",\(^{11}\) and each Provincial Parliament has legislative power over "the solemnization of marriage",\(^{12}\) "property and civil rights"\(^{13}\) and the "administration of justice".\(^{14}\)
The legislation enacted at the Federal level is the Divorce Act, 1968. This Act provides, inter alia, for orders to be made for the "custody, care and upbringing of the children of the marriage" ancillary to proceedings for divorce. Section 10 (b) of the Act provides for an interim order to be made according to what the Court considers is "fit and just". Section 11 (1) empowers a Court, upon granting a decree nisi of divorce, and

"if it thinks it fit and just to do so having regard to the conduct of the parties and the condition means and other circumstances of them",

to make

"an order providing for the custody, care and upbringing of the children of the marriage".

Section 11 (2) then permits the variation or rescission of an order if the Court

"thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them".

Finally, Section 12 (b) allows the Court to

"impose such terms, conditions or restrictions as the Court thinks fit and just"

when making an order pursuant to Sections 10 or 11.

The term "children of the marriage" is defined in Section 2 of the said Act to mean

"each child of the husband and wife who at the material time is
(a) under the age of sixteen years, or
(b) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life."

"Child" of a husband and wife is in turn defined to include "any person to whom the husband and wife stand in loco parentis and any person of whom either of the husband or the wife is a parent and to whom the other of them stands in loco parentis."

The Federal Government has not yet seen fit to test its powers fully under the Constitution, and introduce legislation dealing with questions of custody independent of divorce. It is indisputable that the interests of all concerned would be best served by comprehensive legislation existing at one level only,¹⁶ rather than at present, where to which court you go,¹⁷ and which legislation governs, depends on whether the application for custody is ancillary to divorce or not. There is also a precedent in the Australian Family Law Act, 1975 as amended,¹⁸ for setting up a Federal Court with jurisdiction to entertain custody applications independent of divorce. The arrangement of powers between the Commonwealth Government and the State Governments in the Australian Constitution is not dissimilar from the Canadian position, the Commonwealth Government in Australia having power to legislate in respect of "marriage".¹⁹

Accordingly, the way may be open for the Canadian Federal Parliament to take this step. However, Parliament has shown no inclination to legislate comprehensively in this field,
preferring to place pressure on the Provinces to institute legislative reform. Perhaps the Federal Government has been off-put by the hard fought battles to justify Sections 10 and 11 of the Divorce Act, 1968 as being *intra vires*. More likely though, is the fear of stepping on the toes of some Provinces, particularly Quebec, which has an altogether different social and family structure.

The major piece of Provincial legislation in British Columbia is the Family Relations Act, 1978. This statute allows for a custody or access application to be made quite independently of divorce proceedings. In fact, an order can be made pursuant to this Act if divorce proceedings are unsuccessful.

Pursuant to Section 35 (1) of the said Act a Court can order that

"one or more persons may exercise custody over a child or have access to the child."  

In addition, Section 35 (4) authorizes the Court to include in an order for custody or access such terms and conditions as it

"considers necessary and reasonable in the best interests of the child."

A child is defined in Section 1 as meaning a person under the age of nineteen years.

The key section of this Act is Section 24, which
provides as follows:

"(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 interests, shall consider these factors:

(a) The health and emotional wellbeing 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;

and give emphasis to each factor according to the child's needs and circumstances.

(3) Where the conduct of a person does not substantially affect a factor set out in subsection (1), the court shall not consider the conduct in a proceeding respecting an order under this Part.

(4) Where under subsection (3) the conduct of a person may be considered by a court, the court shall consider the conduct only to the extent that the conduct affects a factor set out in subsection (1).

Interim orders are provided for by Section 9 (1) of the Act, and pursuant to that Section such interim orders can be made as the Court considers reasonable.

This is the extent of the applicable legislation in British Columbia, but it is also necessary to emphasise that in addition to this two-tiered system it is beyond doubt that the Supreme Court of British Columbia, as parens patriae, can exercise inherent equitable jurisdiction over children generally. This power may be invoked by anyone properly before the Court and the Court can award custody to whomever it pleases."
Moreover, it is particularly useful where there is no legislative authority for either the order sought or the order proposed by the Court. 25
1. R v Howes (1860), 3 El & El 332; Re Agar-Ellis (1883), 24 Ch. D. 317; Thomasset v Thomasset (1894) P. 295. As regards illegitimate children though, the father had no such right (R v Soper (1793), 5 Term Rep. 278; Barnardo v McHugh (1891) A.C. 388).

2. R v De Manneville (1804), 5 East 221.

3. Tenures Abolition Act, 1660.

4. Wellesley v Duke of Beaufort (1827), 2 Russ 1; De Manneville v De Manneville (1804), 10 Ves. 52.

5. Eyre v Countess of Shaftesbury (1722), 2 P. Wms. 103, at P. 118; Hope v Hope (1854), 4 De G.M. & G. 328, at PP. 344-345.


7. R v Barnardo, Jones's Case (1891) 1 Q.B. 194

8. Andrews v Salt (1873) 8 Ch. App. 622

9. 1973, c. 29 (Eng.)

10. But note that in New Brunswick the father is still adjudged to have a prima facie right to the custody of the children (Layton v Layton (1973) 6 N.B.R. (2(d) 68).

11. Section 91 (26)

12. Section 92 (12)

13. Section 92 (13)

14. Section 92 (14)

15. R.S.C., 1970, c. 8

16. However, it should be noted that the weight of opinion is in favour of this level being the Provincial, rather than the Federal (e.g., see Jordan "Federal Divorce Act (1968) and the Constitution" (1968), 14 McGill L.J. 209). The difficulty with this though, is that it would require an amendment to the Constitution to transfer the Marriage and Divorce jurisdiction to the Provinces.

17. The arrangement of powers under the Constitution has not only meant that the legislation is fragmented, but also
that the jurisdiction of the courts is split. The Provinces have no power to confer upon a provincial judge any jurisdiction to deal with questions that have usually come within the jurisdiction of the Superior Courts and the County Courts. The judges of these courts are appointed by the Federal Government pursuant to Section 96 of the British North America Act, 1867, and included in the exclusive jurisdiction of the Superior Courts is jurisdiction over Divorce and Matrimonial Property. Thus, *prima facie*, one judge cannot be clothed with jurisdiction to deal with all aspects of a family dispute. However, it must be emphasised that this is a contentious issue and space does not permit a detailed discussion thereof in this paper.

18. Act No. 53 of 1975

19. Section 51 (xxi) of the Commonwealth of Australia Constitution Act 1901 (63 & 64 Victoria, c. 12)


21. As the then Prime Minister, Mr. Trudeau, indicated when presenting the Divorce Bill to Parliament, there was a desire to make the divorce legislation realistically comprehensive without destroying the "current traditions and laws in the various Provinces". (*Jordan*, supra, footnote 16, at P. 268).

22. S.B.C. 1978 c. 22

23. It has been held in *Papp v Papp*, supra, footnote 20, that a custody order can only be made under Section 11 (1) of the Divorce Act, 1968 if a divorce is actually granted.

24. c.f. the Divorce Act, 1968, where an application for custody or access can only be made by one of the parties to the divorce action, but an order can be made in favour of a third party.

"If the alternatives are side by side, choose the one on the left; if they're consecutive in time, choose the earlier. If neither of these applies, choose the alternative whose name begins with the earlier letter of the alphabet. These are the principles of sinistrality, antecedence, and alphabetical priority — there are others and they're arbitrary, but useful."¹

To many this depicts the approach adopted by courts in determining child placement. Decisions in the area are often difficult to reconcile and it is hard to establish a consistent line of authority. Inevitably, lawyers and litigants feel that the outcome of their cases will depend to a large degree on the luck of the draw as to which judge is assigned to hear the action. It all seems rather a lottery, but as we have seen, there is ostensibly one guiding principle; placement is determined according to the best interests of the child.²

Indeed, the term "in the best interests of the child" has almost become a household phrase. It is used constantly by courts in their judgements, by commentators in their writings, by barristers in their submissions, and by the public generally. With a usage of this magnitude it would be reasonable to expect that little criticism could be levelled at the results of custody disputes. However, nothing could be further from reality. Courts are frequently criticized for their assessment of the best interests of the children, even to the extent that the role of the court in resolving custody matters has been questioned.
In determining the best interests of the children a court necessarily has a wide discretion allowing it to take many factors into account. This discretion is present even where the relevant legislation specifies the factors to which a court must have regard. The paramount consideration is always the welfare and happiness of the child, and this is so no matter how specific the legislation may be. No other factor can override this principle. In the words of Lord MacDermott in the celebrated House of Lords’ decision of J v C:

"It seems to me that (the words, ‘shall regard the welfare of the infant as the first and paramount consideration’) must mean more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed."

There are obviously many factors which make up the welfare of a child. For instance:

"It means the material well-being of the children equally with their psychological and spiritual well-being; it means that their need for food and clothing and shelter is to be given consideration in conjunction with their real need for love and affection and parental care and training. It means the development of a young human being."

However, history has shown that different factors are emphasised at different times according to society’s prevailing mores and
the level of comprehension of child development. For example, in the nineteenth century, social and moral values held sway in custody disputes, while today the trend is to emphasise the psychological well-being of the child. This change in emphasis is facilitated by the use of a vague test such as the best interests of the child, and one wonders whether the current push to legislate comprehensive guidelines for courts is wise. It may prevent necessary changes in emphasis by putting into permanent form the values of contemporary society.

The argument oft-used in promoting fixed guidelines is that many judges and lawyers are totally unfamiliar with the requirements of custody adjudication, contrasting as it does with the kinds of determinations usually required of courts. Specific statutory directions would spell out the social policy to be applied and would serve as a basis for negotiating settlements.

However, the question that needs to be answered is whether it is possible to provide adequate guidelines. Critics of the existing method of determination are concerned at the width of the discretion reposed in judges, arguing that the process is too speculative. Yet, the guidelines that are suggested are generally vague in themselves and do no more than state the obvious. One commentator, Mnookin, has recognised the problem. He postulates that the determination of what is
"best" or "least detrimental" for a particular child is usually indeterminate and speculative because existing psychological theories do not allow confident prediction of the effects of alternate custody dispositions, and because society lacks a clear-cut consensus about what values should inform the determination of what is "best" or "least detrimental". These underlying reasons for the indeterminacy in turn render the formulation of rules especially problematic. Indeed, after an extensive survey, Mnookin concludes that there is no alternative which is "plainly superior to adjudication under the indeterminate best interests principle."

However, this is not the only difficulty with legislating guidelines. Professors Gosse and Payne highlight the circumstance that, even assuming an acceptable list of factors can be found, it must be determined whether the same should be exclusive or inclusive. They argue as follows:

"If it were to be inclusive, then there would be unspecified matters that could be looked to... On the other hand, a list of factors which were to be exclusively considered could have greater drawbacks. It would be essential for such a list to be drafted so as to cover all the desirable factors for consideration. Judges would be confined to the strict terms of the statute and consequently interpretation problems could give rise to what would be an undesirable number of appeals. In addition, the listing of factors might create a tendency to give these factors equal weight when in the circumstances of particular cases, such equal weight will seldom, if ever, be warranted."
Nevertheless, despite these drawbacks, both commentators and legislators have proceeded apace in formulating statutory guidelines. With some, the aim is to ensure that at least the judge reviews those factors deemed to be important, even if they are not meant to be exclusive. Even Gosse and Payne conclude that it is preferable to have statutory guidelines, and their proposal was picked up by the Law Reform Commission of Canada in its Report on Family Law (1976). Examples of recent Canadian legislation setting up guidelines can also be found in British Columbia and Ontario, although one notable exception in the latter province is Section 35 (1) of the Family Law Reform Act, 1978. That Section simply directs placement in accordance with the child's best interests. Interestingly though, the courts have divided in their application of this Section, some holding that the factors to be taken into account are the same as under previous legislation, others holding that common law principles continue to apply, and still others holding that a fresh and modern approach to family law is required.

However, whether these attempts to provide guidelines will lead to less indeterminacy and less speculative decisions is debatable, and I suggest that child placement will continue to be a highly individualised determination.

A rather unfortunate consequence of this approach is
that although the bottom line in any custody dispute is that the best interests of the child prevail, courts have sometimes allowed other considerations to vitally affect their decisions. They do this by treating them as factors to be looked at in addition to the welfare of the child, instead of regarding them as factors to be weighed in assessing how the best interests of the child can be served. Generally, these considerations are centred around the conduct of the parents and the concept of parental rights, which highlights the inability of courts to appreciate the special nature of the problem confronting them and the need to rid themselves of the paternalistic notions of the past.

PARENTAL RIGHTS

It is a trait of areas of the law where courts are provided with an extremely wide discretion for presumptions to be developed in order to provide some guidance. This is certainly the case in the law relating to the custody of children, and particularly so because of the need to offset the paucity of evidence that is presented by the feuding parents concerning what is actually in the best interests of the child. The danger though, is that the presumptions may develop into hard and fast principles. For example, the concentration by
courts on parental rights produced the presumption that in custody disputes between a parent and a stranger the natural parent prevailed unless the latter's behaviour was of such a nature that it would be improper to leave the child with him or her. As I have indicated, greater stress was placed on this principle than on the best interests of the child.  

This anomaly was compounded in many cases by the fact that often the subject child had been in the de facto care and control of third parties, such as foster parents, for sufficient time to create strong bonds of affection between them. Yet, courts would cast aside the possible deleterious effects of returning the child to the natural parent in the name of preserving the family unit and its blood ties.  

However, the welfare of the child is gradually gaining dominance over this presumption and the trend was given a healthy boost in England by the House of Lords in J v C.  There, the court held that the best interests of the child demanded that he be left with foster parents rather than be returned to his natural parents. In Canada the approach of the House of Lords was taken up in Re Moores and Feldstein et al.  There, Dubin J.A. said this  

"I find it difficult to approach a custody case by adhering to a formula. As pointed out by Megarry J. in the case of Re F (An Infant), (1969), 3 W.L.R. 165, in cases such as these, the court is dealing with the lives of human beings and these cannot be regulated by
formulae ... Although in most cases it is to be expected that a child will benefit by the ties of affection of a parent and what naturally flows from it, that must be a question of fact in every case, and I do not think that I am bound by precedent to proceed on the assumption that it is inevitably so."

After having regard to all the circumstances in the case at hand he then concluded:

"Considering the welfare of the child in its broadest aspect and giving due consideration to the fact that it is the mother who is now seeking her return, in my view, the welfare of this child will best be served if left in its present happy surroundings, and I have concluded that the tie of affection of a mother to a child is not the overbalancing consideration in this case."37

However, this has been far from the end of the matter because there is a difficulty in courts applying Re Moores and Feldstein. It is only a decision of the Ontario Court of Appeal, whereas the relevant Supreme Court of Canada authority is Hepton v Maat,38 a case which espoused the presumption in favour of the natural parent in the strongest of terms. Dubin J.A. in Re Moores and Feldstein attempted to dispose of this case by saying that the court was really applying the best interests test, and the natural parent happened to succeed on the particular facts.39 However, this interpretation does not square with the clear statements of principle made by the Supreme Court.40 Thus, there is some doubt as to the effect that Re Moores and Feldstein has on Hepton v Maat, and this is reflected in the subsequent case law. On the one hand there are cases such as Re Squire41 and C.A.G. v F.D.R.42 which welcomed Re Moores and Feldstein with open arms and treated it as the...
leading current authority, but on the other hand, some courts have either deferred to the binding authority of *Hepton v Maat*, attempted to distinguish *Re Moores and Feldstein*, or simply resurrected the language of the Supreme Court.

The most likely result of this judicial conflict is that the use of the best interests principle will prevail, however, some commentators would view this as an unfortunate development. It is recognised that the need to make a choice between prospective custodians in most cases comes close to overwhelming human powers of prediction and judgement. Rational guidelines are essential to ease the trial judge’s burden. The question though, is where are these to come from. The most logical resource would be the behavioural sciences, but unfortunately it has been demonstrated that the same are not always able to provide the judge with sufficient relevant data to inform his decision. Accordingly there has been a call for a return to the use of presumptions, such as the parental right principle, until empirical research can provide a better method. There is no doubt that a presumption in favour of the natural parent renders a judge’s task less burdensome. It is much easier to establish biological parenthood than to enter into an investigation of the child’s psychological ties.

Of course though, the professionals all feel that *Re Moores and Feldstein* is the best approach, and they have
recognised it as

"a land-mark decision ... not only because it extend(ed) the principle that the welfare of the child is the paramount consideration to be considered in custody disputes between parent and non-parent, but because it consider(ed) the welfare of the child apart from the wishes of the natural parent." 52

Behavioural scientists have been saying for a long time now that biological relationships are not determinative of the welfare of children. To a child it matters not whether the person providing the necessary love and attention is the natural parent or a stranger in blood, the important aspect is that there is a strong attachment between the child and that care-giver. 53 It is just as traumatic to the child for this attachment to be broken where the care-giver is a stranger in blood as it is where the care-giver is the natural parent.

Yet, the question can still be asked whether it is appropriate to interfere with the relationship between a child and its natural parent. 3 In the community of professionals it is easy to say that a child should be placed with its psychological parent without regard to biological ties. However, outside this community there is a conservative element in society which views the natural family as the mainstay of society. The concern is that if the relationship between natural parent and child can be easily disturbed, great inroads can be made into family solidarity. 3 There are many people who would say that the State should not interfere with the family and that
the law ought to preserve the same against professional intrusion. However, the trend towards the professional takeover of the family continues, enhanced as it is by the indeterminacy of the best interests test.

The celebrated authors, Goldstein, Freud and Solnit are the chief proponents of the concept of psychological parenthood, and it is perhaps appropriate at this stage to consider their theories. Indeed no discussion of the concept of the best interests of the children would be complete without reference to their work.

The initial criticism made by the authors is that courts concentrate on the child's physical well-being as a guide to placement in preference to the child's psychological well-being. They charge that courts have been slow in recognising the necessity of safeguarding this aspect of a child's make-up, primarily through a lack of understanding of the same.

A child develops an emotional attachment to an adult through day to day interaction, companionship and shared experiences. This adult can be a biological parent or any other care-giver, but it must be remembered that a biological parent is not necessarily a psychological parent.

Children need a psychological parent for their emotional
development and they should have the opportunity of being placed with a person or persons likely to become such a parent. On this basis the authors propound three component guidelines for decision makers.

(i) Placement decisions should safeguard the child's need for continuity of relationships. This is now generally accepted by practitioners of the behavioural sciences and it is an important factor in custody disputes where an attempt is made to alter a long-standing custodial arrangement or where there has been a pre-existing de facto custodial situation.

Both continuity and stability are important for a child's normal development, and disruptions will have serious effects on the same. The authors consider that stability of environment is necessary to offset the internal instability experienced by a developing child. He or she may not be able to cope with both internal and external disruptions. Naturally though, disruptions of continuity evoke different reactions and consequences at different stages of development. The authors recognise this, but instead of looking at developmental levels they fall into the trap of using age groupings to illustrate these differences. The catch is that age is an extremely unreliable criterion from which to draw conclusions that will be relevant to children-at-large. In any event, the groupings identified are as follows: infancy - from birth to 18 months; young children under the age
of 5 years; school-age children; adolescence; and adults (who as children suffered from disruptions as to continuity). Now, although the effects differ, the common thread running through these groups is that all suffer adverse reactions from a disruption of continuity.

One conclusion which the authors come to is that multiple changes in the child's relationships, surroundings, and environmental influences must be avoided. From this it is argued that, unlike the present situation, child placement should be final and unconditional. However, this is an unacceptable proposition. Not only does it assume that the court will invariably make the right choice, but that that choice will remain valid throughout the child's minority. Admittedly, it may be possible for the first assumption to become a reality if courts were more receptive to the child's wishes and evidence from the behavioural sciences. However, even given the detrimental effects of altering a long standing custody arrangement, I doubt the feasibility of the second assumption. The authors are really suggesting that because life is so uncertain the law should opt out and simply allow the private ordering of interpersonal relationships. Yet, it seems to me that it is peculiarly within the province of a court as parens patriae to promote the welfare of a child by catering for changed circumstances.
Allied to this proposal of finality of placement is an aspect that I will touch on later, namely, that the question of access should be left entirely to the discretion of the custodial parent. In my experience access causes so many heartaches that I have some sympathy with this proposal. Yet, there are many inherent difficulties and disadvantages all the same. The proposal not only ignores the other parent, but also the weight of evidence concerning the effects of parental deprivation. There will also be a temptation towards blackmail, extortion and imposition if the non-custodial parent wants to maintain contact with the child. Accordingly, the disadvantages may outweigh the advantages.

(ii) The second guideline is that placement decisions should reflect the child's and not the adult's sense of time. It is argued that a child experiences a time period according to his or her purely subjective feelings and not according to its actual duration. Thus a child, depending on his or her age or maturity level, may be unable to anticipate the future and manage delay in the way that adults can. Accordingly, in a custody dispute it is necessary to reach a decision promptly in order to maximize the child's chances of restoring stability to an existing relationship, or of establishing a new psychological relationship. This is a laudable objective, but invariably court time is limited and delays occur. The answer here lies with the persons responsible for staffing the courts and administering the same.
(iii) The third guideline is that account must be taken of the law's incapacity to supervise interpersonal relationships, and the limits of knowledge to make long-range predictions. The authors consider that all the law can do is provide an environment for relationships to develop. Private ordering of the relationship then takes over and there is no place for State intervention. The vicissitudes of life are too great. However, I again stress that this is not a valid argument for preventing a court from arbitrating on changed circumstances. Such a jurisdiction is essential to preserve the best interests of the child.

Here though, the authors have hit upon the crux of the problem of child placement. In their own words, 

"no-one - and psychoanalysis creates no exception - can forecast just what experiences, what events, what changes a child, or for that matter his adult custodian will actually encounter." Nor can anyone predict in detail how the unfolding development of a child and his family will be reflected in the long run in the child's personality and character formation." 

If these things could be done then all custody disputes would be easily resolved. In the meantime, the most that can be achieved is to ensure that the decision-maker is placed in the best position possible for rendering judgement. In my opinion this entails the use of independent counsel, and, interestingly enough the authors too consider that such counsel is indispensible in determining child placement.
The overall guideline proposed by the authors is

"the least detrimental available alternative for safeguarding the child's growth and development."

This is to be used in lieu of the "best interests" principle and it has as its major components the three guidelines discussed above. It is

"that specific placement and procedure for placement which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent".73

The principal reason for the authors' rejection of the current prevailing criterion is their feeling that the same is too adult-centred. Often the child's interests are placed in direct competition with, and even subordinated to, the interests of the litigants. Although lip-service is paid to the principle, decisions are fashioned to suit the requirements of the parties. This, coupled with the delays inherent in the court process of trial and appeal,74 and the lack of adequate knowledge concerning a child's development, create a sorry picture indeed of child placement. Yet, although I agree that these defects exist, I wonder whether it is not better to remedy the same and allow "the best interests" principle to operate in a conducive environment rather than look to an entirely new principle which may in time be plagued with similar underlying problems. Frankly, if the concentration in using the existing principle is in fact on the best interests of the
child, then in many cases there will be no difference between the guidelines. The court must still make a decision well knowing that there are potential dangers and disadvantages to the child whether custody is given to the mother, the father or a third party.

The approach suggested by the authors appears to create the impression of defeatism from the outset. The court would be saying that the proper environment for the child's upbringing has been lost and the task at hand is to choose the lesser of two evils or, where applicable, the least of a number of evils. Although this may not be a substantive reason for rejecting the criteria, I feel it is a valid criticism given the need to look positively towards the child's future. Indeed, what is wrong with the aim of doing good? The authors suggest that courts lose their way attempting to ascertain where the best interests of a child lie, instead of setting their sights lower by looking at the available alternatives and choosing which will cause the least harm to the child. Yet, I fail to see how courts will find this latter exercise any easier; a choice still has to be made and the same factors need to be considered. There is no magic in framing the issue as prevention of harm instead of promotion of best interests. In the words of Mnookin:

"What is psychologically least detrimental will usually be no more determinate for expert and nonexpert alike
than what is in a child's best interests; and to reframe the question in a way that invites predictions based on the use of labels and terminology developed for treatment is both demeaning to the expert and corrupting for the judicial process."

In summary, although I consider the aims of the authors to be sound, namely to have child placement depend entirely on consideration for the child's own inner situation and developmental needs, I remain unconvinced of the need to introduce a new guideline. With a little effort the "best interests" principle can be ideally suited to the resolution of a custody dispute.

Not unnaturally the theories expressed by the authors have attracted other criticisms from commentators in various disciplines. One line of attack is that the authors have only made use of a limited range of social science material, and that what they have considered has been accepted too readily without appreciating opposing views. In particular, it has been pointed out that there is controversy amongst social scientists about whether it is separation per se or the relative deprivation that often follows separation which is harmful to children. The authors have accepted the former without mentioning this controversy. I suppose though, it again becomes a question of whether the law relating to child placement should be enveloped by psychiatric and psychological theory. The behavioural scientists will answer in the
affirmative, but Parliament, the courts and the legal profession will balk at this suggestion, and perhaps the authors appreciated this point only too well. It is a question of finding the happy medium between theory and the social sciences. In my view the closest to this ideal is for courts to say to the social scientists, you provide us with the evidence and we will evaluate and apply the same to the particular facts.

The distinguished jurist Henry H. Foster Jr. has also taken the authors to task for being too inflexible with their presumptions, and for not allowing any leeway for exceptional circumstances. He agrees with most of the content, but considers that there is "a case of oversell". He says:

"The authors ... in their promulgation of absolutes overlook humane considerations and ignore the weighing and balancing process which is the essence of the law."

Foster considers that courts will have difficulty both in accepting the absolutes advanced by the authors and in dealing with the psychological evidence presented. He questions whether the approach might not flounder, given that courts only have a limited capacity to adjudicate upon conflicting and controversial psychiatric opinion.

Yet another commentator has validly criticised the book for failing to consider the possibility that healthy
transitions can occur from one "psychological parent" to another, and indeed for failing to recognise the possibility that a child might maintain more than one psychological relationship.85

Nanette Dembitz, a judge of the Family Court of New York State perhaps foreshadowed the scepticism that the judiciary have for the authors' theories when she wrote86:

"the mission of (the) authors ... is to provide guidelines based on psychoanalytical theory to govern the judge's decision in all types of child placement cases. The promise is seductive but impossible; the authors fail to devise useable scales because the amalgams of factors to be apprised in custody contests are too complex."87

In company with most other critics she feels that concentration on the need for continuity is laudable but one should not ignore the necessity for weighing continuity against competing values.88

The most important indicator though, of the practical worth of a fresh approach is the attitude of the courts. Here, there have only been sporadic examples of courts utilizing the authors' approach, even in the United States.89 From my own experience in the Australian jurisdiction judges do not feel that there is much difference between the two principles,90 given that in the majority of cases there are dangers and disadvantages whoever is awarded custody. Accordingly, the concept of the least detrimental alternative is rarely, if ever, referred to. However, if the book does nothing else it should
awaken courts to the need to pay more attention to the psychological needs of children and less to some of the unrealistic assumptions that guide the resolution of custody disputes.

CONDUCT OF THE PARENTS

By looking at the conduct of the parties in particular, the courts find themselves dealing in revenge or retribution, neither of which should have any part in child placement, not even under the guise of administering justice to the litigants. The difficulty, though, is that legislation such as Section 11 (1) of the Divorce Act, 1968 specifically provides for the conduct of the parties to be taken into account. Yet, this mandate must be taken in context, and it is perfectly legitimate, and indeed desirable, for a court to consider conduct of the parties which has a direct bearing on the assessment of what is in the best interests of the children. This has been made quite clear in the Family Relations Act, 1978. As we have seen, Section 24 of that Act specifically states that conduct can only be considered by a court to the extent that it affects one or more of the factors which the court is directed to consider in assessing the best interests of the child. However, the conduct must "substantially" affect
a factor before it can be taken into account.

There is also clear authority in British Columbia supporting this need for a causal link between conduct and the best interests of the children. But the difficulty is that not all courts apply this link strictly. It seems that some courts commence from the premise that the welfare of the children is paramount, then say that every aspect of the conduct of the parties is relevant in determining that issue, and render their decision on the basis of such conduct as it effects the litigants. Alternatively, courts are a little more open about their priorities and stress that the welfare of the child is the paramount consideration but it is not the sole consideration. For example, courts have made a great deal of mileage out of the fact that one spouse may be said to have caused the breakdown of the marriage. The argument propounded is that a child has a natural right to be brought up in a two parent household and that a spouse who abuses this right cannot be considered capable of providing for the best interests of the child. The epitome of this approach is contained in the judgement of Lord Denning M.R. in the case of Re L. There he said this:

"... whilst the judge is right to give great weight to the welfare of children and indeed to make it the first and paramount consideration, it is not the sole consideration. In this case while no doubt the mother is a good mother in the sense of the word, in that she looks after the children well,"
giving them love and as far as she can, security, one must remember that to be a good mother involves not only looking after the children, but making and keeping a home for them with their father, bringing up the two children in the love and security of the home with both parents. In so far as she herself by her conduct broke up that home, she is not a good mother... it seems to me that a mother must realize that if she leaves and breaks up her home in this way, she cannot as of right demand to take the children from the father. If the mother in this case were to be entitled to the children, it would follow that every guilty mother (who was otherwise a good mother) would always be entitled to them, for no stronger case for the father could be found. He has a good home for the children. He is ready to forgive his wife and ready to have her back. All that he wishes is for her to return. It is a matter of simple justice between them that he should have the care and control. Whilst the welfare of the children is the first and paramount consideration the claims of justice cannot be overlooked.

With the greatest respect I suggest that "the claims of justice" simpliciter of the parties should not be the determining factor in a child custody dispute. The parent most capable of meeting the present and future needs of the child should be awarded custody, regardless of whether that parent has perpetrated an injustice against the other spouse. The court demeans itself in taking such a stance and, in effect, the child becomes the prize to be awarded to the unimpeachable parent.

Re L has been cited with approval in many Canadian decisions, but more importantly it appears to have been picked up by the Supreme Court of Canada in Talsky v Talsky and MacDonald v MacDonald. However, to what extent it is incorporated into the law of Canada, and the effect that it has, is not entirely clear. Neither case treats Re L as laying down
a principle that competes directly with the best interests of the child. Rather, the decision is treated as indicating that the conduct of a parent as it affects the welfare of the child should be taken into account. Admittedly, the majority in *Talsky v Talsky* distinguished *Re L* on the basis that the conduct of the wife was not of the same order as that of the wife in *Re L,* but their conception of where conduct fits in was made clear when they agreed with the trial judge that 

"a wife who is 'well-nigh impossible' as a wife may nevertheless be a wonderful mother."\(^{102}\)

The difficulty though, is that albeit this is a more acceptable interpretation of *Re L* from the point of view of the children, it is probably not the correct one. In fact, Lord Denning appears to suggest an additional test along the lines of ensuring justice between the partners. Thus, it is unfortunate that the Supreme Court chose to refer to this decision at all, because it means that subsequent courts will have to be careful to treat *Talsky v Talsky* and *MacDonald v MacDonald* as reading down *Re L* to a more conservative principle; namely, that the conduct of a parent is relevant to determining the welfare of the child in the sense that it can provide an insight into how that parent will respond to the exigencies of being the sole custodian. Fortunately, there has already been a subsequent Manitoba case in which this approach was taken,\(^{103}\) and British Columbian Courts in particular will need to do the same in view of the line of authority referred to above.\(^{104}\)
The decision by the Supreme Court to refer to Re L is even more unfortunate when it is realised that not long afterwards that same case was rejected by the Courts in England. It was felt that Lord Denning's approach could no longer stand in light of the subsequent House of Lords decision in J v C. For example, in Re K, after referring to that portion of the judgement of Lord MacDermott in J v C reproduced above, Stamp L.J. said this:

"Applying the law so stated the Court of Appeal in S v S, October 21, 1975, held that (Re L), where this court appears to have balanced the welfare of the child against the wishes of an unimpeachable parent or the justice of the case between the parties was no longer to be regarded as good law."

The conduct of the parties can affect the welfare of the child in many ways. Indeed, it may provide the court with an insight into the character, personality, and temperament of the particular parent. For example, a child needs the love and affection that can only be provided in an environment where there is as much contact between the parent and child as possible. Thus, if there was evidence that the parent was rarely at home this might validly affect the court's decision. Again, evidence that one spouse deliberately broke up the matrimonial home may well indicate that he or she is ambivalent towards the children of the marriage and places his or her own wishes at the forefront. It is really a matter for the court, looking at the past and present conduct of the spouse, and making a judgement as to whether there are any implications
for the future if that spouse was awarded custody. If there are such implications, then the court can legitimately have regard to that conduct in assessing where the best interests of the children will lie.

This approach applies regardless of the type of conduct involved. For example, a circumstance commonly presented to the courts is the sexual conduct of one spouse. This can range from a single act of adultery to living in a common law relationship. Yet, no matter what the degree of such conduct, if the same adversely affects the moral welfare of the child this will weigh heavily against the spouse engaging in such conduct. Conversely, if the court considers that the child's welfare and happiness would best be served if custody was awarded to the "offending" spouse, then the court should not hesitate.

Inroads are even being made into the previously taboo area of homosexuals, and it is illustrative to consider the various approaches to this question. In England the House of Lords has recently stated that homosexualism is not "in itself a reason for depriving the parent of access to his or her child or for holding that such a parent is unreasonably withholding consent to adoption." However, this did not prevent the court from deciding in the particular case before it that the homosexual father was
unreasonably withholding his consent to the proposed adoption. The court was careful to say that the matter had to be decided for reasons which were individual to it and to the parents themselves, but the unwillingness of the court to entirely let go of the traditional prejudice against homosexuality is illustrated by the following extract from the judgement of Lord Wilberforce:

"Whatever new attitudes Parliament, or public tolerance, may have chosen to take as regards the behaviour of consenting adults over 21 inter se, these should not entitle the courts to relax, in any degree, the vigilance and severity with which they should regard the risk of the children, at critical ages, being exposed or introduced to ways of life which, as this case illustrates, may lead to severance from normal society, to psychological stresses and unhappiness and possibly even to physical experiences which may scar them for life."

As regards the situation in Canada the first decision to refer to is Case v Case. There the court considered that homosexuality *per se* was not a bar to obtaining custody, it was just one more factor to be taken into account. However, in the end result the court found against the homosexual parent, one reason being the failure of the mother's partner to give evidence. Then there is the case of K v K where custody of a 6 year old girl was awarded to the homosexual mother who was living with her partner. Rowe Prov. J. said this:

"One must guard against magnifying the issue of homosexuality as it applies to the capacity for performing the duties of a parent. Heterosexuals produce children who become homosexual and the evidence of the psychiatrist and psychologist in
this case did not indicate the odds of becoming or being a homosexual would increase solely by reason of being reared by a homosexual parent."

The court distinguished Case v Case\textsuperscript{121} on several grounds:

(a) Mrs. K's partner gave evidence and reassured the judge.

(b) Unlike Mrs. Case, Mrs. K. had clear-cut plans for the future care of the child.

(c) Mrs. Case had left the child with the father for a lengthy period of 15 months to pursue an affair.

(d) There was evidence that Mrs. K. was a better mother than Mrs. Case.

(e) Mr. K. used drugs whereas Mr. Case's character and conduct were exemplary.

(f) Mrs. K. was not as active and public a homosexual as Mrs. Case.

However, one factor which had a vital effect on the court in K v K, and which is borne out in the above extract from the judgement, was the circumstance that counsel for the mother presented substantial medical evidence which was favourable to his client and downplayed the relevance of homosexuality. Accordingly, this can be an important strategy on the part of counsel acting for a homosexual parent.

Although no authorities were cited, the approach of the court in K v K was adopted in the recent case of D v D.\textsuperscript{122} There, custody was awarded to the homosexual father and one of the principal grounds for so deciding was that he was not a
public homosexual.

From this review of the cases it would seem that although homosexuality is not a bar *per se* to an award of custody, the court will still examine the circumstances surrounding the practices of the homosexual parent very carefully. Yet, this may not be a bad thing because there will always be a danger of courts overlooking the capacity of the child to cope with the fact of having a homosexual custodian as he or she grows up. In other words too much emphasis can be given to the psychological ties between the child and the parent and not enough to the social interests of the child. 123

Just pausing at this stage, it can be seen already from the two factors of sexual conduct and causing the breakdown of the marriage how changing social mores can have a vital effect on the future of a child. The approach of the judges obviously reflects these changes in the attitudes of society.

Courts also face a dilemma where one spouse has kidnapped the child. The temptation is to punish the "offender" by awarding custody to the other spouse, but the court must look beyond this. One of two situations will be present. Either the abductor is merely attempting to gain revenge against the other spouse, or the child is not being adequately looked after and abduction is seen as the only alternative, albeit the
child might be affected by such a traumatic experience. I suggest that in the former case the kidnapper should experience the full wrath of the law, but otherwise in the latter instance.

It is clearly difficult for courts to turn a blind eye to the actions of a litigant, which in a normal situation would call for some form of retribution, particularly where the other party is beyond reproach. Yet, this is required in some disputes concerning custody and it emphasises the special nature of such disputes and the corresponding need for a change of attitude from that prevailing in the traditional court room drama.

Of course, the presence of questionable conduct on the part of one spouse is not the only source of difficulty for a court. Headaches also abound where the conduct of both parties has relevance to the happiness and welfare of the child. Here, the court is faced with a real dilemma and, in effect, must attempt to place the child where the least harm will occur. For example, in the case of Re Milsom, the father presented as being overly permissive to a ridiculous degree, while the mother lacked the ability to project warmth and love, and had difficulty in suppressing hostile expression. Robertson J.A. highlighted the difficulties confronting the court on these facts when he pronounced the result of the case in these words:
"The better gamble - and that is really all that it is - seems to be to let the father have the custody."

However, it is also important to note that one circumstance which swayed the court to this conclusion was the wishes of the children; each child gave evidence that favoured the father. Otherwise, the decision may have been different.

Thus, conduct and parental rights both have their place in determining the best interests of a child. Where relevant, they provide content to the assessment of where the best interests lie, and in order to further illustrate how courts determine child placement today I will now look at some of the other circumstances which also provide content to the decision-making process.

FACTORS RELATING TO THE PARENTS

(1) THE CONDITION AND CAPACITY OF THE PARENTS

Although it is clear that the prime concentration should be on the children and their needs, they cannot be considered in vacuo. Accordingly, Section 11 of the Divorce Act, 1968 also requires consideration of the "condition" of
the parties, and Section 24 (1) of the Family Relations Act, 1978\textsuperscript{130} specifies that the capacity of the spouses must be taken into account. As with conduct though, the factors to be considered have to be aligned with the welfare and happiness of the children. This requires regard to be had to such aspects as the age\textsuperscript{131} and health of the parties,\textsuperscript{132} their character and temperament,\textsuperscript{133} their religious beliefs, and generally their position and status in life and society.\textsuperscript{134}

The rubric can also encompass such important considerations as the ability of the parents to discipline the children,\textsuperscript{135} and provide them with the necessary love and affection.\textsuperscript{136}

The parents are placed under a microscope by the courts and their entire life-style is examined.\textsuperscript{137} Indeed, with the stakes so high, a court would be failing in its duty if it omitted to do this. It is also important to stress that the enquiry is not confined to the parent in isolation but, of necessity, includes third parties with whom the child would be associating. This would involve a future surrogate parent, a common law spouse, any children of such a spouse, a housekeeper, a babysitter, and any relatives who may care for the child. As we have seen, if the parent is in fact living in a common law relationship the court should not enter into the morality of of such an arrangement except to the extent that the welfare
of the children is directly affected thereby. The court is here concerned with whether it is in the best interests of the children to be exposed to the presence of such third parties. Accordingly, it is essential that the court have the opportunity to assess these persons at first hand and they should all be called as witnesses at the hearing.\textsuperscript{139}

However, as crucial as it is to examine the life-styles of all concerned, it is another matter to determine which life-style will afford the child the best opportunity to succeed in the future. This is the real dilemma for a judge, and it is illustrated very well by the much publicised case of Painter \textit{v} Bannister.\textsuperscript{140} There, the competing parties were the natural father and the maternal grandparents. The former presented a life-style described by the Supreme Court of Iowa as "unstable, unconventional,arty, bohemian, and probably intellectually stimulating",\textsuperscript{141} while the latter provided a "stable, dependable, conventional, middle-class, middle-west background."\textsuperscript{142} In the end result, the court decided that the grandparents should be awarded custody because of the likelihood of seriously disrupting the child's development if he was returned to the father's "unusual" household.\textsuperscript{143} Of course, factors other than the life-styles of the litigants were important here, but the court was essentially left to make a choice between two entirely different philosophies of life.
A perusal of the judgement indicates that in making this choice the court allowed its own prejudices to influence its decision, but it attempted to justify the same by affording great weight to the evidence given by the only behavioural scientist called in the case. However, there were obvious flaws in his assessment. He was a child psychologist presented on behalf of the grandparents. He based his opinions on only a minimal number of interviews with the child and on what he was told by the grandparents. He did not see the father at all, and there was little meaningful cross-examination. Obviously, this was not the way to achieve a satisfactory resolution of the problem confronting the court. Ideally the judge should have an open mind about what is best for the child and reach a decision on an adequate information base. However, the case still brings into sharp relief the dilemma in which a court can find itself when confronted with diverse life-styles.

(2) THE MEANS OF THE PARTIES

The means of the parties could rightly be considered as just one aspect of the capacity of the parties and, indeed, this is how it seems to be dealt with in Section 24 (1) (e) of the Family Relations Act, 1978. However, Section 11 of the Divorce Act, 1968 specifically directs the court to have regard to this factor in determining what is fit and just, and accordingly I have chosen to discuss it as a separate topic.
Courts have taken a very low-key attitude to this aspect. For some reason judges are not taken with the thought of weighing comparative material advantages, yet it seems to me that the economic interests of children are as important as their emotional well-being. Indeed, the latter can follow directly from the former.

Of course, where both spouses are able to provide an adequate environment for the children, their placement should not necessarily be determined by asking which parent has the greater wealth. Yet, rarely are both parents able to provide adequate environments, and accordingly the financially superior spouse would appear to have an advantage regarding custody. However, most courts are quick to say that the spouse who has a considerable fortune is better able to make proper and adequate provision for child maintenance, and thus, there is no advantage. On the other hand though, some courts have not been dogmatic about this issue and have treated the circumstance that one spouse can make better financial provision for the children as relevant when considering the totality of that spouse's situation and the ability to meet the best interests of the child. Certainly, at the other end of the financial scale, courts have not hesitated to have regard to the fact that a parent is in a poor economic position and is therefore unable to provide adequate accommodation.
Parents frequently enter into a separation agreement when a family unit dissolves, and generally the question of custody is dealt with in such an agreement. Unfortunately though, parents cannot always be relied upon to give precedence to the best interests of the child, and the question is whether in such circumstances courts are bound by the terms of the agreement. The answer can only be in the negative. Although the fact that one parent has agreed that the other should have custody is a relevant factor in itself, courts should not hesitate to investigate the circumstances surrounding the agreement in determining what weight should be attached to it. This should be the case whether the agreement is contained in a written document entered into prior to the court proceedings, or whether it takes the form of a consent order sought from the court. The latter situation is an important one because it is common for parties to settle their dispute immediately prior to the actual hearing of the matter. A court should not be hoodwinked into accepting the proposal presented to it without reaching an independent conclusion that the best interests of the child will be served by making the order sought. To neglect to do this is to lapse into the false sense of security created by the notion that parents know best. Invariably the child would have had no say in the settlement reached by the parents, and it may have been a situation where
custody was simply forfeited to gain some form of property right; i.e., the children merely became part of the bargaining process.

However, all too frequently courts are prepared to make consent orders without any inquiry whatsoever. Whether this is complacency, an unwillingness to interfere with the relationship of parent and child, or purely a matter of pressure of court business, it is certainly lamentable that it can occur. Indeed, courts go even further and regularly make statements to the effect that it would be much preferable if the parents were able to resolve the dispute amongst themselves.¹⁵⁸ No criticism can be made of this approach if it can be assumed that the parents will reach an agreement that is in the best interests of the children, and not simply one that suits their own conveniences, but, as I have suggested, it is rare that this assumption can be made. For a child who is placed in a situation which is detrimental to his or her welfare, there can be no comfort in the fact that the same was brought about by a negotiated resolution between the parents, or that he or she is able to continue a relationship with both of them.¹⁵⁹

A court should take one of two courses; it should either fully investigate for itself whether the proposed order will best serve the interests of the children, or have the children
separately represented and receive submissions on their behalf as to the propriety of the order. The British Columbia Royal Commission on Family and Children's Law appreciated this problem of consent orders. Under Section 10 of Part iv of its Draft Model Children's Act, 1976 a court can only make a consent order for guardianship, custody and access without taking evidence if a family advocate and a family court counsellor each certify that the child's circumstances have been investigated and that each is satisfied that the terms and conditions are in the best interests of the child. Unfortunately though, Parliament has not taken this up in the Family Relations Act, 1978. Section 10 of that Act provides that an order can be made without evidence being taken, the only condition being that the written consent of the party against whom the order is made must be obtained.

Professors Gosse and Payne, in their research paper prepared for the Law Reform Commission of Canada, bring to light a proposal in this area by an unnamed Alberta lawyer who has acted frequently as amicus curiae in divorce cases. The proposal is that an administrative tribunal be established to review custody agreements in divorce cases. The tribunal would be an independent board appointed by the Lieutenant-Governor-in-Council, and consist of a lawyer, a social worker and two lay persons appointed from the public at large. Its function would be to conduct an investigation and advise the
court whether the child should or should not have counsel. Frankly, though, I consider such a tribunal unnecessary when the court itself can conduct the investigation or, preferably, appoint counsel on the assumption that children require a voice in any decision that vitally affects their future.

FACTORS RELATING TO THE CHILD

Now we come to where the principal emphasis in determining child placement should always be. However, it has only been in recent times that the need to consider the circumstances of the child has gained a prominent place in custody legislation. For example, nowhere in Section 11 (1) of the Divorce Act, 1968, is there any reference to this need. Accordingly, courts have had to shift the concentration away from the parents and place the same on the children by utilizing the catch-all provision in that Section which permits regard to be had to "other circumstances" apart from conduct, condition and means. The age, health and special requirements of the children have all been considered under this rubric. However, prima facie, this may be an unjustified use of this catch-all provision because on its own wording the "other circumstances" to be considered are those relating to each of the parties. Thankfully though, courts continue to ignore this restriction.
(1) **AGE**

The question of the age of the child has an interesting history and it continues to provide controversy. It was once considered a principle of law, or at least a presumption of law,\(^1\) that during the years of nurture\(^2\) a child should be in the care of the mother.\(^3\) This is commonly known as the "tender years" doctrine. Corollaries of the doctrine are that girls of any age should be with their mothers,\(^4\) and boys over the age of seven years should be in the custody of their fathers.\(^5\)

Unfortunately, some courts tended to treat this doctrine as indicating *per se* what was in the best interests of the child,\(^6\) rather than accepting it for what it was; one of the many factors to be taken into account in assessing the welfare of the child. That this was so was recognised even in the classic case of *Austin v Austin*.\(^7\) There, Lord Romilly M.R., in expressing the doctrine, stated that a child would be taken away from the mother if it was

"essential to the welfare of the child".\(^8\)

Yet, as I say, courts paid undue homage to the principle; at the very least, to the extent of utilizing the same where all things were equal.\(^9\) Fortunately though, there have been recent pronouncements berating such an approach. It has been said that the doctrine is not a rule of law but simply a rule
of common sense, and more emphasis has been given to legislative directions such as was contained in Section 5 of the former Equal Guardianship of Infants Act. That Section provided that neither a husband nor a wife had a paramount right to their infant children. Unfortunately, the Family Relations Act, 1978, which repealed this Act, does not contain as graphic a statement, but the same can be implied from Sections 27 and 34 thereof.

In any event, some commentators feel that the principle is losing much of its force as a result of the gradual assimilation of the roles of mother and father in today's society. It is no longer the case that in all families the father goes out to work while the mother stays home and minds the children. With mothers becoming more and more a part of the workforce, they have no more time to devote to the child than the father.

On the other hand, this lessening of the impact of the doctrine does not appear to accord with the preponderance of the available psychological evidence relating to both maternal and paternal deprivation of children. The question though, is whether the courts will have regard to such evidence. Admittedly, courts are becoming more attuned to receiving evidence from the behavioural sciences but the time has not yet come when they will rely on such evidence without question,
and, as we shall see, this appears to be a justifiable position.\textsuperscript{182}

There is voluminous material indicating the importance of the role of the mother in the development of her children.\textsuperscript{183} Indeed, some commentators believe that a child's physical and psychological development will cease entirely if there is deprivation of emotional contact with the mother.\textsuperscript{184} Both mental and physical deficiencies in children separated from their mothers seem to have been proved beyond reasonable doubt, and the indicators are there that the bond between mother and child is crucial for the development of relationships in later life.\textsuperscript{185}

Maternal deprivation obviously has different effects according to the child's stage of development at the time. However, commentators have talked in terms of the effect on age groups rather than the effect on children with a particular maturity level. This is because of limitations on the experimental design utilized by researchers.\textsuperscript{186} As I have stressed before, the difficulty in referring to age groups is that age is an unreliable guide to a child's capacity,\textsuperscript{187} and this throws doubt on the validity of the conclusions so far as they relate to either an individual child, or children in general. Nevertheless, these studies are all there are to work with at the moment.
Skard believes\textsuperscript{188} that the age-group between 6 months and 3½ years suffer the most, and that the critical age is 7 months. On the other hand Bowlby in his seminal work on maternal deprivation\textsuperscript{189} believed that the critical age concluded at approximately 18 months. Taking a broad approach to accommodate as many opinions as possible, it would appear that a child will suffer adversely from maternal deprivation until the age of 3½ years. Between the age of 3½ years and 7 years the evidence appears to be that not every child is affected by such deprivation, and herein lies the difficulty. It is not yet possible to ascertain either the type of child who is unaffected, or the set of circumstances that will cause a child not to be affected. If it was, and courts were prepared to accept such evidence, then their task would be much simplified. On the other hand, in a state of uncertainty the court theoretically has no option but to award custody to the mother. The risk that the particular child was one of those unaffected by maternal deprivation would be too great.

The evidence regarding paternal deprivation has been significantly less in magnitude than the evidence regarding maternal deprivation, yet some assumptions have still been made.\textsuperscript{190} In particular, it appears that after the period of nurture the father assumes a more prominent role.\textsuperscript{191} Studies involving delinquent children indicated that delinquency was more apparent amongst boys where the father was absent, and
delinquency was more apparent amongst girls where they were living with their fathers only or living with neither parent.\textsuperscript{192} There was also evidence of immaturity, difficulty in socializing, and deficiencies in mental aptitude amongst boys as a result of paternal deprivation.\textsuperscript{193} Unfortunately though, there was very little evidence of the effect of paternal deprivation on girls.\textsuperscript{194}

What conclusions then, can be drawn from this evidence? One commentator\textsuperscript{195} has said that,

\textit{"(i)n view of the many areas of research into 'deprivation' which lack sound data, it would be quite unappropriate to draw any firm conclusions at this stage."}

Yet, Bradbrook suggests\textsuperscript{196} that,

\textit{"(t)he boldest justifiable conclusion that can be made on the strength of the prevailing evidence is that, under normal circumstances, a child under the age of seven is better off with its mother, as is a girl of any age. Persuasive, though not quite as significant, evidence further suggests that a boy over the age of seven is better off with his father."}

However, as Bradbrook also points out,\textsuperscript{197} if this was taken to its logical conclusion a boy would be placed in the mother's care until he reached the age of 7 years and then custody would be transferred to the father. The difficulty is that from the viewpoint of stability of environment it may not be in the best interests of the child for custody to be altered at that time.\textsuperscript{198} An entirely different set of pressures and adverse reactions may become apparent. The alternative would seem to
be to place the child with the mother throughout childhood. However, it must be remembered that this is the alternative presented on the assumption that the child should not be deprived of the mother during the period of nurture. I suggest that there may be certain doubts concerning this assumption, firstly, because of the assimilation of the role of mother and father in today's society, and secondly, because of recent studies concerning parental deprivation. As to the first aspect, it seems to me that the empirical data available in the area of maternal deprivation was obtained on the basis of the traditional roles of the parents, namely with the father working and the mother remaining home caring for the young child. It is not unreasonable to assume that if those traditional roles were reversed the child would still suffer the same adverse effects, but via paternal and not maternal deprivation. Thus, the conclusions drawn from the evidence do not necessarily take account of the context in which the studies were made. As regards the second aspect, it is now felt by some scientists that the consequences for so long attributed solely to maternal deprivation, can be equally attributed to paternal loss, and that it is more accurate to use a total concept such as "parental deprivation". It is said that for too long now the quality of father/child interactions have been ignored, especially since studies have indicated quite clearly that fathers have a marked impact on their child's personality development. Far too much emphasis has been placed on the
mother when it is clear that it is not necessarily to her that a child becomes most attached. Many children develop bonds with several people and it appears likely that these bonds are basically similar. However, the principal bond need not be with the biological parent, it need not be with the chief caretaker, and it need not be with a female. The important thing is that a bond be formed and it is of less consequence to whom the attachment is made. However, that is not to say that it makes no difference in terms of individual psychological development with whom the young child forms bonds. It is probable that for optimal development bonds need to be formed with people of both sexes.

It is illustrative, I suggest, that the more recent studies do not concern themselves with paternal or maternal deprivation as such, but rather with the effect on the child of say separation or divorce, without reference to the sex of the departing parent. However, whether this is because of a recognition of role assimilation is unclear. In fact, the only thing that is clear concerning the evidence in this area is that very little is certain, and a great deal more study is called for.
Another area where courts must look to the psychological influences at play is where an application is made for custody of a child who has been in the de facto care and control of the other parent for some time. The courts frequently find themselves in a cleft-stick here, and the question of justice between the litigants may raise its head once again. De facto custody is generally determined without any specific reference to the best interests of the child. It usually occurs by force of circumstances. For example, one party may have had no alternative except to leave the matrimonial home, but having no suitable accommodation immediately available, could not take the child with him or her. Again, one parent may simply disappear without warning, taking the child as well. Alternatively, there may be an abduction of the child by one parent. Even the court itself may have created the situation, either by an interim order for custody or by a delay in hearing the application. The problem confronting the courts here is that the de facto situation may have continued for such time as to create a strong bond between the child and the parent. The court must then look very closely at the effect that a change in custody will have on the child and his or her future development. This must be the dominant factor in assessing the best interests of the child, and the court cannot take into account that leaving custody with the de facto care-giver
may not be doing justice to the other spouse. There will obviously be hard cases, but hard cases do not make good law. The pressure on the court is immense, particularly in an abduction situation. The court does not want to be seen as condoning this type of action because an abduction itself can be a traumatic experience for the child and may have long-lasting effects. The tug-of-war is between promoting the interests of the particular child before the court, and sacrificing that child in the hope that would-be abductors can be dissuaded by an adverse court decision.

One escape for the court is to find that there is no psychological damage to a child when the status quo is altered. Thus, in the case of In Re Thain (an infant) Eve J. remarked:

"It is said that the little girl will be greatly distressed and upset at parting from Mr. and Mrs. Jones. I can quite understand it may be so, but, at her tender age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case."

However, courts have not been consistent in their approach to this issue, and, in a sense, it depends on what evidence is presented to the court. If the court receives substantial evidence from the behavioural sciences, and accepts such evidence, then the chances of the status quo being disturbed where a bond has been formed, are minimal. As we have seen,
there is a growing medical concern about the risks entailed in moving a child from one environment and custodian to another, and the concern increases in direct proportion to the number of changes imposed. There tends to be a shallowness of affection with a decrease in reaction at each change; an index of severe emotional disturbance. Strong bonds of affection are forged over a period of time as a natural consequence of the parent-child relationship, involving as it does close proximity and attention to the physical and emotional needs of the child. Of course though, blood ties alone do not create this type of bond, and as we have seen the important thing is the nature and quality of the bond rather than with whom it is forged.

An appreciation of the need to consider the presence of such a relationship, and the consequences of its breach appears in the following extract from the judgement of Lord MacDermott in the case of J v C:

"Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing dicta to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young people may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case."
Of course, the problems here are similar to those which hound the concept of parental deprivation, namely, how conclusive is the evidence and will the courts be receptive to such evidence? As with studies concerning deprivation, it is apparent that not all children are affected by an alteration in de facto custody, and there is a need for data isolating the types of children so unaffected. Until such data is forthcoming the safest course for a judge is to assume that the best interests of the child will be served by maintaining the status quo unless evidence from the behavioural sciences indicates, otherwise in the particular circumstances of the case at bar.

However, even this may be too simplistic an approach. There are countless variables to consider, including the age of the child (or rather his phase of development), any already existing emotional and mental problems, and the familiarity of the surroundings. Again, the difficulty with the age factor is that there is no consensus amongst practitioners of the behavioural sciences as to when the risk of emotional disturbance is greatest. Of course, a page may be taken out of the parental deprivation book, and the conclusion reached that the most that can be said is that encompassing the differing views the effect will be greatest between certain ages. Yet, this will not assist the judge confronted with the situation where a child is over the maximum age, and
psychiatric evidence is presented to the effect that this particular child will be severely affected by a disturbance of the de facto situation. Inevitably, the court is left to make its own judgement in these circumstances. 221

Naturally, where the child has a pre-existing emotional disorder the court will need to be even more reliant on the medical evidence and the treatment requirements. For example, in *Davis v Davis* 222 the child was suffering from juvenile schizophrenia and the recommended environment was one where emotional disturbance was limited. The father had been providing such an environment for the preceding 15 months, and, accordingly, the court had no hesitation in leaving the custody of the child with him.

The familiarity of the surroundings is a self-evident factor. If a child has been residing in one place for a lengthy period of time he will have a close affinity with the people around him and with the neighbourhood as a whole. To uproot him and place him in a strange environment will obviously have an effect on him, and the general opinion is that such effect will be an adverse one for his emotional equilibrium. 223 It is perhaps a question of degree though. The effect of the change might be most traumatic where the child has never had any contact with the proposed environment, and where the same is so far away from his present environment as to effectively
prevent the retention of any links with the latter.

However, although in theory there may be a number of factors bearing on whether a court will defer to the fait accompli presented by a settled de facto situation, in practice it is rare indeed for a court to disturb a settled environment.224 This is certainly my experience in the Family Court of Australia and it would seem to be the case in the Supreme Court of Ontario. Bradbrook has conducted an empirical study of the attitudes of the judges in the latter court and the results are quite revealing. His findings in this particular area are as follows225:

"All but one of the judges admitted that they seldom upset the status quo before the trial, although the majority emphasised that everything depends on the length of time that the pre-trial arrangement has been in operation. The majority opinion is that once one party has had possession of the child for six months or longer a presumption of continuance arises, but that possession for a shorter time carries little weight. However, three judges remarked that they would be reluctant to change possession even where the parent with the child had only had possession for two months before the trial. In sharp contrast to his brothers, one judge has no qualms at all about changing possession of the child, since the trial is intended to be a determination of the issue, not necessarily the maintenance of the status quo: his only proviso is that the parent without possession before the trial must have kept in regular contact with the child at all stages or else he or she will become a stranger and be unlikely to win custody. The only other observation worthy of note in this context is that two judges are of opinion that the time of the year of the trial rather than the length of the pre-trial arrangement is of importance: if the child is in the middle of the school year and would have to be uprooted if the party without possession were to
gain custody then this would be a very weighty factor in favour of the status quo. The same judges commented that if the same case were to be heard during the summer vacation they would be far more likely to reverse the status quo."

The question of interim custody in this context of maintaining the status quo is also an important one. On an application for interim custody the court has generally little else to rely on other than the de facto situation. It is not possible for the issues to be canvassed extensively at that stage and both parents may not even be present at the hearing. Accordingly, although the welfare of the child is still the paramount consideration, it is common practice for courts to require more cogent evidence to disturb the de facto custody situation here, than on a final application.

The courts naturally take comfort in the circumstance that any order made is an interim one only, and that it would be harmful to the child for the existing custody arrangement to be altered when the trial court might return the child to the original custodian. However, this reasoning is only acceptable if there is little or no delay between the making of the interim order and the actual trial. Otherwise, the child will become even more ensconced with the de facto custodian, and the more reluctant the trial court will be to disturb the status quo. Unfortunately though, in most jurisdictions there are delays in bringing a matter to trial simply because of the
pressure of court business. Thus, tactically the interim hearing can become quite important and the temptation is there for parties to gain possession of the child prior to the hearing by whatever means may be available. Of course, as we have already seen, the fact of abduction simpliciter should not necessarily lead to a return of the child to the original custodian, but the actions of the abductor may still have a bearing on his or her fitness as a parent. Thus, in Johnson v Johnson et al. the methods utilized by the father in removing the child from the de facto custody of the mother, and the inference that he did so to gain a tactical advantage at the hearing, weighed heavily against him on his application for interim custody. Courts must be careful here though, because there is a very thin line indeed between looking at the justice of the case vis à vis the parents, and taking the parties conduct into account in assessing the best interests of the child. The former should play no part whatsoever in determining the issue at hand.

Courts sometimes go too far in deferring to the de facto situation on an application for interim custody, and statements can be found to the effect that exceptional evidence suggesting possible harm to the child is needed to disturb the status quo. Although it is reasonable for more weight to be attached to this circumstance than normal, it must still be remembered that it is only a factor to be taken into account
in determining the welfare of the children, and it does not override the paramountcy of the latter.

(3) **SEPARATION OF SIBLINGS**

Where a family unit is comprised of more than one child, relationships of varying kinds and degrees will exist between the children themselves. Accordingly, it is essential to consider the interaction of the children when assessing their best interests. In particular, the question is whether the children should be kept together or separated.

Courts almost invariably attempt to keep the children together in order to retain some vestiges of the previous family unit.\(^2\) It is considered that each child can only benefit from the presence and companionship of his or her siblings.

However, as always, the welfare of the child is paramount, and there may be instances where this consideration requires the children to be separated.\(^3\) The obvious example is where the intended custodial parent is unable to cope with all the children, either because the family is too large,\(^4\) or the financial resources are insufficient. Similarly there would be little advantage in keeping children together where there was bitterness within the family, either between the
children themselves or between the parents. 237

(4) THE WISHES OF THE CHILD

Now, from the point of view of the theme of this paper we come to the most important factor of all; the wishes of the subject child.

The child’s wishes have long been considered relevant in the determination of a custody dispute, 238 but until relatively recently this consideration has been of a haphazard nature. Today it is rare to find a statement of the factors to be taken into account in assessing where the best interests of the child lie, which does not include the wishes of the child. 239 It is also apparent that commentators and courts alike have become increasingly aware of the need to ascertain the views of the child. 240 However, to say that the child is to be consulted and his or her wishes are to be taken into account is only the first step, and one which will be discussed extensively later in this paper. For the present, the vital question is what effect will those wishes have on the court’s decision? It is in this area that courts have been inconsistent in their approach.

A judge can utilize the expressed wishes of the child in several ways. He can simply give them full effect; he can treat them as one factor to be considered along with all the
other factors in assessing the best interests of the child; he can disregard them entirely; or he can use them to determine border-line cases. Now, in accordance with the interpretation of the best interests test expounded in J v C, the wishes of the child should be no more than one factor to be considered by the judge. However, it would not seem unreasonable to suggest that those wishes should be a controlling influence in the child's placement. After all, it is the child who has to reside where the court determines, and it stands to reason that the child will be happier in an environment where he or she wants to be. However, the judiciary has not bought this argument, preferring to say that

"the welfare of the infants when in issue is not to be confused with the wishes or will of the infants."  

Most commonly a judge will treat the wishes of a child as merely one of the factors to be considered.

There are at least two reasons for this unenthusiastic approach by the courts. The first is related to the paternalistic notions of the past, namely, that a child is not a separate person entitled to his or her own viewpoint, and parents invariably know what is best for their child. However, this thinking is gradually being eroded with the strong push for legislative recognition of children's rights in the last decade, and courts are becoming more sensitive to the individual needs of each child. The second reason though,
is not as easily overcome. Judges, conservative creatures as they are, have a natural reticence to allowing a child to determine the result of a custody dispute.\footnote{246} The prime factor here is that the weight assigned to the child's wishes is related to the capacity of the child to make a reasoned choice. Yet, doubts invariably exist as to this capacity, there being no infallible standard by which to determine whether the particular child possesses the necessary decision-making ability.\footnote{247} Indeed, this conundrum exists as well during the prior stage of determining whether the child should be consulted at all.\footnote{248}

The most commonly used touchstone has been the age of the child.\footnote{249} For instance, in his empirical studies of judges' attitudes in Ontario, Bradbrook found as follows:

"The majority took the line that the opinion of a child over the age of 10 years carried great weight in every case, but that under the age of 10 years the weight attached to the opinion depends on the circumstances; in the latter cases the child's opinion usually only settled the case in border-line situations, whilst in the former cases, the opinion overrides all but exceptional evidence suggesting a contrary judgement."

However, a general perusal of the case law indicates that no one particular age is determinative, and the most that can be said is that the older the child is, the more weight that is accorded to his or her wishes.\footnote{250} Historically though, the age of discretion (14 years of age for boys, and 16 years of age for girls) was all-important, and it was a rule of common law
that the child's will prevailed over the parent's right to custody once the child had reached that age. Indeed, a writ of *habeas corpus*, which was the remedy for regaining custody, could not be issued in respect of a child over the age of discretion. This common law rule was subsequently adopted by equity and became ensconced in the Divorce Court in England.\(^{251}\)

There has also been statutory intervention in this area rendering particular ages determinative. For instance, Section 64 (1) (b) of the Australian Family Law Act, 1975 as amended,\(^{252}\) provides that a court is not permitted to make an order with respect to the custody, or guardianship of, or access to, a child who has attained 14 years of age if such order would be contrary to the wishes of that child.\(^{253}\) This is not an absolute prohibition though, and the court has a discretion where it is satisfied that there are special circumstances rendering such an order necessary.\(^{254}\) Nevertheless, the fact remains that this is a significant reversal of the accepted method of assessing a child's best interests. By giving full effect to the child's wishes they become the paramount consideration rather than the court's conception of what the welfare of the child requires.\(^{255}\) There is no equivalent of this legislation in British Columbia except in the area of adoptions. Section 8 (1) (a) of the Adoption Act\(^{256}\) provides that no adoption order is to be made without the written consent of the child, if over the age of 12 years. However,
pursuant to sub-section (6), the consent may be dispensed with if the same ought, in the opinion of the court, and in all the circumstances of the case, to be dispensed with.

Now, although age is an oft-used criterion, it seems to me that too much emphasis has been placed on this factor. I suggest that by itself it is an unreliable gauge, and it does not necessarily provide insight into the decision-making capacity of the child.\textsuperscript{257} As I have said, there is no one infallible standard, and the best a court can do is look to all the indicia it can find, including the age, the maturity and the intelligence of the child, as well as his or her environmental influences. It is significant, I suggest, that in almost all pronouncements dealing with taking the wishes of children into account, no one factor is held out as the controlling guideline \textit{per se}. They do no more than direct the court to look to the ability of the child to make a reasoned choice.\textsuperscript{258}

It seems to me that even to suggest making the age of the child presumptively controlling as to its capacity is too arbitrary. Yet this is Leon's proposal.\textsuperscript{259} Albeit conceding that there is no directly relevant empirical data from the social sciences, he utilized what evidence he could find to establish rebuttable presumptions. They are, that children under 5 or 6 years of age are incapable, that children between
7 and 13 years of age have "a sufficient degree of capacity to justify taking their preferences into consideration", and that children over 13 years of age have the necessary capacity to allow "effective participation in the decision-making process." Unfortunately, I suggest that this exercise is too speculative to have any practical worth.

Of course, the uncertainty surrounding the capacity of a child is not the only reason for the reluctance to allow a child to determine the result of a custody dispute. There is also the nagging doubt that the child has been influenced by one of the parents. This can take the form of direct influence, such as a bribe or coercion, or, more importantly, there may be subtle influences at play, such as the natural effect of the relationship between the child and the parent with whom he or she is living. This effect is one of strong bias towards that parent. It is a delicate exercise to distinguish between the expression of a positive choice rationally based, and a desire which is the result of an emotional attachment to a particular parent.

This concern at the presence of influence in one form or another is illustrated in Spence J.'s judgement in the case of McDonald v McDonald. There, the three infant children had expressed a preference to stay with their mother, but the trial judge had awarded custody to the father. Spence J.
commented on this as follows:

"The learned trial judge astutely observed that, in fact, the children had been with their mother for about a year previous to the trial. It would only be natural that a parent who had custody of his or her children for that period of time would see to it that those children expressed a preference to have such a situation continue."  

Unfortunately, this state of affairs occurs all too frequently, and it is a sad indication of how children can become the innocent victims of the conflict between the parents. The case of Kramer v Kramer and Merkelbaq is particularly illustrative of how far a parent is prepared to go. There, the father had custody of the son, and the mother custody of the daughter. The court refused access because

"the boy would act as his father's instrument to disturb and upset the girl."  

There was a

"strong indication that his father had infected him with his detestation of the co-defendant" and that the father was

"willing to destroy (the daughter's) happiness to revenge himself on the defendants."  

There can be no denying that the capacity of a child and the danger of undue influence are major impediments to giving full effect to the wishes of a child. Indeed, they are impediments to utilizing the wishes in anyway whatsoever. However, I suggest that they are not insurmountable, and that there are a number of devices open to a court to assist in quelling any doubts that may exist. They involve the use of
behavioural scientists and independent legal representation for the child. Quite clearly, the question of the capacity of a child is one that the judge cannot hope to resolve himself, and he should be provided with evidence from a social scientist who has evaluated the child and all interested parties. Independent legal counsel can also play a major role here. At the very least, he can prize the child from the clutches of both the parent having de facto custody and that parent's counsel, and with the assistance of behavioural scientists ascertain whether the wishes of the child are soundly based or not. If they are, then the same can be put to the court in their proper context. This approach was adopted by McDonald J. in Currie v Currie. There, an 11½ year old girl exhibited a desire to be with her mother. However, McDonald J. was not entirely convinced that this was the correct result in all the circumstances. Indeed, he felt that if it was not for the determination of the child, custody should be awarded to the father. Accordingly, he awarded the mother interim custody for a period of four months, after which time the matter was to come back before him. In the meantime, he directed the appointment of an amicus curiae to represent the child's interests.

Of course, where a court is satisfied that the child is capable of marking a conscious choice, full effect is generally given to that choice. Courts have even given
effect to the wishes of a child where the reasons for the same, although rational and, to the child, entirely cogent and compelling, are nonetheless "touched with the immaturity of judgement which one would ordinarily expect to find" in a young child.275 Similarly, in Shapiro v Shapiro276 the decisive factor was the honest wish of the child to be with her father, albeit the latter had influenced the child against her mother. Davey J.A. said this277:

"As in many cases, there is one decisive element which controls the disposition of this case ... That decisive element is the wish of the fifteen-year-old girl on the verge of womanhood, who seems ... to be a person of some maturity of judgement, to be placed in the custody of her father ... The girl has not only expressed the wish, but she has filed an affidavit, the contents of which would indicate that the chances of her establishing a satisfactory relationship with her mother are now very remote ... I assume for the moment that the learned trial judge is right in finding that the father, by his conduct and his relationship with the children, has turned them against the mother, that he has secured their confidence by manipulation and by manoeuvering ... But nevertheless, no matter how that feeling on the part of the daughter was induced, it is present and real, and the daughter now honestly wishes to be with her father."278

The practicalities of the situation must also be borne in mind. For instance, little advantage will accrue as a result of opposing the clearly expressed preference of an older child.279 He or she will make his or her own choice anyway, and the court will be relatively powerless to supervise the order.
This issue is particularly apparent in the context of access where the child refuses to see the non-custodial parent. The child's wishes in such instances will usually be acceded to by the court. Indeed, in the area of access there seems to be a willingness on the part of judges generally to give full effect to the child's preferences, more so than in the area of custody. Doubtless they feel more comfortable in taking this stance where a supposedly less momentous decision is required. However, I suggest that children can be affected in their future development just as much over access as they can over custody.

One illustration of the more liberal approach of the courts in access matters is the recent trend of allowing the child himself to determine whether access will take place, or at least, have a significant say in the terms and conditions thereof. For example, in Tassou v Tassou Bowen J. ordered

"that the father have access for a total of 4 days in each month; such days to be determined by the father, mother and children",

with the children's wishes to be paramount. Similarly, in the case of McCann v McCann the Nova Scotia Court of Appeal affirmed the award of the trial judge that access to the two youngest children (8 and 6 years of age respectively) should occur only when they wished, while access to the two oldest children (14 and 12 years of age respectively) be denied at their insistence.
There can be no denying that there is a definite part for the child's wishes to play in determining its future placement and relationships. As Leon says:

"In light of the inherently 'indeterminate and speculative' as well as value-laden nature of custody determinations (Mnookin, "Child-Custody Adjudication - Judicial Functions in the Face of Indeterminacy", (1975), 39 Law and Contemporary Problems 226, at P. 299) there is much to commend attaching significant weight to the preferences of the competent child, and at least considering those of the child with less than full capacity."

Their wishes must be accorded a much higher priority than being just one of the many factors to be taken into account. Judges should shrug off any reluctance to come to terms with the expressed wishes of a child and not attempt to hide the same amongst these other factors. Nor should the child's wishes simply be used to determine border-line cases. It seems incongruent to me that the wishes should be determinative in these circumstances and not where the scales are unevenly balanced. Moreover, a word of caution is necessary. It is all very well to adopt this approach where there is little to choose between the parents because the interest of the child will be served equally as well by both. Yet, I doubt its efficacy where the deadlock is because neither parent offers much of an alternative. This is not to say that the wishes of the child should not be considered at all in such circumstances, but I feel that this is one area where there is a need for the court to look to other alternatives.
amongst available third parties.

On the other hand it seems to me that it is not necessary to go overboard in giving effect to the wishes of children. One proposal which I consider that does go too far in this respect is that espoused by Bersoff.\textsuperscript{289} He has suggested that the child's preference by presumptively controlling, but not conclusive, of the outcome.\textsuperscript{290} For a child over 12 years of age, his preference would only be disregarded if he was made a victim of criminal behaviour by the preferred parent. For a child under 12 years of age there would need to be evidence that placement with the non-preferred parent would provide significant advantages, essential to the child's development which could not be substantially provided by the preferred parent. Now it seems to me that it is all very well to accord considerable weight to the wishes of the child, but there is still some truth in the statement previously quoted,\textsuperscript{291} to the effect that the wishes of the child should not be confused with the welfare of that child. It is only where the wishes of the child are \textit{ad idem} with its best interests that they should be given full effect. In all other cases it is a question of degree as to how much weight is afforded the child's preferences. In both instances though, it is still necessary for the court to make a determination as to where the best interests of the child lie, as well as receiving evidence of its wishes.
ESCAPE VALVES

The resolution of a custody dispute is an extremely difficult process for a judge, particularly where there is little to choose between the parents, or where the best interests of the child demand that the rogue in the action be awarded custody. However, there are avenues open to the judge to lessen the burden on himself, and at the same time ameliorate the apparent harshness of a decision from the unsuccessful parent's viewpoint.

(1) ACCESS

The most commonly used device in this regard is to award access to the non-custodial parent. In fact, it is very rare to find access being refused by a court and I suggest that this illustrates its use as an escape valve.

As in matters of custody, whether access is granted and on what conditions, is determined according to the best interests of the child. This is the paramount consideration. Yet, given this circumstance, it may seem somewhat inconsistent that a parent who has been denied custody as a result of this consideration, can be awarded access on the basis of the same consideration. The answer given by the courts is that although many of the same factors are taken into account in determining
both issues, different weight and emphasis is accorded to those factors depending upon which issue is under consideration.294 To me this is not an entirely satisfactory response.

It would appear that many courts have not yet ridded themselves of the anachronisms of the past as far as access is concerned, and approach the issue on the basis that the parent has a natural right to access which will only be denied if danger to the child is apprehended.295 Indeed, this "right" is sometimes placed on a pedestal in direct competition with the "best interests" principle.296

The question may be posed though, whether this is an intentional exercise by the court. If it is correct to say that access is used as a sop to the parent deprived of custody, then it may very well be an unthinking action on the part of the court in many cases. That this may be so is borne out by my experience as a practitioner in the Family Court of Australia. In a suit involving children every one is so concerned with the question of custody, and all the evidence and all the energies of those involved is directed to this issue, that once the same is resolved, very little time and effort is afforded the question of access. In most cases, it simply follows the event. Of course, this is not the case where custody has been agreed and the only issue before the court is
access. It is generally in these cases that the law relating to access is expounded.

Naturally, there are cases where the correct approach is taken, and a sensitivity to the needs of the child is displayed. For example in the case of *Re Tuokimaki* the court said this:

"I cannot agree that as a rule of general application access may not be refused except in cases where danger to a child is apprehended. I think the overall welfare which of course includes not only the physical surroundings but the mental, moral and spiritual, are to be considered as a whole whenever possible, and the decision based on how the scales fall according to the interests of the child and not either parent."

Professor Davies explains away the apparent concentration on the parental right to access on the basis that the court is really emphasising the need of a child for continuing contact with both parents. It is said that even though there is a parting of the ways when a family unit dissolves, the child retains ties with both parents. Thus, to deprive a child of all contact with one parent entails the withholding of the contribution that that parent would normally have made to the child's physical and psychological development. There is also the possibility that in later life the child will grow to resent the custodial parent believing that he or she is responsible for such deprivation. However, this again raises the issue of the psychological influences at
play, and as we have seen it is extremely difficult to be
dogmatic in this area. There is a school of thought amongst
some child psychologists that access should not be the subject
of judicial determination at all, but rather, should be left
completely to the discretion of the custodial parent. The
basis of this theory is that a child has difficulty in relating
to two parents who are in conflict. Loyalties become split and
there is a danger of destroying the child's positive
relationships with both parents. It is much more important to
foster positive emotional ties with the custodial parent.

This slant on access has not yet been taken up by the
courts, but this is not to say that the courts turn a blind
eye to the unsettling effect that access may have upon the child.
Where there is clear evidence that contact with the non-
custodial parent will cause the child to become emotionally
upset the court will deny access. In particular it has been
recognised that access is not feasible where there is great
animosity between the parents. The risk to the emotional
stability of the child is too great. For example, in the case
of Re Stroud and Stroud the parents had been engaged in
bitter feuding for most of the child's life and they had used
him as a weapon for their own purposes. His emotional
stability had already been affected to the extent that he exhibited
"an almost panic reaction when exposed to the presence
of his father."
The reports of behavioural scientists presented at the trial indicated that the child's emotional well-being might be permanently impaired unless the feuding ceased and the child was placed in a stable environment. Accordingly, the court denied access to the father until such time as he and the mother could agree on a method of access, or until the child reached an age where he could better cope with the situation.\textsuperscript{305} A similar set of circumstances arose in the case of \textit{Kroll v Kroll}.\textsuperscript{306} There, the medical evidence was that the child's future development would be harmed by the continued animosity between her parents and, in particular, by the mother's very strong hatred for the father. However, Aikins J. was not prepared to resolve the problem of access in the same manner as the court in \textit{Re Stroud and Stroud}. He felt that there were dangers in such an approach; firstly, if the child was left entirely under the influence of the mother, the rift between father and child might become permanent, and secondly, the medical evidence indicated that the child might develop psychiatric problems if she was brought up exposed solely to the mother's hatred for the father. Accordingly, he made an interim order that there be no access, but arranged for the child to receive psychiatric treatment for up to 6 months and for the mother to receive assistance from a social worker. At the end of the 6 months, the matter could be brought back before him for reassessment.
Whether the real reason for granting access is, as Professor Davies suggests, the alleged benefits thereby enuring to the child, or whether this is merely camouflage to divert attention from the fact that courts emphasise access as a natural right of a parent, is debatable, but it is still the most common approach taken by the courts. The benefits said to flow from access are generally related to the retention of as many of the aspects of a two-parent household as possible. For example, if access is ordered the child can experience the love and attention of both parents and be guided and influenced in his or her development. The child presumably will have a more balanced outlook on life. There is also the possibility of the untimely demise of the custodial parent, and a court will not be so uneasy about awarding custody to the surviving parent, if that parent has played a role in the development of the child.

Although there is this tendency of courts to think in terms of a parent having a natural right to access, some of their number have gone to the other extreme, and given access a very low priority. For example, courts have not been adverse to denying access where the non-custodial parent is not paying maintenance. How this can be justified as being in the best interests of a child is anybody's guess; the most that can be said is that the court is making a value judgement as to whether access or maintenance is more important to the child.
Fortunately, the general consensus amongst courts in Canada, England, the United States of America, and Australia, is that access does not depend on maintenance, and *vice versa*. On the other hand though, there have been decisions in Canada, and some quite recently, to the contrary. For example, in *Gregson v Gregson*[^309] the court ordered that the father have reasonable access to the child *conditional* upon him paying the mother maintenance for the child.[^310] In *Cartageno*ra (Lipson) *v Lipson*[^311] Garrett J. of the Ontario Supreme Court made what he admitted was an unusual order with respect to access. He ordered that after the arrears of maintenance had been paid, and when it could be shown that all current payments of maintenance had been paid, the father could apply to the court for access to the children.[^312] These decisions are unfortunate; if the best interests of the child dictate that the non-custodial parent have access, then such access should not be frustrated in anyway.

The courts also possess a control device when awarding access in that if any aspect of contact between the child and the non-custodial parent causes concern, terms and conditions can be imposed to overcome the difficulty. For example, access can be limited to the day-time only, restrictions can be placed on the persons with whom the child comes into contact, directions can be given as to the method of collecting and returning the child, conditions can be imposed on where the
child is taken and on what activities are to be engaged in; the list is endless. The court is also able to order that access be supervised by a third party, and this is an important option, particularly where the supervisor is a psychiatrist, a psychologist or even a social worker. In the Australian jurisdiction it is quite common for access to be supervised by a Court Counsellor, who in turn submits a report regarding access to the judge.

One aspect that should be emphasised in this context is that it is important for the court to make the parties aware of the effect of awarding custody to one parent and access to the other. In particular, the part that the parent granted access plays in the development of the child needs to be clarified. Strictly, this role is a very limited one, as illustrated by Spence J. in Gubody v Gubody:

"(t)he father's contact with his daughter must be that of a person who visits her, who spends some time with her, but who cannot change or alter her mode of life or have any general direction of the child's conduct. That is a matter of custody... (W)hat he is entitled to do is to be with his daughter and apart from the mother, but... he is only to have the ordinary control of a child necessary for the well-being of the child during the hours they are together, and he is not to interfere in any way with the child's upbringing."

This sounds fine in theory, but does not accord with the realities of the situation. Indeed, it is even a little inconsistent with the reasons proffered for awarding access in the first place; the enrichment of the life of the child
through contact with the non-custodial parent. A child is bound to be influenced in his or her development merely by the presence of the non-custodial parent and there is nothing the court can do about that. What the courts are more concerned about though, is positive interference by the non-custodial parent, an all too frequent occurrence. Many parents consider it their duty to constantly be looking over the shoulder of the custodial parent, thus creating unnecessary tension and unpleasantness. This in turn can have an adverse effect on the child.

Nor are parents adverse to using access as an opportunity to gain an advantage over the other parent. Many non-custodial parents use access periods to influence the child against the custodial parent in the hope that they will succeed in an application for a change in custody. The courts are more concerned about the negative influence of the non-custodial parent than the custodial parent, who often attempts to frustrate access by influencing the children against the other parent. Devices such as never having the children ready on time, pretending the children are ill, or that other arrangements have been made for the day are also common-place. The sad part of it all is that the children are the ones affected the most. Their emotional stability is often seriously jeopardized by this constant toing and froing between the parents.
However, what is even more anomalous is the fact that rarely does a court order solve the problem. Cutting off access rights entirely is a course which is sometimes taken, but, as we have seen, there are disadvantages to the child even with this approach. The real problem is that a court usually does not have the resources at its disposal to supervise each access order it makes, and parties just continue the battle. The preferred solution is to have the parties reach an agreement as to access (subject to a court review, of course), and to this end courts very often order that a party have reasonable access to the child in the hope that the parties will negotiate the particular terms thereof. If they cannot agree, or if one or both spouses spurn the order, then the dilemma begins. The court generally commences by making a very detailed order as to access, but without supervision this will be of little value if the parties are antagonistic towards each other. The options then available to the court (apart from cutting off access entirely) are, a variation of the custody or access rights, use of its contempt powers, or making the payment of maintenance conditional on the spouse with custody permitting access.

Courts are most likely to use their contempt powers in this situation. They are very reluctant to utilize the first option because the best interests would have dictated the original orders, and those same interests may not require a
It must be remembered that children are not to be bandied around in the name of punishing an errant spouse. Unfortunately though, this does occur, and the action develops into a battle between the judge and the defaulting spouse, with the interests of the children being put aside. For example, in the case of Martiniuk v Martiniuk and Kowerchuk the access rights of the father were continued even though the children did not want to see him, and there was a strong psychiatric opinion that the children might be harmed, or at least pushed further away from the father. The court found that the children's feelings were as a result of the conduct and influence of the mother, and took the attitude that to deny the father his access rights would be to allow the mother to "beat the system".

As regards the third option, there have been instances of courts using a financial lever in this fashion to enforce access rights. It is the reverse of the situation discussed earlier, namely, making access conditional on the payment of maintenance. Just as I submitted there that the decisions overlooked the best interests of the children, I suggest that children are the losers in this exercise as well. Here, the value judgement being made is that contact with the non-custodial spouse is more important than the payment of maintenance, and again I consider this to be an abuse of discretion. For example, in the case of Kett v Kett and
Mitchell the mother had moved to another Province effectively preventing the father from exercising the access awarded to him. The court held that future maintenance payments by the father should be suspended until such time as the mother made some arrangement satisfactory to the court to permit in practical terms the exercise of the father's right of access. In reaching this decision the court distinguished a case of Wright v Wright where the Court of Appeal had taken the view that in the circumstances of a separation agreement where there was no restriction on the residence of the parties, the husband was not entitled to suspend unilaterally the payment of maintenance under the agreement as a counter-measure to the frustration of his right of access. The court said that in an application under Section 11 (2) of the Divorce Act, 1968,

"the court has a discretion to adjust matters by its order as it considers in the best interests of the children and of the parties".

The defect in the court's approach though, is too much emphasis on the alleged right of the non-custodial parent to access, and not enough emphasis on protecting the economic interests of the children.

However, an even more deplorable decision is the case of Tassou v Tassou. There, the Alberta Supreme Court was faced with the situation where the children had refused to see their father pursuant to an access order. Bowen J. dealt with the problem in this way:

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"From a practical point of view this court has no effective way of actually physically forcing the children to see their father. I do feel, however, that the mother had a duty to do everything within her power to see that the boys see their father and to carry out the wishes of this court as contained in my original judgement. It is her positive duty to assume this responsibility. I do not feel she has done so. It is the responsibility of this court to try to ensure that its orders are not thwarted by the parties to an action and the only effective method that I can use to have the access continued is to use the payment or non-payment of maintenance as inducement to the wife to assume the responsibility outlined above. I am therefore ordering that all maintenance payments set out in my original judgement will be suspended for such length of time that the husband fails to obtain access to the children."

Unfortunately, I fail to see how this can be justified as a valid exercise of the court's discretion. With the greatest respect it seems to me that the children are the losers in the exercise proposed by Bowen J. In the first place, I do not consider it appropriate for the children to be forced to see the non-custodial parents if they do not wish to do so. The duty of the custodial parent should be to create an atmosphere conducive to contact with the other parent taking place, and to not place any obstacles in the way of such contact. In the second place, what the custodial parent does in relation to access should have no effect on the maintenance obligation of the other parent. The needs of the child still continue.

Accordingly, I do not consider this option to be one that courts should have resort to, and the problem of enforcement will need to be resolved in another fashion, if
indeed it can be at all.

Of course, this difficulty in enforcing access orders was one reason for Goldstein, Freud and Solnit\textsuperscript{332} recommending that access rights be determined by the custodial spouse alone. However, as I have suggested already, it is doubtful whether even this resolves the problem, and it may create further difficulties in itself.

(2) \textbf{SPLIT CUSTODY ORDERS}

Another alternative that is open to a court is to make an order for divided custody. Here the child is physically placed in the care and control of one parent with the other parent having the custody of the child in the broad sense; i.e., the right of supervising the education, religious training, and general upbringing of the child, and the right to make decisions having a permanent effect on the child's life and development.\textsuperscript{333}

A slightly different order frequently made in the present Australian jurisdiction is to place a child in the joint custody of the parties, with one party exercising the day-to-day care and control of the child, and the other having reasonable access.\textsuperscript{334} Each parent retains an equal voice in the major decisions affecting the development of the child,
but the parent exercising day-to-day care and control is entitled to make the more mundane decisions regarding the welfare of the child.

The aim of both types of orders is to prevent one party becoming a mere "weekend" parent. Yet, there are obvious problems. The first is to adequately differentiate between custody and care and control, or between mundane and major decisions. Unfortunately though, there is no case-law providing a definitive answer here, and the parties are left to their own devices. Secondly, with a divided custody order there is the logistic difficulty of the parent entitled to make the important decisions not having "possession" of the child. This is not a problem in the case of a joint custody order, but rather the difficulty there is the necessity for a consensus between the parents on those decisions that can be termed "major". Thus, it is evident that both kinds of order are only appropriate where the parents are capable of working together for the benefit of the children. Neither order is workable where there is animosity and bitterness between the parents. Accordingly, because it is common-place to find the parties at loggerheads when a marriage breaks down, it has traditionally been felt that such orders can only be used in rare instances. However, commentators are now suggesting that the fact that parties are not co-operating generally, does not mean that they cannot put their differences aside when
dealing with issues concerning their children. Indeed, it is said that the great majority of parents can separate their emotional attitudes towards each other when practical conditions require it. It is felt that joint custody is the appropriate solution because it allows both parents to exercise their rights and to concentrate their efforts and energies on being good parents. The rationale behind this movement is that more and more researchers are becoming aware of the need for the child to retain emotional bonds with both parents. The loss of either parent is painful and traumatic to the child, yet this is the result of an award of sole custody.\textsuperscript{340}

Now, this is all very well, but the aspect which concerns me is whether too much is being expected of the child, or indeed, of the parents. The plain fact of the matter is that the family unit no longer exists as such, and the parties are separated both in space and time, each attempting to establish new lives. The child is bound to be torn between the two parents and I suggest that, at the very least, the danger is that he will be confused as to which one to look to for guidance.\textsuperscript{341} Thus, I do not entirely agree that joint custody is the solution.

Finally, one other type of order that should be mentioned is where the parties are awarded joint custody of the child, and the child then spends part of the year with one
parent and part with the other. Here, not only must the parents be co-operative but also the child needs to be extremely flexible.\(^{342}\) Otherwise, with constant changes in environment and of care-givers, there would be an extraordinary strain on his or her emotional stability. In fact, it is difficult to see how such an order can be in the best interests of a child, and I suggest that it too should be used sparingly.\(^{343}\)

(3) **CONDITIONS**

Just as terms and conditions can be imposed on an access order, the court can ameliorate its decision concerning custody by attaching conditions thereto.\(^{344}\) For example, a court sometimes wants to grant custody to a parent but is unhappy about that parent's associations. Here, it is possible to attach conditions to the custody order to the effect that the parent is only to have custody as long as he or she refrains from associating with a named third party. However, even so, such conditions should be imposed sparingly, and only when there is positive evidence that the third party is a harmful influence on the child.\(^{344}\)
FOOTNOTES, CHAPTER 3


2. The test is sometimes phrased in terms of the "welfare and happiness of the child". In this paper they are used interchangeably.

3. McKee v McKee (1951) 2 D.L.R. 657, per Lord Simons at P. 666. Although Section 11 of the Divorce Act, 1968 (R.S.C., 1970, c. 8) does not state specifically that the welfare of the child is the paramount consideration it has been held that that is in fact the case (Bray v Bray (1971) 1 O.R. 232 and Wittke v Wittke (1974), 16 R.F.L. 349). Note that Laskin J.A. in Dyment v Dyment, (1969) 2 O.R. 748, at PP. 750, 751, put to rest any notion that the common law rule of a father's prior claim to custody, all else being equal, prevailed under the Divorce Act, 1968.

4. (1970) A.C. 668, at P. 710

5. In Re Winsor (1963) 48 M.P.R. 445 at 447, per Furlong C.J.


7. Re Besant (1879) 11 Ch. D. 508

8. Goldstein, Freud and Solnit, "Beyond the Best Interests of the Child" (1973)


10. For an excellent discussion of the ways in which the resolution of custody disputes differ from the traditional model see Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 Law and Contemporary Problems 8, at P. 29.

12. There is a school of thought that this vagueness will eventually lead to a professional takeover of child placement. It is argued that because the test is so vague, developments in other disciplines are too readily accepted.

13. See Gosse and Payne, supra, footnote 11, at PP. 175-177, for some examples of guidelines that have been suggested.

14. Mnookin, supra, footnote 10. Also see Gosse and Payne, supra, footnote 11, at P. 175.

15. Also see Finlay and Gold, supra, footnote 6

16. Supra, footnote 10, at P. 292

17. Supra, footnote 11, at PP. 174-175

18. Ibid

19. e.g., see British Columbia Royal Commission on Family and Children's Law, Fifth Report, Part vi, "Custody, Access and Guardianship" (1975). Also see Section 402 of the United States Uniform Marriage and Divorce Act, an Act approved in 1970 by the National Conference of Commissioners on Uniform State Laws.

20. Supra, footnote 11, at P. 177

21. At P. 55

22. Section 24, Family Relations Act, 1978 (S.B.C., 1978, c. 22)


24. S.O. 1978 c. 2


27. Re Gromoll (1979), 1 F.L.R.R. 76

28. Note that apart from enumerating the factors to be taken into account, presumptions have been developed in an attempt to reduce the burden of this determination. However, this approach has also proven unacceptable and I
discuss the same later in this paper in the context of parental rights. Also see Mnookin, supra, footnote 10, at P. 227.

29. Mnookin, ibid, at PP. 262, 282-283, talks of this in terms of the establishment of "intermediate premises or rules."

30. Mnookin, idem, at P. 284, postulates that such principles have a detrimental effect on private negotiations. For example, a rule providing for maternal preference "gives mothers as a class more bargaining power than fathers in negotiations over custody." In comparison, the "best-interests-of-the-child standard provides a more 'neutral' backdrop for both private negotiations and adjudication."

31. Hepton v Maat (1957), 10 D.L.R. (2d) 1; Martin et al. v Duffell (1950) 4 D.L.R. 1; Re Agar-Ellis (1883), 24 Ch. D. 317; Meikel v Authenac (1970), 74 W.W.R. 699


33. Supra, footnote 4

34. (1973) 3 O.R. 921

35. Ibid at PP. 926-927

36. Idem at P. 933

37. For a case where Re Moores and Feldstein was accepted but where it was found that the tie of affection was the overbalancing consideration, see More v Primeau (1978), 2 R.F.L. (2d) 254.

38. Supra, footnote 31

39. Supra, footnote 34, at PP. 927-928

40. e.g. at P. 1 of the report

41. (1974), 16 R.F.L. 266

42. (1977), 21 N.S.R. (2d) 631

43. Also see More v Primeau, supra, footnote 37
44. **Funk v Funk** (1968) 6 W.W.R. 137

45. **Wiltshire v Wiltshire** (1975), 20 R.F.L. 50

46. **Dugay v Dugay** (1978), 5 R.F.L. (2d) 33

47. Interestingly enough, Section 1 of the new Ontario Family Law Reform Act, 1978, supra, footnote 24, defines "parent" in a way which is no longer confined exclusively to a blood unity.


50. Chisholm, "Obtaining and Weighing the Children's Wishes; Private Interviews with a Judge or Assessment by an Expert and Report" (1976), 23 R.F.L. 1, at P. 1.

51. As was said by Katkin, Bullington, and Levine when pointing out the undesirable side effects of the psychological parent theory of Goldstein, Freud and Solnit (see infra P. 29 et seq.) "(P)sychology does not offer the same guarantees of clear-cut issues as biology". (Katkin, Bullington and Levine "Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action" (1974), 8 Law and Society Rev. 669, at P. 679).


54. e.g. see Guggenheim, "Crisis in the Family" (1978), 5 Civil Liberties Review 76.

55. However, the concept itself was received into legal thought some time ago; e.g. see "Alternative to 'Parental Right' in Child Custody Disputes Involving Third Parties" (1963), 73 Yale L.J. 151, 158 et seq.
56. **Goldstein, Freud and Solnit**, supra, footnote 8

57. Ideally they should be the same, but by force of circumstances this is not always the case. For example, a child might be abandoned by the biological parent, or left on a temporary basis with third parties.

58. **Rutter**, supra, footnote 53


60. The authors would place a heavy onus on a person wanting to alter such an arrangement. The burden would be to show that the current custodian is unfit or that the child is unwanted in the present family, and that of the available alternatives, the person seeking custody provides the least detrimental for the child's physical and psychological well-being.

61. e.g., see **Saxon v Saxon** (1974) 6 W.W.R. 731, at P. 739

62. **Skolnick**, supra, footnote 59; **Mnookin**, supra, footnote 10; **In Re W** (an infant) (1971) A.C. 682; **In Re S** (1977) 3 W.L.R. 575.

63. **Leon**, supra, footnote 48; **Bersoff**, "Representation for Children in Custody Decisions - All that Glitters is not Gault" (1976), 15 J. Fam. L. 27, at P. 42.

64. Supra, footnote 8, at PP. 32-34

65. Ibid, at P. 38

66. **Bersoff**, supra, footnote 63, at P. 43, makes a similar suggestion.

67. It is interesting to note that Section 409 of the United States Uniform Marriage and Divorce Act, supra, footnote 19, provides that no application to vary a custody order can be made within 2 years after the making of the order unless there is reason to believe that the child is in serious danger.

68. **Infra P. 89**
69. More v Primeau, supra, footnote 37

70. The Australian Family Court for example has received heavy criticism for delays in hearing custody disputes. Generally though it has been unwarranted, and the blame can be traced to either the litigants or their solicitors.

71. Supra, footnote 8, at P. 51

72. Mnookin, supra, footnote 10, at P. 261, also sees predictive ability as a fundamental obstacle to custody resolution.

73. Supra, footnote 8, at P. 53


75. Supra, footnote 10, at P. 287

76. Also see ibid at P. 255, footnote 154

77. Of course, there have been favourable comments as well. See Epstein, Book Review, (1973), 1 J. of Psychiatry and Law 377.

78. Supra, footnote 51

79. Ibid, at P. 674


81. Ibid at P. 546

82. Idem at P. 551

83. Indeed, this occurred in the case of Pierce v Yerkovich, (1974), 363 N.Y.S. (2d) 403, where the court rejected the authors' theory relating to access. In so doing the court said this (ibid at P. 413): "The concept of psychological parenthood should never be permitted to obscure the truth that 'the natural father,' as well as the natural mother, remains a parent no matter how estranged parent and child become. A stranger may by conduct become a foster parent; but no conduct can transmute a natural parent into a stranger." (Beaumet v U.S. 344 U.S. 82, 85 ... (opinion, Douglas J. dissenting in part)).
84. See also Read, Book Review, (1974), 13 J. of Fam. L. 601 at P. 607


87. Also see Mnookin, supra, footnote 10

88. See Montgomery County Department of Social Services v Sanders (1978) 4 Fam. L. Reporter 2152.

89. De Forest v De Forest, (1975), 228 N.W. (2d) 919 and Reflow v Reflow, (1976), 545 P. (2d) 894

90. Mnookin is of the same opinion (supra, footnote 10, at P. 255, footnote 154).

91. R.S.C., 1970, c. 8; c.f. Section 402 of the United States Uniform Marriage and Divorce Act. (Supra, footnote 19).

92. S.B.C., 1978, c. 22

93. Supra Chapter 1

94. Belfochi v Belfochi (1920) 1 W.W.R. 248 at P. 253; Re Moilliet (1960), 56 W.W.R. 458; Re Chave (1967), 62 W.W.R. 193. Also see Re Squire, supra, footnote 41.


97. (1962) 3 All E.R. 1

98. Ibid at PP. 3,4

99. Gauci v Gauci, supra, footnote 95; Conrad v Conrad (1973), 7 N.S.R. (2d) 684; Re Pittman and Pittman, supra, footnote 95; Korteling v Korteling and Buse (1974), 19 R.F.L. 21. But see Hill v Hill (1975), 19 R.F.L. 119, at P. 122, and note that some courts have been at pains to distinguish Re L. For example, in Dyment v Dyment, supra, footnote 3, Disbery J. disposed of the case by holding that there was an adverse finding by Lord Denning regarding the
fitness of the mother. In truth though, the plain fact of the matter was that the mother was a good mother.

100. (1975), 62 D.L.R. (3d) 267
101. (1975), 62 D.L.R. (3d) 301
102. Supra, footnote 100, at PP. 278-279
104. Supra P. 40
106. Supra, footnote 4
107. Supra, footnote 105
108. Supra P. 20
109. Supra, footnote 105, at P. 649
110. Nielsen v Nielsen, supra, footnote 96
111. Re F (1969) 2 All E.R. 766, at PP. 769-770
112. Re Moilliet, supra, footnote 94
114. Re Cyr Infants (1969), 68 W.W.R. 273; Richardson v Richardson et al. (1971), 17 D.L.R. (3d) 481; Torresan v Torresan (1972), 6 R.F.L. 16; Hill v Hill, supra, footnote 99; Willoughby v Willoughby (1951) P. 184; Phillips v Phillips (1974) 44 D.L.R. (3d) 750. Contra see Friday v Friday (1976), 20 R.F.L. 202. There are even instances where setting up a home with a de facto wife can be positively advantageous. In Miller v Miller, (1976), 27 R.F.L. 189, custody of three children was transferred to the father on the ground that the children would benefit from a two-parent relationship. It appeared that the mother was likely to remain single, whereas the father intended to marry the woman with whom he was living.
115. In Re D (1977) A.C. 602, per Lord Simon at P. 640
116. Lord Simon put it succinctly when he criticized the appellate judge for treating the matter as a "moral abstraction, without regard to the actual evidence before the (trial) judge" (Ibid at P. 637).

117. Idem, at P. 629


119. (1976) 2 W.W.R. 462

120. Ibid at P. 468

121. Supra, footnote 118

122. (1978), 3 R.F.L. (2d) 327

123. Indeed, it is interesting to note that Goldstein, Freud and Solnit, supra, footnote 8, consider that homosexual couples would not be adequate psychological parents. Parents, they believe, who "reject their own male or female identity" (ibid at P. 17) are unable to nurture a child's sense of identity and self-worth. (Also see idem, at P. 15).

124. This dilemma presents a particular problem of jurisdiction where the child is removed from one Province to another, or from one country to another, but it is not intended to deal with this problem in this paper. For a useful discussion of this aspect see Robinson, "Custody and Access" in Mendes da Costa (ed.) "Studies in Canadian Family Law" (1972) 543, at PP. 557-560, and the 1977 Supplement thereto at PP. 218-222.

125. Clarkson v Clarkson (1972), 19 F.L.R. 112; In Re K (Infants) (1973) 3 W.L.R. 408

126. (1971), 4 R.F.L. 129

127. Ibid at P. 140

128. In the words of Mnookin, supra, footnote 10, at P. 251: "In a divorce custody fight, a court must evaluate the attitudes, dispositions, capacities, and shortcomings of each parent to apply the best interests standard".

129. R.S.C., 1970, D. 8
130. S.B.C., 1978, c. 22


134. **O'Leary v O'Leary** (1923) 1 D.L.R. 949 at P. 977; **Barea v Barea** (1972), 9 R.F.L. 78

135. **Pinner v Pinner and Godfrey** (1962), 40 W.W.R. 375

136. **Humphreys v Humphreys** (1970), 4 R.F.L. 64

137. It has even been suggested that there should always be an investigation of the mental normalcy of the proposed custodian. This derives from studies which conclude that one of the most important factors in the development of a child, who is in the exclusive custody of his or her mother, is the mental normalcy of the mother. **McCord, McCord and Thurber**, "Some Effects of Paternal Absence on Male Children" (1962), 64 J. of Abnormal Social Psychology 361, at P. 364. Also see **Finlay and Gold**, supra, footnote 6, and **Gore v Gore** (1978), 4 Fam. L. Reporter 2181.

138. Except perhaps for any child involved. But this depends upon his or her age and degree of maturity.

139. See **D v D**, supra, footnote 122, at PP. 332-333

140. (1966), 140 N.W. (2d) 152

141. **Ibid** at P. 156

142. Idem at P. 154

143. Following the tragic deaths of the natural mother and another child of the marriage, the father had temporarily placed the subject child with the maternal grandparents and he had remained there for 2 years before the matter came to trial.

144. For example, the court made statements such as the following:
"We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child."
(At P. 156).

145. See Foster, "Adoption and Child Custody: Best Interests of the Child?" (1972), 22 Buffalo L. Rev. 1, at P. 5. Also note the comments of the trial court in disregarding this evidence (140 N.W. (2d) 152, at P. 156).

146. S.B.C., 1978, c. 22

147. R.S.C., 1970, D. 8


149. Robinson, supra, footnote 124, at P. 594, refers to a study which concluded that "variations in child behaviour were directly related to the socio-economic environment in which the child was living."
The study is reported in Thornes, "Children with Absent Fathers" (1968) 30 J. of Marr. and Fam. 89.

150. Talsky v Talsky, supra, footnote 100; Leboeuf v Leboeuf (1928) 2 D.L.R. 23

151. McDonald v McDonald, supra, footnote 101; Re F (1969) 2 All E.R. 766; Re Allan and Allan (1958) 16 D.L.R. (2d) 172; Beck v Beck (1950) 1 D.L.R. 492


153. The United States Supreme Court had this to say in Ford v Ford (1962), 371 U.S. 182, At P. 193: "Experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where ... the estrangement of husband and wife beclouds parental judgement with emotional prejudice."

154. Re Allan and Allan, supra, footnote 151

156. Under Section 74 (4) (b) of the Family Relations Act, 1978 (S.B.C. 1978, c. 22), a provision in an agreement that is enforceable under sub-section (2) thereof can be altered, varied or rescinded by the court in the same fashion as an order of such court. In addition, it is quite clear that the court's power under Section 35 of the Act to make a custody order is not fettered by the existence of a custody agreement. See also Section 55 (1) of the Ontario Family Law Reform Act 1978, (S.O. 1978 c.2), which explicitly provides that a custody agreement is subject to the overriding powers of a court.

157. In the past, courts have been content to defer to the suggestion that "the father knows far better as a rule what is good for his children than a court of justice can". (Re Agar-Ellis, supra, footnote 31 at PP. 337-338; also see Martin et al. v Duffell, supra, footnote 31 and Hepton v Maat, supra, footnote 31). However, I submit that this does not accord with reality in many instances.

158. In the context of access see Brown, C.C.H., Family Law, 2109.

159. On the other hand, Mnookin, supra, footnote 10, at P. 288, suggests that "courts should not second-guess parental agreements" for these reasons. Unfortunately, I cannot agree with him in this regard.


162. The Law Reform Commission of Canada in its report on Family Law (1976) recommended that there should be "review by the court of parental agreements respecting children, with power to disapprove where statutory criteria are not met" (At P. 49, and see P. 54).

163. S.B.C., 1978, c. 22
164. Gosse and Payne, supra, footnote 11
165. E.g., see Section 24 of the Family Relations Act, 1978
166. R.S.C. 1970 D. 8
167. Nielsen v Nielsen, supra, footnote 96
168. This is another example of a presumption developed to provide some guidance for the court in view of the wide discretion they have, and to offset the general lack of evidence.
169. i.e., until the child reached the age of 7 years.
170. Austin v Austin (1865), 34 Beav. 257
171. Bell v Bell (1955) O.W.N. 341, per Roach J.A. at P. 344; Dunn v Dunn and Holcombe (1954) O.W.N. 561
174. Supra, footnote 170
175. Ibid at P. 257
176. Gauci v Gauci, supra, footnote 95. This approach was taken even as recently as 1977 in the case of Knowles v Knowles (1977), 2 R.F.L. (2d) 396
177. Talsky v Talsky, supra, footnote 100; Re Pittman and Pittman, supra, footnote 95; Saxon v Saxon, supra footnote 61; K v K (1976) 2 W.W.R. 462.
178. R.S.B.C. 1948 c. 139
179. S.B.C., 1978, c. 22
180. Power on Divorce and Other Matrimonial Causes, Third edition Volume 1 (1976); Chisholm, supra, footnote 50, at P. 3. Also see Philpott v Philpott (1955) O.W.N. 344 and Desilets v Desilets (1975), 22 R.F.L. 87. This is particularly evident in the United States; e.g. Mnookin reports as follows (P. 235-236):
"At the present time, maternal-preference standards are being displaced by a formal insistence on a neutral application of the best-interests standard
... No fault divorce, the changing social conception of appropriate sex roles, and the women's movement are all contributing to this trend."

181. Indeed, see Smith v Smith and Morrow (1978), 6 F.L.D. 291 where the traditional roles were completely reversed. This change in role is also noted in Guggenheim, supra, footnote 54, at P. 77.

182. Ellsworth and Levy, supra, footnote 49

183. The concept of maternal deprivation has gained very wide currency, and it has been held to be the cause of conditions as diverse as mental subnormality, delinquency, depression, dwarfism, acute distress and affectionless psychopathy (Bowlby, "Maternal Care and Mental Health" (1952); Ainsworth, "The Effects of Maternal Deprivation : A Review of Findings and Controversy in the Context of Research Strategy", in Deprivation of Maternal Care : A Reassessment of its Effects, W.H.O., Geneva (1962)). However, this is despite severe methodological and other criticisms (Casher, "Perceptual Deprivation in Institutional Settings", in Newton and Levine (Eds.), "Early Experience and Behaviour" (1968); Casher, "Maternal Deprivation : A Critical Review of the Literature," Monog. Soc. Res. Child Devel. Vol. 26 No. 2 (1961); Yarrow, "The Crucial Nature of Early Experience", in Glass (Ed.) "Environmental Influences" (1968).), with one problem in particular being that studies of maternal deprivation are generally concerned with children in institutions or foster homes. Thus, doubts can be raised as to the value of this evidence in the resolution of custody disputes.

184. Spitz, "The Role of Ecological Factors in Emotional Development in Infancy," (1949), 20 Child Development 145, at P. 155. However, it should be noted that subsequent studies have required a reappraisal of such extreme beliefs (Yarrow, "Separation from Parents During Early Childhood", in Hoffman and Hoffman (Eds.), Review of Child Development Research Vol. 1 (1964)). It is now the case that this would be considered an illustrative example of what can happen, rather than a definitive statistical account of what will happen.

185. For a brief summary of both the short term and long term effects of maternal deprivation see Rutter, supra, footnote 53, at PP. 29-30, 33-34 respectively. Also see Heinicke and Westheimer, "Brief Separations" (1965)
186. Ellsworth and Levy, supra, footnote 49, point out that this is a common problem with studies that are in any way relevant to custody adjudication.

187. Rutter, supra, footnote 53; Bersoff, supra, footnote 63, at P. 42.


189. Supra, footnote 183, at PP. 26-27. Also see Rutter, supra, footnote 53.


192. Glueck and Glueck, "Unravelling Juvenile Delinquency" (1950); Gregory, "Antirospective Data Following Childhood Loss of a Parent" (1965) 13 Arch. Gen. Psychiat. 99, at P. 102. Yet, these studies cannot be considered conclusive because there has been other research indicating that there is very little differentiation in the rate of delinquency between boys living in father-absent homes and boys living in homes where fathers are present (McCord, McCord and Thurber, supra, footnote 137). It is also important to bear in mind that some scientists suggest that it is not the deprivation which is the prime cause of the delinquency, but rather, the discord and disharmony preceding the separation (see Rutter, supra, footnote 53, at P. 108, and the references cited therein).


194. Most studies that have been made in this area are limited in their scope. For example, Heilerington conducted a well-controlled study concerning father absence and a girl's development, but it was restricted to girls between the ages of 13 and 17 years. It also seems that
the majority of research has concentrated on just one aspect, the effect of paternal deprivation on sex role functioning (Biller, ibid).

195. Rutter, supra, footnote 53, at P. 118


197. Ibid

198. Finlay and Gold, supra, footnote 6, at P. 89.

199. Rosen, supra, footnote 190, at PP. 117, 120-121

200. Rutter, supra, footnote 53; Biller, supra, footnote 193

201. In 1964 Schaffer and Emerson found that the sole principal attachment was to the mother in only one half of the 18 month old children they studied and in nearly one third of cases the main attachment was to the father (Schaffer and Emerson, "The Development of Social Attachments in Infancy," Monogr. Soc. Res. Child Devel., Vol. 29, No. 94 (1964)).


203. Goodman, supra, footnote 53, at P. 646


206. See Infra PP. 71-72

207. More v Primeau, supra, footnote 37; Smith v Goulet, supra, footnote 74.

208. S (B.D.) v S (D.J.), supra, footnote 105. Of course though, it is perfectly in order for the court to consider how the unilateral action of the parent creating the situation bears on his or her fitness as a parent (Dyment v Dyment, supra, footnote 3).
209. (1926) Ch. 676

210. Ibid at P. 684

211. A similar conclusion was reached in the more recent case of Conrad v Conrad, supra, footnote 99, indicating that the passage of time has not necessarily affected this view. Also see Dugay v Dugay, supra, footnote 46, at P. 42, and Menasce v Menasce (1963) 48 M.P.R. 281, at P. 295.

212. See supra, footnote 59. Also see Rosen, supra, footnote 190, and Goodman, supra, footnote 53.

213. Goldstein, Freud and Solnit, supra, footnote 8. Also see supra, footnote 55.

214. See Rosen, supra, footnote 190, at P. 117, where he says this:
"Child development studies (have) established that the strong bonds that a child forms in his attachment to a loving and caring person is essential for healthy personality growth and if deprived of such experience of love and caring, or if separated from the person giving the caring, the child will suffer degrees of emotional trauma with very serious consequences."
Also see Rutter, supra, footnote 53, at P. 118-119

215. Supra, footnote 4, at P. 715

216. This approach was approved by the Court of Appeal in Re Moores and Feldstein et al., supra, footnote 34, at P. 929. Also see Berger v Berger (1974), 17 R.F.L. 216 and Re Squire, supra, footnote 41. It is also illustrative to note that courts in England have taken judicial notice of the harmful effects of removal from a good stable home. See In Re W (an infant) (1971) A.C. 682 and In Re S (1977) 3 W.L.R. 575.

217. Moreover, there is evidence that not all breaks in continuity involve bond disruption. It depends on the relationship itself, and, of course, on whether any bonds have been formed at all. See Rutter, supra, footnote 53.

218. See In Re McGrath (Infants) (1893) 1 Ch. 143, at P. 148 where Lindley L.J. said that,
"(t)he duty of the court ... is to leave the child alone, unless the court is satisfied that it is for the welfare of the child that some other course should be taken."
219. See generally Rutter, supra, footnote 53. Also see More v Primeau, supra, footnote 37.

220. It has been said that infants under 3 months display no measurable adverse effects from a change of parent; that between 3 and 6 months there is evidence of appreciable distress consequent upon a change, but at 5 years of age no residual effects can be found; and that children between 6 and 12 months exhibit marked distress with a change, and residual effects are still present at 5 years of age (Yarrow, supra, footnote 183.) As regards children over 12 months of age all that can be said is that a change of parent may result in prolonged psychological impairment (Bowlby, "Attachment and Loss" (1973) Volume Two, Separation, PP. 25-32).

221. e.g. see McGee v Walden and Cunningham, supra, footnote 132.


223. Rutter, supra, footnote 53, at P. 34 et seq.; Heinicke and Westheimer, supra, footnote 185 at PP. 316-318. Also see Jones v Jones (1960) N.S.W.R. 762, at P. 770.


226. In Section 10 (b) of the Divorce Act, 1968 (R.S.C., 1970, D. 8), the legislative direction is for the court to make "such interim orders as it thinks fit and just". Section 9 (1) of the Family Relations Act, 1978 (S.B.C., 1978, c. 22), uses the term "as it considers reasonable". Also see Papp v Papp, (1970) 1 O.R. 331; Dyment v Dyment, supra, footnote 3; Hanson v Hanson (1974), 18 R.F.L. 301.


228. This was also recognised by the Law Reform Commission of Canada in its Report on Family Law (1976) at P. 60.
229. More v Primeau, supra, footnote 37
230. Supra PP. 47-48
231. Dyment v Dyment, supra, footnote 3
233. However, see Sobanski v Sobanski (1973), 9 R.F.L. 318 where Zuber J. said this (at P. 319):
   "I am told in argument that I should not disturb the status quo by ordering the children to go
   back to the father and the paternal grandparents, yet really it is the mother who disturbed a
   satisfactory status quo by taking the children in the first place. It would seem to me to be an odd
   state of affairs where she did something wrong to disturb the status quo and now says the court
   is cast in the role of the villain which, by ordering a second change in custody, is really
   the agency that disturbs the status quo. To accede to this argument would really be to award
   her for having ... snatched the children."
234. Re Moilliet, supra, footnote 94; Nielsen v Nielsen, supra, footnote 96; Sinclair v Sinclair (1974), 17
236. Torresan v Torresan, supra, footnote 114
238. e.g., in talking about the practice of the Court of Chancery in England, Kay L.J. of the English Court of
   Appeal, had this to say in The Queen v Gynagall, (1893) 2 QB 232, at P. 251:
   "When one comes to consider what it is that the Court of Chancery had to determine and what the
   main consideration in exercising its jurisdiction was, viz., what was really for the welfare of the
   child, whose interests were being discussed, it is obvious that, if the child were of any reasonable
   age the Court would hardly desire to determine that question without seeing and speaking to the child
   and ascertaining its own views on the matter."
239. e.g., see Section 24, Family Relations Act, 1978 (S.B.C., 1978, c. 22); Law Reform Commission of Canada Report on Family Law (1976), at P. 13; British Columbia Royal Commission on Family and Children's Law, Fifth Report Part vi, " Custody Access and Guardianship", (1975), at PP. 13-14; Ontario Law Reform Commission, Report on Family Law, Part iii - Children, (1973), at P. 121; Section 402 United States Uniform Marriage and Divorce Act, supra, footnote 19. It is also interesting to note that one of the 12 basic rights of children proposed by the British Columbia Royal Commission on Family and Children's Law is the right to be consulted in all decisions relating to guardianship, custody, or a determination of status (Fifth Report, Part iii, "Children's Rights", (1975) at P. 8).

240. Chisholm, supra, footnote 50

241. Supra, footnote 4

242. There is some empirical data supporting this. Ellsworth and Levy report as follows:

"In a study of successes and failures of foster home placement, Malone (1942) found statistically significant differences in the proportion of successes according to whether the child agreed to the arrangement (80% successes) or rejected it (44% successes)."

Ellsworth and Levy, supra, footnote 49


245. Chisholm, supra, footnote 50

246. Re Allan and Allan, supra, footnote 151, per Sheppard J.A. at PP. 182-183; Saxon v Saxon, supra, footnote 61.

247. See generally Leon, supra, footnote 48 and Bersoff, supra, footnote 63, at P. 42.

248. Wakaluk v Wakaluk, supra, footnote 243
249. Bradbrook, supra, footnote 225, at P. 560.


251. Re Agar-Ellis, supra, footnote 31; Thomasett v Thomasett, (1894) P. 295.

252. Act No. 53 of 1975

253. The practice of the Court is not even to make a consent order without first ascertaining the wishes of the child.

254. The only example of special circumstances that has been accepted by the courts thus far is where there is evidence that physical or moral danger will result if the child's wishes are carried out (In the Marriage of Todd (No. 2) (1976) 1 Fam. L.R. 11,186 per Watson J. at P. 11,191). It still remains to be seen how this exception will be interpreted.

255. C.f. the situation in some areas of the United States where children of a stipulated age are allowed to select their custodial parent. See O'Neil, "Child's Wishes as a Factor in Awarding Custody" (1965) 4 A.L.R. (3d) 1366, at P. 1399.

256. S.B.C., 1960, c. 4

257. e.g., Stone reports that, "... leading members of the medical profession have expressed the opinion that children aged 6 or 7 years, even if below normal intelligence, may have decided views about their custodian, and should be heard." (Stone, "The Welfare of the Child", Baxter and Eberts (Eds.), "The Child and the Courts" (1978) 229, at P. 242.). Also see British Columbia Royal Commission on Family and Children's Law, Part vi, "Custody, Access and Guardianship" (1975), PP. 13-14.

258. e.g. See the Model Custody Act proposed by the Family Law Section of the American Bar Association (Foster and Freed, "Child Custody (Part II)" (1964), 39 N.Y.U.L. Rev. 615, at PP. 628-629.). Also see the California Civil Code (1954) Section 138 and the references cited in footnote 239, supra.

259. Supra, footnote 247, at P. 433
Unfortunately, there is also a danger that the possibility of influence will increase proportionately with an increased acceptance by the court of a child's preference.

In *Kroll v Kroll*, (1976), 5 F.L.D. 92, though, the effect was one of strong hatred for the non-custodial parent. The psychiatrist involved in the matter indicated that the intense dislike of the husband by the mother would be obvious to the child, and in subtle ways would "rub off" on her.

Similarly see *Bradbrook*, supra, footnote 225, at PP. 559-560, and *More v Primeau*, supra, footnote 37, at P. 265.

In the case of *In the Marriage of Todd* (No. 2), supra, footnote 254, Watson J. referred the child to counselling by a Court counsellor before he would let her express her wishes definitely to him. Also see *Smith v Smith* and *Morrow*, supra, footnote 181 and *Sanness v Sanness*, (1977), 6 F.L.D. 61.

But see *Sanness v Sanness*, supra, footnote 271, where the court thought it best not to have the child represented at the further hearing.

275. Kroll v Kroll, supra, footnote 263, at P. 95. C.f. Archibald v Archibald, (1977), 6 F.L.D. 275 where Provenzano C.C.J. disregarded the wishes of the oldest child because he felt that the same were only expressed to escape the discipline of the father. He also rejected the preferences of the younger children because their reasons did not appear to him to be substantial ones.

276. Supra, footnote 250

277. Ibid at PP. 765-766

278. C.f. Knowles v Knowles, supra, footnote 176, where it was held that the preference of a child as to custody should not be considered at the age of 6 years.

279. Sharpe v Sharpe, supra, footnote 244; Re Bennett Infants, supra, footnote 234; H v H (1976), 71 D.L.R. (3d) 161; Kroll v Kroll, supra, footnote 263.


281. e.g., in Kroll v Kroll, idem, the wishes of the child as to access were accorded full effect even though Aikins J. found (at P. 95) as follows:
"There is nothing in what was said to me by (the child), or in any of the other evidence that I have heard, which would support the conclusion that the father is for any reason of conduct, character, or otherwise, unfit as a parent and that he should not have access to his daughter".

282. (1976), 28 R.F.L. 171

283. Ibid at P. 173


285. In the United States, a Supreme Court has recently held that a lower court erred in ordering visitation without ascertaining the children’s wishes (Clark v Clark (1978), 4 Fam. L’T Reporter 2677).

286. Supra, footnote 48, at PP. 406-407. Also see Bersoff, supra, footnote 63, at P. 43
287. The case of Currie v Currie, supra, footnote 235, provides an excellent example of the wrestling that a judge is required to undertake when confronted with the views of a child. Fortunately, there, McDonald J. was prepared to come to grips with the same.

288. e.g., as in Re Milsom, supra, footnote 133. Also see Bradbrook, supra, footnote 225, at P. 560.

289. Supra, footnote 63

290. Ibid at P. 40 et seq.

291. Infra at P. 75

292. It must also be appreciated that judges very often take comfort in the fact that an order for custody is subject to variation in the event of changed circumstances. Indeed, many judgements conclude with remarks to the effect that if the unsuccessful parent does this or alters that, then the decision will be reviewed. Mnookin, supra, footnote 10, at P. 282, sees this as an unavoidable consequence of the use of an indeterminate standard such as the best interests of a child for the resolution of a custody dispute.

293. Although there is specific provision in the Family Relations Act, 1978 (S.B.C., 1978, c. 22) for the granting of access (Section 35), this is not the case under the Divorce Act, 1968 (R.S.C., 1970, D. 8). However, it is accepted that the power to award custody necessarily includes the power to award access.

294. e.g., in Price v Cargin and Cargin (1956), 4 D.L.R. (2d) 652, aff'd 8 D.L.R. (2d) 2, although the proven lack of bona fide parental feelings on the part of the father played a decisive role in the matter of granting custody, such was not the case on the question of access. Also see Case v Case, supra, footnote 118, where the mother's homosexuality affected custody but not access.

295. Alder v McLaughlin et al. (1964), 46 D.L.R. (2d) 12; Podolsky v Podolsky (1975), 26 R.F.L. 321. An extreme example of apprehended dangers to the child occurred in Davis v Davis, supra, footnote 222. There, the child was mentally ill and required the environment provided by the unemotional father rather than the humane and highly emotional atmosphere that the mother could offer. McPherson J. said this (at P. 262):

"The terrible thing that I must do in denying custody
and even access to a wife who is not guilty of any matrimonial offence is to me a shattering experience. Access in this modern day is denied a parent only in extreme cases. I doubt if anyone would suggest that a more extreme case would be found than this one. The access is denied not because of her behaviour but because of the welfare of the child. In my practice at the bar, which was extensive in these cases, and in my period on the bench, I have never before denied access to a mother. I hope and sincerely pray that I never shall again."

Also see Section 407 of the Uniform Marriage and Divorce Act, supra, footnote 19, which is quite blatant in giving the non-custodial parent a right to reasonable visitation unless such "visitation would endanger seriously the child's physical, mental, moral, or emotional health."

296. Stroud v Stroud (1974) 4 O.R. (2d) 567 at P. 574. However, in this case the court came down on the side of the best interests of the child. But see Martiniuk v Martiniuk and Kowerchuk, supra, footnote 280, where the court not only downplayed the concept of the best interests of the child but continued the father's access rights in the face of strong psychiatric evidence predicting harm to the children.


298. Ibid at P. 338


300. Goldstein, Freud and Solnit, supra, footnote 8, at P. 38.

301. Indeed, in Pierce v Yerkovich (1974), 363 N.Y.S. (2d) 403, the custodial parent called Professor Solnit himself to give evidence on an application for access. His evidence was in terms of the thesis in his book, yet the court refused to accept his recommendation, saying (at P. 421):

"...the court totally rejects the specious notion so ingenuously urged by Professor Solnit and his co-authors that the custodial parent should have the sole right to determine in the name of the
best interests of the child whether the non-custodial parent should be permitted or denied association with his own child. Experience and common-sense teach that, given the imperfections of human nature from which flow the bitterness and resentment which all too often accompany a marital or illicit love affair breakup, no one parent can, under such circumstances, be safely entrusted with a power so susceptible of abuse. The authors' solution to the frictions engendered by the selfish desires of separated parents envisions an unattainable ideal wherein the custodial parent always acts from the purest, noblest and loftiest motives and never from selfish, base or crass ones. Until such time as that ideal is more nearly approached than experience shows is presently the case, this court will retain its prerogative of making decisions, however difficult and freighted with potential for good or ill in cases involving the lives and welfare of its wards."

Also see O v O, supra, footnote 297, and Whitehouse v Whitehouse (1970) 1 R.F.L. 294, but note Reynolds v Toi (1975), 21 R.F.L. 171. Rosen, supra, footnote 190, at PP. 117-118, has also taken the authors to task on the basis of their theory and argued that joint custody is the most appropriate solution.


303. Supra, footnote 296

304. Ibid at P. 574

305. Also see Re Wright, supra, footnote 297, but note Ader v McLaughlin et al., supra, footnote 295 and Martiniuk v Martiniuk and Kowerchuk, supra, footnote 280.

306. Supra, footnote 263.


309. (1975), 4 F.L.D. 83


312. Also see Parkinson v Parkinson (1973) 3 O.R. 293


314. The Ontario Supreme Court has even ordered that during periods of supervision, the custody of the children be in the person exercising such supervision. O v O, supra, footnote 297.

315. Supra, footnote 307, at PP. 550,552. Also see Evershed v Evershed (1882), 46 L.T. 690.

316. In Farden v Farden (1972), 8 R.F.L. 183, the father had been undermining the authority of the mother and influencing the children against her. To contend with this the court upheld a judgement severely limiting the extensive right of access that the father had been enjoying. Also see Re Stroud and Stroud, supra, footnote 296, and Re Milsom, supra, footnote 133. But note Shapiro v Shapiro, supra, footnote 250.

317. Martiniuk v Martiniuk and Kowerchuk, supra, footnote 280.

318. Re Stroud and Stroud, supra, footnote 296; Re Milsom, supra, footnote 133; M v M, supra, footnote 307; Reynolds v Toi, supra, footnote 301.

319. Supra P. 90

320. It has been held that breach of neither an access order (R v Rupert (1974), 16 R.F.L. 325), nor a custody order (R v Andrews (1977) 4 R.F.L. (2d) 224) is punishable under the Canadian Criminal Code (R.S., 1970, c. 34).


322. Re Maestrello and Maestrello (1975), 57 D.L.R. (3d) 663.

323. Supra, footnote 280

324. Ibid at P. 46
130

325. (1977), 28 R.F.L. 1

326. See also Dair v Dair (1973), 8 R.F.L. 330, where the court refused to include an order for payment of arrears of maintenance in the decree nisi because the wife had taken no prior steps to enforce the previous order and had denied access to the husband.


328. R.S.C., 1970, D. 8

329. Supra, footnote 206, at P. 4

330. Supra, footnote 282

331. Ibid at PP. 172-173

332. Supra, footnote 8


334. For a similar order made by an English Court see Juna v Juna (1972) 2 All E.R. 600.

335. Rosen, supra, footnote 190


337. Huber v Huber, supra, footnote 333

338. Indeed, if the theories of Goldstein, Freud and Solnit, supra, footnote 8, are accepted there can be no room for these orders at all. According to the authors (at P. 38), one person must be awarded custody and he or she must then have sole authority to decide under what conditions the child will be raised.


340. Rosen, ibid

342. However, it is interesting to note that **Rosen**, supra, footnote 190, suggests that one follows from the other; i.e., if the parents can co-operate in these circumstances then children find it easy to adapt to a variety of arrangements.

343. **F v F and C** (1966), 56 W.W.R. 368; **McCahill v Robertson**, supra, footnote 341; **Mnookin**, supra, footnote 10, at P. 233 footnote 26. Also see **Dodd v Dodd**, (1978), 4 Fam. L. Reporter 2302, at P. 2304, for an illustrative discussion concerning this type of order.

344. **Hill v Hill**, supra, footnote 99
CHAPTER 4

IMPROVING THE DETERMINATION OF
THE BEST INTERESTS OF THE CHILD

(1) INCREASING THE INPUT FROM THE CHILD INTO THE DECISION-MAKING PROCESS

From the preceding discussion of how courts treat the principle of the best interests of the child, it can be seen that judges generally tend to skirt the issue and attempt to decide child placement without coming to grips with the child himself. I again stress that this is inexcusable in light of the circumstance that the entire exercise concerns the child and how best to secure his or her future development. It is vitally important, both to the child and to society in general, that the decision is made which affords the child the best opportunity to become a responsible member of the community. To be as certain as possible of achieving this result I suggest that there is a need for two fundamental changes. Firstly, the input by the child needs to be increased, and secondly, the courts need to be receptive to such input. The latter alteration is an important one because all too often courts do receive input from a child in various forms, but the same is not accorded the weight it deserves.¹ This is not to say that the court should necessarily abdicate its function as the final arbiter; it is simply intended that courts become more child-orientated. This in turn will provide the court with the
necessary balance and the proper foundation on which to reach a decision which does in fact promote the best interests of the child.

Courts in various jurisdictions have attempted a piece-meal approach to this change of emphasis. In other words, one judge might simply interview the children, another judge might only order the children to be independently represented, and yet another might just call for a report from a social welfare worker. With the greatest respect, such an approach is entirely inadequate. What is required is for the court to use every available method at its disposal in order to understand the child and his or her environment.

Yet, as I have indicated previously, it is clearly difficult for a judge steeped in the traditions of the adversary system to come to terms with this emphasis on the child. Such judges treat disputes regarding custody as no different from any ordinary civil suit; the parents are the litigants with the child as the prize. The rights of the child are identified with the rights of the parents, and in this fashion courts are able to talk in the same breath of the best interests of the child and the rights of the parents. The law has proceeded on the assumption that parents can adequately represent the interests of the children. This may be true in a stable and secure family environment, but it has inherent
difficulties when that family environment disintegrates. It is then that the differences between children and their parents become so prominent. As Goldstein, Freud and Solnit comment³:

"Children are not adults in miniature. They are beings per se, different from their elders in their mental nature, their functioning, their understanding of events, and their reactions to them."

There can be obvious conflicts of interest.

The adversary system has been universally blamed for the emphasis being placed on the parents rather than on the children. Apart from perpetuating the winner-loser syndrome it allows for the child to be haggled over. One parent might use custody or access to gain an advantage in respect of maintenance or property settlement. Indeed, the traumatic experience of a custody trial may only eventuate because a parent who is not really interested in custody is using the same as a lever against the other party.

Yet, it must be remembered that it is not only the courts that are to blame. Lawyers, too, revel in the adversary system because that is the system in which they are trained. The public can be singled out as well. There is a pre-conceived notion of what should happen in a court-room, and not only the public, but the parties themselves, expect a forum where their dispute can be resolved in traditional fashion. But the real culprit is the legislature in allowing
family matters to be handled in this fashion. Only in recent times has it been realized that such matters require specialist courts staffed by judges who "by reason of training, experience and personality", are suitable persons "to deal with matters of family law".\textsuperscript{4} The push in Canada over the last few years has been to set up Unified Family Courts in the Provinces with the assistance of the Federal Government. Unfortunately though, the constitutional division of powers has proven difficult to overcome in making these courts truly unified.

More significantly, even with the introduction of these specialized courts the adversary system has continued to be in vogue, and again I suggest that the same is here to stay, at least for the immediate future. In Australia there were grand visions of leaving the adversary system behind with the commencement of the new Family Court in early 1976. Judges went to great lengths to impress upon counsel and the parties that the proceedings were not adversary by nature. Indeed it was forbidden to refer to an action as "Smith \textit{versus} Smith", the proper title being "Smith \textit{and} Smith". Yet, all these efforts were to no avail, because once the courts commenced hearing defended custody matters in late 1976, the old habits returned and the adversary process came to the fore once again. Fortunately though, the court now had at its disposal all the devices considered necessary to place the child's views, thoughts and feelings in focus. These included the use of
support staff comprising Court counsellors and welfare officers and a simple straightforward power to order that a child be separately represented. Thus the adversary process took on a different slant and the court was perhaps able to enjoy the best of both worlds.

Whether the adversary process is the culprit or not, the first priority is to increase the input of the child into the decision-making process. I suggest that this can be achieved within the existing scheme of things by a combination of methods and procedures. The most important of these is the separate representation of the child, not only during the actual hearing but as soon as practicable after the disintegration of the family unit. Next there is the presentation of evidence from the behavioural sciences concerning the particular psychological and social influences at play. Such evidence can take the form of reports submitted by psychiatrists, psychologists and social welfare workers, as well as direct evidence from the same at the hearing. Nor should it be a case of the child being seen and not heard. The question of an interview by the judge should be canvassed as well as the prospect of the child filing affidavits and giving oral evidence. Finally, emphasis should also be placed on conferences at which the child is represented, both prior to the institution of proceedings and prior to the actual hearing. In other words a trial over custody must be seen as a last
resort to resolve the dispute.

Although these methods are not new, their use in the past has generally been haphazard and sporadic. Courts have even taken the attitude of preferring one method over another. However, each method must be viewed in the context of its particular purpose or value. It may be true to say that evidence from a behavioural scientist is a better method of informing the court of the thoughts and feelings of a child than direct evidence by the child or an interview by the judge, but only in so far as it provides the court with an insight into the psychology of the child. It is not necessarily the better method for gauging the child's character and personality. This purpose is ideally served by the judge having direct contact with the child. I suggest that the methods should each be viewed as a link in a chain leading from the child to the judge with each link supporting the other. Only in this fashion can the judge be placed in the best position to promote the welfare of the children.

However, I again point out that even if the input of the child is increased by the use of these methods the court must still be receptive to such input. The onus is on the judge here and he must be careful not to lapse into allowing the interests of the parents to dominate.
(a) **IS CHILD INPUT FEASIBLE?**

Before canvassing the methods of providing input from the child into the decision-making process, it is necessary to briefly consider the question of whether children are capable of providing input in the first place. I say briefly because this is not as critical an issue as it may seem at first blush. It must be borne in mind that involvement by the child is not necessarily direct involvement, and, indeed, as we shall see, direct participation in the proceedings is to be discouraged because of the possible harmful effects on emotional development. Rather, the input will be of an indirect nature. It will be presented to the court by the child's counsel in the form of evidence from third parties, including behavioural scientists, and in the form of submissions from such counsel. Admittedly, the judge will need to assess this input for himself, but hopefully he will rely to a large extent on independent counsel and the behavioural scientists in this regard. It will only be where the child gives evidence in the proceedings, or where the judge conducts an interview, that he will be specifically concerned with the question of the child's capacity. Even here though, he can receive valuable assistance from the child advocate and the social scientists.

It must also be remembered that the input does not solely comprise the expressed views of the child. Otherwise,
to say that the input is provided through an intermediary would count for nothing; it would merely be pushing the question of the capacity of the child one step away from the judge and letting the intermediary grapple with the same. In addition to the wishes, thoughts, feelings and preferences of the child, a significant part of any input will be evidence of the child's circumstances, his physical and psychological environment, and the results of indepth assessments of the child. The capacity of the child cannot be said to be a necessary ingredient of input of this nature.

However, the question of the capacity of the child is not eliminated altogether. It specifically raises its head when the child expresses wishes of its own, when deciding how best to represent the child, and in general, when determining how the child should be treated and approached.

The question is one that must be directed to the behavioural scientists, both for the purpose of obtaining general assumptions about capacity, and for the purpose of dealing with the particular child involved. However, the unfortunate truth is that there is very little relevant empirical data available. The social sciences have been unable to provide acceptable criteria by which to determine the ability of a child to make a conscious choice in a custody dispute. Admittedly, there are reams of literature dealing
with developmental child psychology, but there is a dearth of research which focuses on legally relevant variables.  

The ability to communicate, the ability to understand others, the ability to plan, cognitive ability, and reliability, have all been identified as behavioural attributes relevant to a child instructing counsel, and, I suggest relevant generally to any reasoned choice that a child must make in a custody dispute. Yet, as Leon says, "(t)here are ... few examinations of these attributes that render them of value in formulating specific legal policy." 

Even if one looks to the general psychological research and theory regarding children, an ambivalent attitude is apparent. On the one hand, recent studies indicate that a young child is a sensitive individual with an active mental life. Yet, on the other hand, psychology has continued to play a major role in promoting the societal view of children as incompetent and totally dependent on adults. Naturally, this dichotomy leaves anyone attempting to find clear-cut principles in a predicament. 

However, in a sense, legal commentators searching the available scientific data for some guidance have contributed to their own disappointment. The assumption is generally made that the age of the child is the centrepoint, and commentators
expect to find evidence distinguishing a child’s ability to choose according to its age. The flaw is that age is an unreliable indicia of a child’s capacity, and social scientists have understandably shied clear of talking in terms of specific ages. Of course, there have been clinical studies of children of different ages, but one wonders at the validity of the results given the impossibility of having a large enough control group to allow for the variation in development of children of the same age. In any event, it has not been possible for these clinical studies to produce findings concerning children of one particular age. At the most, the findings relate to age groups, such as up to 7 years, between 7 and 13 years, and 13 years and above. Accordingly, at best, the results are suggestive of patterns of behaviour.

The trend of recent studies has been to concentrate on the general reaction of children to the disruption of the family unit. There has been very little research dealing with the responses of children to being asked to choose between parents. However, in one such study by Levy, an American child psychiatrist, he found that children exhibited three differing responses to that question: unwillingness and inability to choose, ambivalence and anxiety in their commitment to their choice, and emphatic preference. He found these responses amongst children with an age spread of 5 to 13 years, but again there can be no relevance to the question of
the capacity of a particular child outside the group studied.

Given this background, the answer to the question whether it is feasible to expect input from a child, can only be that it depends on the behavioural attributes of the particular child. There must be an individual assessment of each child involved in a custody dispute, and it is impossible to rely on general assumptions. Indeed, there is something abhorrent in dealing with children on the basis of a presumption about their capacity. It takes away the child's individuality to treat him as though he is only capable of doing what most children of his age group can do.

However, as we have seen, Leon has suggested certain rebuttable presumptions concerning a child's capacity to instruct counsel. He divides children into three age groups; up to 5 or 6 years of age, between 7 and 13 years of age, and over 13 years of age. With the first group the presumption is that the child's capacity is suspect. As regards the second group, the presumption is that the child

"has developed a sufficient degree of capacity to justify taking his preferences into consideration in the decision-making process."

With children in the final group, there is a presumption that they have

"a sufficient degree of capacity to instruct legal counsel."
Leon built these presumptions out of the available behavioural science knowledge, but he freely admits that the same is sparse, and that there is a need for more empirical research. He even concedes that

"the selection of a specific age as a cut-off point is an arbitrary process."

It is significant, I suggest, that the proposal is merely put forward as a tentative one, and that a great deal of emphasis is laid on the fact that the presumptions are rebuttable. Indeed, it seems to me that because of their shaky foundations the presumptions will be of little use, and the concentration will still be on the individual behavioural attitudes of the particular child involved.

In addition to these attempts to use general assumptions, a disturbing tendency in assessing the capacity of a child is to look to the cognitive ability and moral judgement of adults as the yard-stick. Apart from the fact that this perpetuates the adult orientation of the resolution of custody disputes, the criticism that can be made of this approach is that it assumes a mature stage of intellectual and moral development in adults which is not always present in reality. In any event, who is to say that the opinion of an adult should be accorded more weight than that of a child. There is certainly no irrefutable evidence indicating this, and it is no more than a societal presumption of how things ought to be. This
exemplifies again the dangers of relying on broad generalisations concerning the capacity of a child.

Another important factor to bear in mind when assessing the ability of a child to provide input into the decision-making process, is that the same will vary according to how the child is treated. For example, no matter how sophisticated a particular child's mental processes may be, if he is not made aware of the context in which his preferences will be looked at, and if he is kept in the dark about what is happening generally, he will not be in a position to make any useful contribution. Now, I suggest that the most appropriate person to ensure that the child is in fact in such a position is independent legal counsel. With the assistance of behavioural scientists he can provide the most conducive environment possible for the capacity of the child to be utilised to its fullest extent. Capacity in the context of this discussion is a two-way concept. Most children may have the ability to adequately express their wishes, views, thoughts and preferences, but that ability may need to be tapped. For instance, the ability to communicate has been mentioned as a relevant behavioural attitude, yet the child's communication facility may be, in part, a function of the lawyer's experience and skill in communicating with children.

Again, the bottom line of this discussion is that each
child is different, and the question of whether it is feasible to look for input from the child is one that cannot accurately be answered by reference to general presumptions; each child must be individually assessed in this regard.

It is generally felt that child development is a product of the interaction between internal biologically ordained change and the environment. However, at the very least, a child is potentially capable of participating in its own development, and it is the rationale of this paper that the opportunity to fulfil this potential should be given. I suggest that the circumstance which is preventing this is not anything inherent in a child's make-up, but is rather the fact that contemporary society has a particular conception of childhood which determines policies and decisions concerning children. That conception is one of incompetence. In the words of Mnookin:

"Laws that at once saddle children with special burdens and disabilities and pamper them with special protections are typically justified by and premised upon the child's assumed deficiencies - intellectual, physical and moral."

Thus, what is needed is for society's conception to be brought in line with reality. The concentration must be on relevant developmental research, the lack of which many commentators believe is the cause of this discrepancy. Most research has had little to say about children and their daily
lives, and thus fails as a guide both to understanding them and to formulating policies to deal with them.

The fact is that children are not as incompetent as developmental theories would have us believe. Those sociologists who have concentrated on the child's actual behaviour in other than an experimental setting invariably conclude that the same is both intellectually and socially complex. For instance, Denzin found as follows:

"Children's work involves such serious matters as developing languages for communication; presenting and defending their social selves in difficult situations; defining and processing deviance; and constructing rules of entry and exit into emergent social groups. Children see these as serious concerns and often make a clear distinction between their play and their work. This fact is best grasped by entering those situations where children are naturally thrown together and forced to take account of one another."

However, it is obvious that not all children possess this competence, and the perennial question of when does the transition take place, again becomes important. Although I have criticised the use of presumptions involving the age of a child in determining its capacity, it cannot be denied that a broad distinction can be made between very young children and others as far as psychological functioning is concerned. In the former group the process is primitive, direct, impulsive, and noncognitive, while in the latter it is more controlled, thoughtful, and logical. Skolnick reports the general
consensus as being that the transition from one type of functioning to the other takes place between the ages of 5 to 7 years.\textsuperscript{41} At that time the step from childhood to the higher level is made. Of course though, it is not a case of the child being incompetent one day and totally competent the next. This age merely marks the beginning of the attainment of the higher level of competence. This accounts for findings by sociologists that certain abilities such as communication,\textsuperscript{42} understanding others, intellectual capacity and the ability to plan, develop gradually with increasing age.\textsuperscript{43} As Skolnick says\textsuperscript{44}:

"Before the age of 5 to 7 years, maturation plays a major role in developmental change; afterwards, learning and culture become major forces influencing psychological development."

However, it can still be seen that, even given the availability of this one general presumption, it will be necessary to look to an individual assessment of the particular child in order to determine capacity. The presumption can be no more than a working guide.
(b) THE METHODS OF ACHIEVING INPUT FROM CHILDREN

(i) INDIRECT METHODS

INDEPENDENT REPRESENTATION OF CHILDREN

Separate representation of children has been with us for some time now but it is still an evolving concept with some degree of scepticism apparent regarding its worth. Yet, if it is accepted that children should play an increased role in proceedings concerning their future placement, even to the extent of being treated as parties in the fullest sense of the word, it seems to me fundamental that they be separately represented.

Admittedly, adult parties often choose not to be represented, not only in Family Law matters but in respect of any matter that comes before a court. Children though, do not have that freedom of choice.

An examination of three common types of issues involving children will illustrate the need for separate representation. The first category of cases is that in which there are allegations of maltreatment of a child by one parent or the other, and here it is hard to see how the interests of the child can be served without bias by either party - that is,
there is on the one hand a conflict of interests between the child and the party alleged to have injured the child (if such injury is denied) and on the other hand a desire to use the child to prove the mal-treatment of which the other party, and not necessarily the child, complains. The child's reaction to the alleged treatment and his attitude towards his parents are not properly heard except through the child's legal representative being able to advance these matters. 47

Then there is a category of cases in which allegations are made that a child is uncontrollable while in the custody of one parent, but manageable, or said to be so, while in the custody of the other. In cases of this kind there must obviously be a conflict of interest between the parent making the assertion and the child about whom it is made. The force of the evidence is directed towards a denigration of the child in circumstances where the child has no opportunity to defend himself from the attacks being made upon his personality.

The third category of cases is where the thrust of the evidence is directed towards proving that not only is one parent unfit to have custody, but is unfit to have any contact with the child at all. In cases of this kind, it is important to have the child separately represented, so that the court has some independent evidence of the impact of parental behaviour upon the child to assist in determining whether or
not continued contact with one parent is in the child's best interests. It is the right of a child that he or she have and enjoy a relationship with his parents as near as possible to that enjoyed by a child in a unified family. Access and periodic visiting to preserve and develop this relationship is important to the child and should not be denied him or her unless it is contrary to his or her sustained wishes and those wishes are reasonably based. Too often, in this class of case, the parent seeking to deny access is more concerned with vindicating his feelings towards the other parent than with an unbiased appraisal of what the interests of the child require. The court is better able to discharge its duty to the child if it has the assistance of counsel for the child.

The point is that in a custody dispute the interests of the children rarely coincide with the interests of both parents. Thus, unless there is an independent medium through whom the interests of the children can be conveyed to the court, there is a very real risk of them not being brought to the court's attention at all.

(1) **THE CHOICE OF THE INDEPENDENT REPRESENTATIVE**

Given the need for separate representation of children the first question is who should provide the same. It is generally assumed that this person should be a lawyer, yet it
is not unreasonable to suggest that the advocate be drawn from the behavioural sciences or even from some other walk of life. The aim of the exercise is to safeguard the interests of the child and place his or her wishes before the court in an unbiased fashion. As we have seen, there are a myriad of psychological influences at play when a family unit dissolves, and who better to unravel those influences and apprise the court of how best to ensure that the future development of the child is not prejudiced, than a practitioner of the behavioural sciences. On the other hand, it is important that the advocate have the confidence and trust of the child, and that the child feels comfortable with the advocate. Accordingly, it may be appropriate to enlist the services of a close relative or friend of the family to place the views of the child before the court.

However, on the assumption that child placement will continue to operate within the adversary system, I suggest that the legally qualified advocate is the ideal person to represent the child. Only he can use the system to work for the child, whereas both the behavioural scientist and the lay person will find themselves at a distinct disadvantage in this regard. Yet, this is not to say that legal counsel will have all the answers. The majority of lawyers have little or no knowledge of child psychology and, of course, there will be no pre-
existing rapport between counsel and the child. The key though, is that a lawyer is able to marshall the services of the behavioural scientist and the close relative or friend, if necessary, to provide him with the proper basis on which to represent the child.\textsuperscript{48}

(2) **THE APPOINTMENT OF INDEPENDENT COUNSEL**

In British Columbia, and for that matter in all common law jurisdictions, the concept that a child needs representation in court proceedings is not peculiar to custody disputes. Historically, children have been regarded as labouring under a legal disability and requiring benevolent protection in law. Thus, in litigation a child can only act through an adult person who makes decisions on the child’s behalf. This person is known as the child’s guardian *ad litem* (or next friend) and can be the child’s parent, a relative, or even a friend. In British Columbia, the Official Guardian may also acquire this role.\textsuperscript{49}

Once appointed, the guardian *ad litem* instructs legal counsel in the particular matter at hand. Thus, it is somewhat different from direct representation in court, yet it illustrates the point that where a child is vitally concerned in legal proceedings, he or she must have representation.
The situation more akin to the independent representation required in custody disputes is that pertaining in criminal cases. Here children have counsel acting directly on their behalf, yet even here there is still an important difference in that such counsel are retained and instructed by the children themselves.\textsuperscript{50} It is rare for independent counsel to be retained directly by a child in a custody dispute.

In most jurisdictions in Canada there is little legislative authority for the court to appoint independent legal counsel to represent children. It has generally been a case of the court having to mould existing procedures to cater for the demand for children to have a separate voice. For example, in Ontario and Saskatchewan the courts looked to the established concept of the guardian, \textit{ad litem} and called upon the Official Guardian to assume the role of the child's representative in a custody dispute. Not only was this foreign in nature to the ordinary purpose of the guardian, \textit{ad litem}, but custody matters were not within the province of the Official Guardian, he being traditionally the protector of children's property interests.\textsuperscript{51} Indeed, this argument was taken up by the Official Guardian in the Saskatchewan case of McKercher \textit{v} McKercher\textsuperscript{52} together with the additional points that there was no allowance in the Guardian's budget for providing this type of service and the necessary facilities were
lacking. Yet, Bayda J. held that he had jurisdiction to order the Official Guardian to act. He felt that the office of the Official Guardian was part of a legislative scheme to enhance the welfare of children generally, and his duties and functions could not be limited to specific legal problems involving infants. In Ontario, the cases of Re Reid and Reid and Re Dadswell paved the way for the use of the Official Guardian as independent legal counsel for children in that Province.

Of course, there is always the jurisdiction of a court of equity representing the sovereign as parens patriae to protect the rights of any person under a legal disability. It is quite clear that courts having this jurisdiction can appoint counsel to act for children. Yet, it is important to realize that such counsel are appointed as amicus curiae and ostensibly are intended to assist the court. Their powers are determined solely by the court appointing them, and the incidents of independent representation are non-existent unless specifically provided for. In other words, the amicus depends on the court for his right to call witnesses, to crossexamine, and even to appeal.

In Alberta, it has been the practice to appoint counsel to assist the court and the child in this capacity of an amicus curiae. This practice commenced in 1966 in the
unreported decision of *Woods v Woods*. There, Manning J. appointed legal counsel to represent the children in the custody dispute before him. He directed that such counsel should have power to make an independent investigation of the circumstances and to appeal at the trial on behalf of the children with the right to examine and cross-examine witnesses and to call evidence.

However, the full extent of the inherent equitable jurisdiction in this regard is unclear. Canadian courts may very well follow the lead of their American counterparts where some extraordinary developments have occurred. For instance in the Ohio case of *Barth v Barth* the trial judge made the children of the divorcing parents defendant parties to the action and appointed a guardian *ad litem* to appear on their behalf. No authority was cited for making the children parties to the suit, but it can be assumed that it was done under the inherent power of the court. The appointment of the guardian *ad litem* was made pursuant to an Ohio statute requiring appointments for infant defendants in suits against them.

An equally extraordinary situation occurred in a recent case before the New York Supreme Court. The children who were the subject of a custody dispute retained an attorney to represent their interests before the court. The court then proceeded to treat the children as real parties for all
practical purposes. They remained in the courtroom throughout the trial except when they elected not to attend. Their counsel was also permitted to call witnesses and to cross-examine other witnesses. The court displayed no doubt as to their ability to permit this course of action and again it must be assumed that the inherent equitable power was being exercised.

Law Reform Commissions across Canada have decried both the lack of legislative authority for separate representation of children in custody disputes, and the sporadic use of such representation when the same is available. For example, the Law Reform Commission of Ontario in its Report on Family Law said this:

"It seems to us inconsistent, therefore, that so far in the development of the law in this Province the right of a child to the protection of his own counsel in proceedings relating to his upbringing has not been established in any more than isolated instances. We believe that decisions concerning a child's physical and emotional welfare are as worthy of the state's special interest as those concerning his property rights, and that courts may be in the most informed position only when there has been an objective evaluation of a child's best interest by a person with legal qualifications who may present the child's case to a court.".

Prince Edward Island is a jurisdiction where there is in fact legislative authority for a child to receive separate legal assistance, but the criticisms of the Ontario Law Reform Commission are still very much applicable. In divorce suits
the Director of Child Welfare screens all petitions involving children and applies for the appointment of a Queen's Proctor where appropriate to ensure that the children's interests are protected. However, this is a very unreliable process because the only information before the Director is the petition which is required to be served on him. Moreover, the Queen's Proctor takes a very low-key stance. He merely adopts the role of a social worker, interviewing the spouses and submitting a written report to the judge. He is discouraged by the judges to make any recommendation in his report and he never assumes the role of advocate for the child in court. In these circumstances it is not surprising to learn that the judges find the Queen's Proctor of little assistance.

One jurisdiction which has been legislatively active in this field is British Columbia. In 1974 the Unified Family Court Act was enacted, Section 8 of which provided for the appointment of family advocates to act as counsel for children. This Act has now been repealed by the Family Relations Act, 1978, but Section 2 of this latter Act continues the system of family advocates. That Section provides:

"(1) The Attorney-General may appoint a person who is a member in good standing of the Law Society of British Columbia to be a family advocate.

(2) A family advocate may, notwithstanding any other Act and subject to the law of Canada, attend a proceeding under this Act or respecting
(a) the adoption of a child, or
(b) the guardianship of a child, guardianship of the person of a child or guardianship..."
of the estate of a child, or
(c) the custody of, maintenance for, or access
to a child, or
(d) the alleged delinquency of a child, or
(e) the Protection of Children Act
and intervene at any stage in the proceeding:
to act as counsel for the interests and welfare
of the child."

However, there are important differences between the
two sections. Under the previous provision the advocate
intervened on his own initiative or upon the court's instruction.
Yet, under Section 2 of the new Act it seems that intervention
is left entirely to the discretion of the advocate himself.
There is no power for the court to order the advocate to act;
at most there could only be a request emanating from the court.

Under the previous legislation the practice was for
the court to request that counsel be appointed for a child.
The Attorney-General would then either appoint one of the two
full-time family advocates or, if they were unavailable, an
ad hoc family advocate would be appointed from the legal
profession for the individual case. There is no reason why
this practice cannot continue under the new legislation but,
of course, on the understanding that the court is not in a
position to demand that the advocate intervene. It remains
to be seen what the policy of the Attorney-General will be in
this area.
This is obviously a highly unsatisfactory situation for a court to be in. The court should have the power to appoint counsel to act independently for children. Of course, there is always the parens patriae power to fall back on, but as we have seen there are limitations on that power, and a court must be extremely careful in defining the rights and duties of the amicus when appointing the same. One alternative might be to follow the lead of Ontario and Saskatchewan and utilize the services of the Official Guardian. Section 4 of the British Columbia Official Guardian Act would seem to permit this. That Section directs the Public Trustee to

"act as guardian ad litem of all infants whenever such a guardian is required under Rules of Court and other orders."

Yet, I emphasise again, that what is required is a clear legislative mandate authorizing the court itself to appoint legal counsel to represent children.

In the Australian Family Law Act, 1975 as amended, Section 65 provides the Family Court with such a mandate. That Section states as follows:

"Where, in proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of the marriage, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it
thinks necessary for the purpose of securing such separate representation."

In addition, regulation 112 (2) of the Family Law Regulations, 1975 as amended, enables the court ordering separate representation to request the Australian Legal Aid Office to arrange such representation. What happens in practice is the court makes an order for separate representation, and whether or not a request under regulation 112 (2) is made, the Australian Legal Aid Office is advised of the order, and arrangements are then made for a member of the legal profession to act for the children. Thus, all costs are borne by the Government.

(3) PRIVATE OR PUBLIC REPRESENTATION?

The obvious question at this stage is whether child advocates should be employed full-time by the Government or drawn on an ad hoc basis from the practising legal profession. It is vital that the right choice is made, because where counsel is appointed, a judge who would normally take it upon himself to look to the child's interests, will rely in this regard on such counsel. Thus, if counsel fails to adequately fulfil his role, the child may be at a greater disadvantage than if no counsel at all was appointed.

The attraction of having full-time advocates is that
they can develop the necessary expertise in acting for children as well as maintain reliable sources in both the investigative and behavioural science fields. Naturally, being Government employees, they would have easier access to Government agencies and the like. Theoretically they would always be available, and in particular for emergencies, but this would naturally depend upon how many advocates there were and their respective work loads. In this regard it is interesting to look at the wide and varied duties of the full-time family advocates in British Columbia. They are not restricted to appearing for children in court and they work as well in other areas of the court's operations. For example, they play a part in the on-going training of family counsellors, they provide assistance to members of the bar, and they advise the public who seek the assistance of the court. In this way the incumbents become truly expert in all facets of the relationship between the family and the law. On the other hand there are disadvantages. In the first place, it may not be possible to attract lawyers with the necessary qualifications and experience, but assuming there is a successful recruitment campaign, the problem is then to retain these people. The danger is simply one of boredom as a result of handling similar cases day in, day out. Yet, perhaps this may be a way of sorting out those lawyers with no aptitude for the type of work. It seems to me that children are interesting enough creatures to provide the advocate with more than enough variety.
However, the major disadvantage of full-time counsel is that they can become identified with the system, particularly if they are employed as a support service to the court and have their base of operation there. Naturally, such identification would be off-putting to the litigants as well as nullifying the advocate's value as an independent, unbiased influence in the resolution of a custody dispute. Although children generally might be insensitive to this identification because of their age and maturity, there is always the possibility of it filtering through to the child and preventing the establishment of the relationship of trust and confidence that is necessary between counsel and child. From the advocate's point of view identification with the system may lull him into a false sense of security. As one commentator has warned:

"He may sit opposite a single judge day after day, and case after case for an extended period of time, and his regular duties will normally bring him into almost daily contact with the probation staff of the court. Under these circumstances the lawyer must exercise constant vigilance and preserve unyielding independence lest his desire to maintain amicable relations with his judicial cohort and with the court and probation personnel reduce him to an ineffective rubber stamp."

In a similar vein it may become difficult for a full-time advocate to always fulfil the dual role of acting as the child's go-between in dealing with the court, and acting as the child's confidant in listening to and understanding his
problems. An oppressive workload may create this difficulty. On the other hand, a private attorney may be less hurried and be able to provide the necessary personal touch.

Utilizing the legal profession on an *ad hoc* basis obviously provides a degree of flexibility and avoids any identity crisis, but I am not at all convinced that this is the answer. In the Australian jurisdiction there are no full-time counsel as in British Columbia, and only private practitioners are appointed to represent children. Moreover, counsel are appointed "willy nilly" with no overt attempt to develop an experienced bar on which to draw. Thus, counsel generally have no particular expertise in representing children and, to me, this is a serious defect which in many instances has completely nullified the effect of the appointment itself. It should be obvious that the qualities required in a child advocate are not inherent in every practitioner. Indeed, at times counsel must discard traditional advocacy and take on the role of a social worker. These are skills which are only acquired with experience, and unless a select bar is created within the profession itself, I suggest that full-time counsel are preferable to *ad hoc* appointments.
Once appointed there would appear to be three roles that counsel acting for children can fill; the traditional adversary role, *amicus curiae*, or social worker. In the words of Bernard Dickins:

"The adversary role is traditionally combative in urging the client's case under strict rules of law and procedure, striving to establish the virtue of his cause by the fact of prevailing. The *amicus curiae* model is comparably legalistic but neutral as to outcome, seeking to assist the administration of justice by advising on law and fact in the hope of counter-vailing more distorting partisan contentions and leading to the best resolution of issues. The social work model is concerned to help the child affected by litigation, as party or otherwise, by proposals, concessions and collaboration to put the children expeditiously into the most satisfactory condition that can be achieved."

In truth, if the task at hand is analysed, a combination of all three models may be required, with emphasis being given to different components according to either the capacity of the subject child, the particular issue at hand, or, indeed, the attitude of the judge. The aim of the exercise is to place the views, feelings and thoughts of the child before the court in a manner untainted by any question of parental rights and interests. Every shred of evidence pertaining to the child's physical and psychological well-being must be presented. Yet, counsel must also make every effort to spare the child the trauma of a bitterly-fought trial.
The inherent problem with counsel acting as a true advocate is the fact that the child's age, disposition, or lack of maturity may prevent the establishment of the traditional lawyer-client relationship. Such a relationship is based on the premise that the client instructs the lawyer who then acts solely on those instructions. Yet, here, counsel may not be able to obtain intelligible instructions for the reasons outlined. Does counsel simply avoid the issue by presenting the facts to the court and leaving it to the judge to make the determination? Or does counsel import into his advocacy his own views and assessment of where the best interests of the child lie. To adopt the latter course is to wear the hats of *amicus curiae* and social worker over the hat of the traditional advocate. Yet in this highly specialized jurisdiction I consider such a stance is essential. The judge requires an unbiased view to counter-balance the partisan attitudes invariably taken by the feuding parents. For independent counsel to provide this input has the desirable effect of preventing the judge from having to descend into the arena of the proceedings in search of the best interests of the child. It also relieves the judge of some of the enormous pressure placed on him by the unenviable task of having to determine the future of the child before the court.

However, it cannot simply be a matter of counsel relying on his own views in the assessment he makes of the best
interests of the child. He must become au fait with both the psychology and the social environment of the particular child. Here he must rely heavily on the opinions of behavioural scientists. I emphasise the word "rely", because it may be that counsel does not agree with the opinion of the expert, yet, unless counsel himself can lay claims to having expertise in the social sciences, I suggest that he should accord due deference to any well-considered, substantiated opinion of an expert in his field. Of course, this is not to say that counsel should settle for one expert opinion if he is unhappy with the same. It is not uncommon for experts to differ in their views and in fact it may be necessary for a number of reports to be obtained before counsel can be satisfied that he has sufficient information on which to base his submissions to the court.

The peculiar position of counsel for the child is illustrated even more acutely when the wishes of the child do not coincide with counsel's assessment of his or her best interests. In a traditional lawyer-client relationship, the lawyer would be obliged to either advance the client's views regardless of his personal opinion or withdraw entirely from the case. However, I do not consider that either alternative should necessarily apply in the situation envisaged. Subject to what I say below regarding the effect of the age, disposition and maturity of the child, I feel that here the duty of counsel
is to apprise the court of both the child's wishes and his own assessment, together with the evidence on which he has reached his conclusion, albeit this may off-set one of the advantages of separate representation itself and leave the judge with a heavier burden to bear.\textsuperscript{90} I see this as the most effective way of counsel fulfilling his dual task of providing input from the child and protecting the child's best interests. However, apart from the effect on the judge, there are three difficulties with this approach, at least one of which may be able to be resolved satisfactorily:

(a) There is the practical problem of how counsel conducts his examination and cross-examination of witnesses. The solution here can only be to emphasise counsel's position as \textit{amicus curiae} and conduct the case from the point of view of providing the court with as much information as possible.

(b) The logical conclusion to be drawn from the fact of counsel going beyond the expressed wishes of the child is that the child does not have full party status. However, it could be argued that counsel is appointed as representative of the interests of the child rather than of the child himself, and this justifies the suggested course of action. The flaw in this argument though, is that in reality counsel represents both the child and the child's interests, and, accordingly, the conclusion may be inescapable that the child is accorded less than full party status in this
situation.

(c) The criticism can be made that by creating a distinction between the situation where a child's intelligible wishes coincide with counsel's assessment of the child's best interests, and the situation where there is no such concurrence, a child may be placed in a disadvantageous position according to whether counsel agrees with his or her wishes or not. In other words, whether a child's wishes are forcefully advocated or not should not be left to the discretion of independent counsel. However, it seems to me that this is one rationale behind the appointment of independent counsel in the first place, and provides yet another example of the need for experienced advocates to be retained. In any event, I suggest that what independent counsel is doing in exercising this discretion is not so far removed from what lawyers necessarily do in representing any other client. The lawyer invariably filters and interprets his client's story, and represents the same in court according to his own assessment of the most effective way of presenting the case, regardless of the client's wishes.

The age, disposition and maturity of the child will become important here, because, as a matter of practicalities, the wishes of a child who is of such an age or of sufficient maturity to make a reasoned choice should be respected. 91 Both
counsel and the court should appreciate that it would be fruitless to place such a child anywhere but in accordance with his or her expressed wishes. On the other hand though, counsel must be certain that such wishes are in fact what the child wants. It may be that the child is mature enough to reach his or her own decisions generally, but this maturity may not have been brought to bear in this particular decision. My practice here was to speak informally with the child about his or her thoughts and explain my own assessment of the situation. Sometimes it transpired that the child had not considered certain factors and was prepared to reconsider his or her stand. Conversely, I recall one occasion where such a discussion revealed that I had been too hasty in my initial investigations. Of course, I never hesitated to involve a counsellor attached to the Family Court in such discussions if I found myself in need of expert assistance.

The need to have independent counsel test the wishes of the children was recognized in the case Hatzioannidis v Hatzioannidis. There, two children, 16 and 14 years of age respectively, filed affidavits in court indicating that they did not want to live with their mother anymore. The Official Guardian happened to walk into the court-room during the course of the trial and the judge requested him to interview the two children and give them independent legal advice. After receiving the report of the Official Guardian Galligan J.
reached the following conclusion:\footnote{94}:

"It seems to me that if I were to order this father to deliver these children to their mother, and if he did so, the children would refuse to go with their mother ... They have been in the presence of their mother and they have been interviewed by their mother's counsel. They have been interviewed by (the Official Guardian), who has strongly urged that they reconsider and return to their mother. They have been subjected to persuasion by their mother to return. Yet they remain adamant that they will not return. An order directing them to return to their mother would be an order that could not reasonably be enforced."

The obvious difficulty confronting counsel, and in turn the judge, is on what basis do you assess the child's wishes, thoughts and feelings. Can you simply look at age groups or is that too naive? In my experience, and as I have stressed previously, the age of a child can only be used as a general guide. I have found children as young as 6 and 7 years of age to whose expressed wishes I have accorded great weight. At the other end of the scale there have been children as old as 14 and 15 years of age who have made very little impression indeed. Accordingly, it is dangerous to be dogmatic on this issue and I consider it unfortunate that the Australian Family Law Act, 1975 as amended,\footnote{95} provides for the wishes of children over the age of 14 years to be determinative except in special circumstances.\footnote{96}

Of course, as we have seen,\footnote{97} Leon has concluded\footnote{98} that behavioural science knowledge can be used to formulate
rebuttable legal presumptions concerning the capacity of children to instruct counsel and reach competent decisions. Yet, Leon concedes that a great deal more research is required from behavioural scientists before presumptions such as those postulated can provide more than a skeletal structure to the discretion reposed in both the lawyer and the judge.

(5) **THE RELATIONSHIP BETWEEN COUNSEL AND CHILD**

From the discussion thus far it should be obvious that a child advocate needs to be a very special animal. He is working in a jurisdiction with unique characteristics, and which demands a new concept of proper representation. In particular, conscientious counsel will need to be discriminating in the use of techniques geared for the conduct of criminal and civil cases. Personal attributes of counsel are also important. Dickens summarises the necessary qualities in this way:

"The child advocate should know how to interview his young client, how to listen and how to perceive when the child is repressing, misdescribing or deflecting his concerns. If his client is too young to speak, the advocate must be able to comprehend specialist's reports predicting the child's future in different potential environments. He should gain a sense of what the child who can communicate considers important in making assessments, while also having the vision to accommodate immature judgement in determinations having longer-term effects than a child has the experience to recognise."

A feeling for children is clearly essential and the advocate
must be able to establish a rapport with the child.\textsuperscript{101} The child must have confidence in counsel and trust him implicitly. To achieve this state of affairs the advocate must be completely open with the child and keep him or her fully informed of any developments. This can relieve stress and assist the child to understand the process which is about to have such a large impact on his or her life. Counsel is also able to allay some of the child's fears, and relieve some of the parental pressure on the child as the trial draws near, and parents attempt to persuade the child to one choice or the other, either expressly or impliedly.

I have also found it important to be as frank as possible with the child about the fact of the dissolution of the family unit. Unfortunately, many parents practice a form of deceit on the child and keep him or her in the dark as long as possible about what is really happening.\textsuperscript{102} This not only tends to produce a greater reaction in the child when he or she does find out, but it may also embitter the child against the parent who has been hiding the truth. The child might misinterpret the motives of the parent and feel that he or she is not worthy of the trust of that parent.

One extremely valuable device to gain the trust and confidence of a child is to initially utilize the services of a close relative or friend. Such person should be encouraged to
attend interviews with the child and generally act as an intermediary. Their presence tends to overcome any nervousness and reticence on the part of the child, and as the child sees this person relying on the advocate, so he or she in turn will come to do the same. However, this approach should only be utilized to break the ice, as it were, between the child and the advocate, because there will be matters which the latter will want to explore with the child that the child may feel inhibited about, even in the presence of a close friend or relative. Moreover, I am sure most lawyers have experienced the frustration of the well-meaning relative who attempts to direct the course of events.

Once legal counsel has the trust and confidence of the child it is vital that the same not be betrayed, either intentionally or unintentionally. The disintegration of the family unit and the conflict over custody is traumatic enough for the child without having his or her faith undermined in the one and only confidant that he or she may have.

There are two situations where counsel needs to tread warily in order to preserve the confidence of the child. The first is where the child's wishes and the advocate's assessment of the best interests of the child do not coincide. As I have said,¹⁰³ I consider that in most cases the duty of counsel here is to place both views before the court in the fashion of an
amicus curiae. However, from the outset counsel should make it perfectly clear to the child that this is what will happen. Naturally the child will be disgruntled, but the necessary relationship should remain intact.

The second situation involves the confidentiality of communications between the child and the advocate. In other words, what is the extent of the duty owed by counsel to the child where the latter apprises counsel of a fact which in normal circumstances should be disclosed? In the traditional lawyer-client relationship all communications are privileged. Yet, as we have already seen, this is not a traditional relationship, and it seems to me that if counsel feels that disclosure would be in the best interests of the child, then he should act accordingly. However, he should be very circumspect in so acting because he will be betraying the trust and confidence of the child. Obviously one very weighty factor to be considered when determining whether it is in the best interests of the child to disclose will be this very danger of destroying the relationship between counsel and child. The only thing counsel can do here is to make the child aware from the outset of this possibility, and that any disclosure will only be in the child's best interests. However, this in itself creates problems because a child, being made aware of this possibility, may tend to be less than candid in his dealings with his counsel, and this may very well frustrate the
raison d'être of independent legal counsel for the child.

Of course, this is not to say that no privilege at all should attach to communications between counsel and child as was the submission made in the British Columbia case of Re Cameron.¹⁰⁵ There, it was argued that the requirement in Section 42 of the Laws Declaratory Act, 1974,¹⁰⁶ that the court consider the best interests of the child, rendered the welfare of the child the paramount consideration, which in turn overrode the privilege emanating from the solicitor–client relationship. Judge Campbell of the Provincial Court of British Columbia rejected this argument on the ground that the best interest of the child was only to be considered by the court, and it was not the sole determining factor. Moreover, he felt that abrogation of the privilege may not always be advisable when considering the best interests of the children.

Although doubts may be expressed about the validity of Judge Campbell's principal ground for rejecting the argument, his reasoning does not affect my proposition. I am not suggesting, as was the argument in that case, that the best interests of the child inevitably requires disclosure; I am saying that the privilege should still remain, but that counsel for the child should have a discretion to disclose where he considers that such disclosure will promote the best interests of the child.
The case itself is illustrative of the importance and weight attached to the privilege existing between counsel and child. The child was the subject of Protection of Children Act proceedings, and counsel had been appointed to act for her. In the course of preparation for trial the child disclosed to her counsel that she was going to run away and requested that her location not be divulged. The question was whether Section 7 (2) of the said Act compelled counsel to reveal this information. Judge Campbell ruled that as a matter of statutory interpretation, Section 7 (2) did not alter the solicitor-client privilege, and thus, disclosure could not be compelled. Yet, as Professor Maczko points out, the judge was

"clearly concerned to protect the solicitor-client privilege even in relation to a child",

and it is an open question whether higher courts will adopt the same interpretation. Obviously there is a need for a clear statement in the legislation providing for the appointment of legal counsel, specifying the duty that such counsel has in this regard.

(6) **THE TIME OF APPOINTMENT OF COUNSEL**

Naturally, it will take time to develop the necessary relationship of trust and confidence between the child and the advocate. Thus, it is important for counsel to be appointed
at the earliest possible moment. Theoretically, counsel should be appointed immediately the family unit disintegrates, but, this is not practical, unless the parents themselves arrange separate representation for the child. This is rare though, and in fact may be less than ideal. The counsel retained may feel that there is some obligation to the parent who retained him, thus preventing him from being a truly independent advocate for the child. It would also be unclear what the court's reaction would be in the event that the dispute went that far. The court may feel that there should not be representation or that the representation arranged is unsatisfactory. Yet, in the case of Johnston v Johnston\textsuperscript{111} the child came to court with counsel already retained, and the court permitted such counsel to lead the child through her evidence and make submissions on her behalf, even though no authority for this course of action could be found.\textsuperscript{112}

The Law Reform Commission of Canada has recognised this need for early involvement of counsel for the child. In its Working Paper on the Family Court it states\textsuperscript{113}:

"The Commission envisages the development of rules of procedure under which, well in advance of the trial, there will be a review of the facts in issue and an opportunity for an appropriate officer of the court to exercise a discretionary power to appoint counsel to represent the interests of the child until the matter is concluded."

Invariably though, counsel is not appointed until the
matter comes before a judge, and sometimes the request for separate representation is not made until after the actual trial has commenced. In fact, it must be remembered that in British Columbia the position of a family advocate appointed pursuant to Section 2 of the Family Relations Act, 1978, is solely as an intervenor in proceedings that have already been instituted. The proceedings then have to be adjourned to provide counsel with an opportunity of coming to terms with the child and his or her situation. Although this is essential, it has the undesirable effect of elongating the proceedings and prolonging the traumatic experience for the child. There is also the possibility that such delay will enhance the prospects of the parent having de facto custody of the child by allowing the child to become more settled in the care of that parent. Thus, it is crucial that as soon as a judge becomes seized of a custody dispute, he should turn his mind to the question of whether to order or request separate representation for the children. He should not rely on the parties to bring the matter to his attention because, if this occurs at all, it generally occurs at a late stage in the proceedings.

An unfortunate situation in this regard arose in the case of More v Primeau. There, a pre-trial conference was held between the parties and an order was made requesting a full psychiatric report. The report was prepared and filed with the court. One recommendation of the psychiatrist was
that the child be independently represented, but this did not come to the notice of the trial judge until approximately one month before the actual hearing. He immediately consulted the Official Guardian who undertook to speak to counsel and consider the possibility of assisting at trial. However, for various reasons the Official Guardian's Ottawa agent was not instructed until midway through the second day of the trial, at which stage a conference took place and in the words of the trial judge:

"We all agreed that no useful purpose could be served by inviting the participation of the Official Guardian at this stage. To have done so would have required a delay of considerable proportions to permit the Official Guardian to employ experts to review the case and examine the child and the parties. It was agreed a further delay was undesirable, particularly when it was not certain that any beneficial result was likely to occur from further investigation. It was not only unfair to the party not having custody but contrary to the child's best interests to prolong the uncertainty about his future."

Now, although I do not necessarily agree with the decision not to proceed with independent representation, the case illustrates the difficulties created by a failure to arrange such representation as early as possible.

As a final comment, it should be noted that not only will appointment of legal counsel at the earliest possible moment allow the necessary relationship to develop, but it will also provide counsel with the opportunity of making the best use of experts in the social sciences. The prospects of settlement
will also be greatly enhanced with the presence of an advocate for the child from an early stage in the proceedings, and I will elaborate on this aspect in the following section.

(7) **THE APPROACH OF COUNSEL**

(a) **PRE-TRIAL**

Unlike counsel for the parties the child advocate should not sit back and simply wait for the trial. His first task, I suggest, is to arrange an interview with the child. Although this may sound simple, in reality it can present the biggest hurdle. Counsel will not have seen the child before, and *vice versa*. The child may also be of such an age and temperament that an interview would be totally abortive. Thus, counsel must be very circumspect in his approach to this initial meeting. Not only should he have a close friend or relative present, but some background information should be sought. Naturally, he should speak to the parents, but it might even be prudent to have a welfare officer interview the child to ascertain whether there will be any particular problems with a meeting with counsel. 118

Obviously, if it is impossible for counsel to interview the child he will need to rely solely on reports from the social scientists. This will place him at a distinct
disadvantage, because, although a well-prepared report will doubtless go a long way towards presenting the child's interests and reactions, it cannot replace entirely the personal touch of an interview. In addition, counsel's interview would have been conducted having regard to how evidence is to be presented in court, and the likely admissibility of that evidence, factors which a welfare worker does not have in mind when preparing a report.

Following the interview (or receipt of a report, if an interview is impossible) counsel should then arrange a conference with the parties and their respective solicitors to ascertain what the contentious issues are. Naturally, counsel cannot compel the parties to attend such a conference but parties rarely fail to appear. This is no doubt because they associate counsel with the authority of the court and they are concerned that their absence will prejudice their chances of success. Moreover, if their respective counsel are worth their salt, the parties would have been advised to attend.¹¹⁹

At this conference it is not unusual for it to become apparent that the parties are not very far apart. In these cases it is often helpful to immediately arrange counselling for the parties, which can sometimes lead to a settlement. If not, or if counselling is not called for, counsel should then set about his own investigations as well as arranging for
reports to be provided by behavioural scientists. Then, armed with this background material he should arrange a further conference where he makes an all-out effort to settle the dispute. He should apprise the parties and their solicitors of the results of the investigations, and, if necessary, have the experts present. Whether the child should attend is debatable because he or she might feel ill at ease at being the centre of attraction. Yet, at the very least, the child should be nearby in the event that he or she is required. My own practice was to only have the child attend if he or she was of sufficient age and maturity not to be adversely effected by a possible emotional confrontation between the parents. However, on occasions I have left it entirely up to the child after fully informing him or her of what was likely to occur. Importantly though, if the child does not attend the conference, he or she should be advised of everything that transpires.

It may be necessary to have more than one such conference before any headway is made, but in my experience the number of disputes settled at this stage is quite high. One reason for this is that the mere presence of independent legal counsel acts as a catalyst to settlement. This is certainly the case in the Australian jurisdiction, and it seems to be the same in British Columbia. Being appointed by the court, parties naturally tend to associate counsel's opinion with that of the court. In addition the parties will generally be
advised by their respective counsel that unless their position is supported by the advocate for the child, then their chances of success are slim.

Of course, there is always the situation where counsel for the children must do more than just attend the conference. There are times when he must bring the parties to their senses, parties who have rushed headlong into proceedings bent on obtaining revenge or retribution without regard for the wishes of the children or the detrimental effect that such action could have on them. One important aspect here is the provision of expert opinions from behavioural scientists who have not been retained by either party. Unfortunately, with an expert who has been retained by one party, it is rarely the case that he has interviewed both parents and the child, and his opinion will invariably support the position of the party who sought his assistance. On the other hand, with an independent expert's opinion, counsel will be able to demonstrate more convincingly to the parties the harm that can be caused to children if they continue to disregard their interests.

It might be argued that the influence possessed by counsel for the child in pre-trial situations usurps the function of the judge. Yet, this assumes that the settlement reached as a result of the intervention of counsel is necessarily the incorrect one. In fact, counsel for the child
is in just as good a position as the judge to make the right choice. He has the advantage of an intimate relationship with the child and he has the assistance of experts from the behavioural sciences. Indeed, as Professor Maczko points out, it is extremely rare for a judge to depart from the opinion expressed by the advocate as to the future placement of children. This again highlights the special characteristics of the office of child advocate, and the need for the incumbent to possess a high level of expertise.

(b) **DURING THE TRIAL**

There are cases where even the pre-trial efforts of counsel for the child are to no avail and the trial proceeds. At this point it is again necessary to reflect on the different capacities in which counsel can act. He can either be a truly independent advocate with no restrictions on the methods available to him to promote the interests of the child, or he can merely be acting as *amicus curiae*. The Ontario Law Reform Commission recommended that its proposed Law Guardian

"should adopt the stance of an *amicus curiae* rather than that of an aggressive advocate intent only on destroying the evidence of parents or of a child welfare agency ... The child’s advocate should be constructive rather than destructive if he is to be of use to the child and to the court".
However, as Catton and Leon remark:

"This type of representation would seem better suited to proceedings involving children that are of a less adversarial nature."

Accordingly, given the existing adversary system of resolving custody disputes, it seems to me that when a matter goes to trial, counsel should act primarily in the capacity of a true advocate. This allows the fullest representation of the child's interests. It is all very well to have amicus curiae to assist the court and call attention to some point of law or fact which may be overlooked, but we are here concerned with transforming the children themselves into vital cogs in the decision-making process, and I suggest that the most effective method of achieving this purpose is to instal them as parties to the action or as close as possible to this capacity. Once they are so installed they are entitled to be independently represented in the fullest sense of the phrase.

Of course, this is subject to the applicable legislation authorizing such independent representation. In Australia this comprises no difficulty, and, in fact, counsel is now never appointed in the sole capacity of amicus curiae. However, as we have seen there is some confusion in British Columbia with the introduction of the Family Relations Act, 1978. It seems that the court has no statutory power to order (or even request) the appointment of a family advocate.
Accordingly, the court may have no alternative but to appoint the Public Trustee as Guardian *ad litem*, or utilize its *parens patriae* power and appoint counsel as *amicus curiae*. However, in the latter instance the court must spell out the powers that such counsel is to have, being careful to equip him with the same rights that counsel for the parents would possess.

The provision of independent legal counsel at the trial stage is not the end of the matter though; it is just the beginning. The onus is then on such counsel to actively pursue the placement of the child in accordance with his or her best interests. This entails a vigorous and independent approach to the facts, in order that the child’s wishes, attitudes, anxieties and appreciation of the parental conflict in which he or she has become involved, can be put to the court from the point of view of the child rather than from the point of view of either of the parents. In the court-room this naturally means more than sitting back, not calling or examining any witnesses, making brief submissions at the conclusion of the case and generally being content with acting as a watchdog over the proceedings. Yet, this happens far too frequently in my experience. 130

I suggest that the approach of counsel during the trial should incorporate the following aspects:

(i) One of the main advantages of independent counsel is to
offset the presentation to the court of both a totally parent-oriented position and the partisan views of the litigants.\textsuperscript{131} This can be achieved in various ways. For example, counsel for the child can call evidence which would otherwise not be available to the court. There may be witnesses which one of the parties does not wish to call because of the possibility of their evidence being adverse to that party's interests. In a traditional court-room contest it would be within the power of the parties to manoeuvre in this fashion. Yet, it may be vital for the judge to hear such evidence in order to properly assess where the best interests of the child lie. Of course, if the judge is aware of such a witness and the party does not call him or her, then the court can always assume that the evidence of this witness is being kept from the court because of some ulterior motive, and proceed accordingly. There is an obvious danger in this approach, yet it seemed to be taken by MacPherson J. in \textit{Case v Case}.\textsuperscript{132} There, as we have seen,\textsuperscript{133} the mother was living in a homosexual relationship, and although her partner was present during some of the trial, she was not called to give evidence. MacPherson J. deprecated this omission on the part of the mother because he considered it essential that he be able to assess a person who would be vitally concerned with the future care and upbringing of the children if custody was awarded to the mother. The absence of this witness left him
in a state of uncertainty whether to place the child with the mother or not, and in the end result he awarded custody to the father saying that he had a strong feeling that the homosexual partner was hidden from him. Now, if the children had been separately represented, their counsel would have definitely called this witness to give evidence.

This case highlights the failing of the traditional adversary process in advancing the interests of children. It is axiomatic that all prospective care-givers be presented to the court, and if the infusion of the concept of independent representation into the adversary process achieves no other purpose than ensuring that this occurs, then the exercise has been worthwhile. It is all too common place to find courts lamenting the failure of parties to place sufficient evidence before them to enable a proper assessment of the best interests of the children to be made. 134

(ii) Another area where the parental influence on the proceedings may need to be offset by counsel in the interests of the children, is where neither parent presents as a suitable custodian. A court has power to award custody of children to persons other than the parents, 135 but in normal circumstances no evidence is placed before the court concerning any viable alternative, and the court is left to choose the lesser of two evils. 136 Accordingly, a
vital function of counsel for the child is to investigate alternative custodians such as near relatives, and present evidence regarding the same during the trial.

(iii) Apart from leading evidence before the court, counsel for the child should place a great deal of emphasis on crossexamining the parties and their witnesses. Invariably in getting a case up for trial, the legal advisers of the parties will concentrate on those aspects of their respective client's case which will display strengths on the one hand, and the weaknesses in the opposing party on the other. The normal pattern of evidence will be the denigration by one party of the other, coupled with assertions of unfitness for parenting, with the intention of leading the court to the conclusion that one parent or the other is the better suited to have the custody of the children. There will be little or no emphasis on the children themselves, and thus, there will be many important aspects of the case on which counsel for the parties will neither examine nor crossexamine. However, the advocacy of counsel for the children will be oriented towards their position, and his investigations will have equipped him with information concerning the children, the parents, and other care-givers, of which counsel for the parties may not be aware and which will thus be vital in crossexamination.137

(iv) The presence of counsel for the child will obviously relieve the pressure on the judge,138 and I have mentioned
in particular the role of such counsel in freeing the judge from having to descend into the arena of the proceedings. This aspect emphasises that part of counsel's role which can be described as amicus curiae. He acts as a watchdog in seeing that the evidence presented is relevant to the issue and that the judge is afforded every opportunity to properly assess the best interests of the child.

(v) Another vital aspect of the advocate's role during the actual hearing, is when he is called upon to make submissions at the close of the evidence. Of necessity he should present to the court his own assessment of how best to cater for the welfare of the child, but as I have indicated previously, if the wishes of the child do not coincide with that assessment then those wishes should be made known to the court as well. Naturally, he needs to be circumspect in his assessment, because the experience is that judges accord great weight to the opinion of counsel for the child. Yet, he must not only be cautious for this reason. There is also the aftermath of a trial to consider. There can be bitter recriminations between the parents and between parent and child as a result of what is revealed or what happens in court. Thus, counsel must be careful, within the bounds of his duty to promote the interests of the child, not to leave the way open for the child to suffer the wrath of a disgruntled parent. It is a delicate exercise indeed, and emphasises once again the special
qualities required of a child advocate.

(vi) The question of access also needs to be mentioned here, because invariably this issue raises its head in a custody dispute. We have already seen how many courts view access as a natural right of a parent, only to be refused if danger to the child is perceived. Yet, there is another aspect here, and that is the actual terms of any access order made. Access involves the fragmentation and rearrangement of the child's time, and all too frequently this is dominated by considerations of what is convenient for the parents. Not only can counsel for the child ensure that the court has sufficient unbiased evidence before it to determine whether access itself will be in the best interests of the child, but also, if access is to be granted, he can ensure that the court is made aware of what is likely to be attractive, productive, and enjoyable for the child. It is the child who is at the receiving end of the court's order for access, and it should accord with the child's own social activities, his own needs for his friends, and the use of his leisure time for purposes pleasurable to him and which contribute to his growth and development.

An enlightened attitude to the interest that children have in the question of access was taken recently by Spencer J. in the British Columbia case of Des Roches v.
Des Roches.\textsuperscript{142} In varying an order for access he concluded with these remarks\textsuperscript{143}:

"Now, the matter may be spoken to again at any time, of course, because an access order is ambulatory. I am not going to fix a date for review. I hope the parties need never come back for a review, but each party, including (the child) through her counsel,\textsuperscript{144} is entitled, of course, to bring the matter on before me again."

(c) POST-TRIAL

Very often it is impossible to finalise the questions of custody and access at the actual hearing. Either the judge wants to experiment with different arrangements concerning the child, or it is felt that psychiatric treatment over a period of time might resolve the dispute. In both of these situations independent counsel can play an important role by way of supervising and checking on the progress of the matter. An illustration of the use of counsel in this capacity occurred in the case of Kroll v Kroll.\textsuperscript{145} There, access was in issue, but was complicated by the fact that animosity between the parents was having a deleterious effect on the psychological well-being of the child. The opinion of the psychiatrist was that the child needed treatment for a period of 6 months before access with the father could be contemplated. In addition, it was felt that the mother would benefit from contact with a social worker for the same period of time. The court accepted these recommendations and enjoined the child's
advocate (together with counsel for the mother) to take such steps as would be necessary to have the programme carried out.

On a more general note, counsel has a vital part to play in the aftermath of a custody dispute. His role as advocate for the child does not come to an abrupt halt once the dispute is settled or the trial is over. It is injudicious for the relationship with the child, which was so painstakingly developed, to be simply left hanging. The child will feel that he or she has simply been used by counsel, and, thus, may be hesitant about placing his or her trust and confidence in another adult again. Accordingly, some form of contact with the child should be maintained. This will not only serve the purpose of preventing disillusionment in the child, but will also enable counsel to assist all parties concerned in accepting the decision of the court and in adjusting to the changed situation. The problem though, is the mechanics of retaining contact with the child. Obviously it cannot be concentrated contact, otherwise counsel could rightly be accused of interfering with the family. Indeed, the exercise could backfire, and the child might be prevented from settling down in his new environment. Accordingly, counsel should be extremely circumspect in his approach to this issue. It may be that contact is not necessary in particular cases, but where it is required, I suggest that it be in the form of an occasional inquiry or visit by counsel.
Although I see the presence of independent legal counsel for children as the key to providing the necessary balance between adult and child interests in a custody dispute, I concede that there may be disadvantages, not all of which can be easily overcome.

(a) One problem that I have touched upon previously in another context is the danger that the child will take on the role of an adversary to one of his or her parents. He or she may become over-enthusiastic with having separate representation. Conversely the parent may feel that a barrier is being placed between him or her and the child. Not only can this effectively prevent any attempt at settlement, but it can also make reconciliation, or, at least, a continuing amicable relationship, impossible. This difficulty is illustrated by the case of Rowe v Rowe where the father had alienated the children against the mother and arranged legal representation for them during the course of the proceedings. Reid J. doubted the value of such legal counsel and in awarding custody to the mother he said this:

"They have, in a real sense been 'on his side' for a long time and, in a legal sense, from the time that the two older children made a joint affidavit in June 1975, which was ultimately adduced in evidence and which placed them firmly
in the father's camp for the purposes of the trial. Whatever the mother's chances of winning over the children under the interim custody arrangements prior to the making of that affidavit and the retaining of counsel for the children, they would in my opinion disappear completely on counsel being retained and upon such an affidavit being made. The mother was asked by Mr. Rowe’s counsel why it was that she had been unable to achieve a reconciliation with her children during the term of the interim custody order and she said she did not know, but she added that she found it easy enough to discuss all other matters with her children than the matters in issue in the courts. I am not surprised that she was unable to effect any reconciliation with children who had been cast by these events as adversaries to her in a court battle and who clearly recognised their position."

He felt that there may be cases where it is appropriate for the Official Guardian to act for children during the actual hearing, but

"(e)arlier involvement of solicitors for children can ... cause more harm than good."149

Although this case is a rather extreme example because of the father's pre-existing influence over the children, and because of the fact that counsel for the children was not truly independent, it nevertheless illustrates how parent and child can be driven further apart as a result of separate representation. The solution might be to involve the parents as much as possible in the interaction between child and counsel, not only at conferences, but at interviews and investigations conducted by counsel. Admittedly, there will be difficulties, particularly where
there is a great deal of animosity between the parties, but it is a question which must be faced in light of the evidence from the social sciences that a child needs a continuing relationship with the non-custodial parent in order to maintain a balanced outlook on life. Nor is it a case of simply ordering access and hoping for the best; the problem must be tackled at the earliest possible moment, or preferably prevented altogether. This is just one more delicate matter requiring a tactful approach by counsel for the child.

(b) Criticism of independent representation has come from another source as well. There is a school of thought that the presence of another lawyer in court merely tends to lengthen the proceedings without contributing a great deal to the resolution of the dispute. I concede that a court hearing may be lengthened, but I suggest that if counsel is to fulfil his duty to the child, this is a necessary occupational hazard. However, I join issue with the second leg of such criticism. Admittedly, there will be instances where the same result will ensue whether the child is represented or not, but this is only natural given the limited number of alternative custodians. The important circumstance though, is where, as a result of the efforts of counsel, the child is correctly placed with a different custodian than if counsel was not present.
Even if this happens in a minimal number of cases, the future of the children in those cases is well worth the effort. In any event, in situations where the result would have been the same without counsel, it is not necessarily correct to conclude that counsel has not contributed very much to the case. Assuming counsel has actively sought the fulfilment of the best interests of the child, he would not only have simplified the task of the judge, but he may have been successful in reducing some of the bitterness and acrimony that is often present in disputes over custody. He may have even paved the way for the development of a successful post-trial relationship, and hopefully his treatment of the child as an independent person with thoughts, feelings and desires worthy of consideration will aid in the child's future development. Thus, the value of independent counsel cannot be weighed in terms of who was awarded custody and who was not. The emphasis is on the child and not the parent.

(c) What I have just said also goes part of the way towards meeting not so much a criticism, but a proposal that would lessen the involvement of counsel for the child. The proposal is that counsel should simply make an independent investigation, and submit a report to the court which would include his own recommendations. Although this
emphasises counsel's role as *amicus curiae*, the real difficulty that I see with this approach is that counsel is being placed on the same footing as an expert in the behavioural sciences; in other words, this is a common method utilized to obtain the opinion of such an expert. Yet, a lawyer is simply not an expert in the social sciences. His prime value is his ability as a negotiator in pre-trial situations and as an advocate in court proceedings. The problem is highlighted when you consider that, in effect, counsel would be submitting evidence to the court and should be subject to crossexamination. I am sure that most counsel would have great difficulty in justifying an opinion on the basis of being an expert in this area.

In Australia it was initially held that the role of the child's representative should be along the lines of the proposal referred to above. However, the courts now accept that this does not achieve the desired result, and expect the advocate to primarily act as any other counsel.

It is clearly preferable that the preparation of any report concerning the welfare of a child be done by a practitioner of the behavioural sciences. In Australia, a report is prepared by a welfare officer attached to the Family Court, and is accorded evidentiary status under the
the provisions of Section 62 (4) of the Family Law Act, 1975 as amended. Similarly, in British Columbia, family counsellors attached to the Unified Family Court prepare reports for various courts. Counsel representing the child can then adopt and develop so much of the report as he finds useful and is in accordance with his duty to the child. Of course, this is not to suggest that the person representing the child will not have information and views which can supplement the report, but such information and views should be based upon direct evidence that has been presented to the court by witnesses, or, indeed, based upon the report itself.

(d) Another criticism that is made of the use of independent legal counsel is that there is really no need for such representation when you consider that the child's interests can be protected both by counsel for the respective parties and by the court itself. For instance, Harry M. Fain, a former Vice-chairman of the Section of Family Law of the American Bar Association, has suggested that the attorneys for the respective parties must be concerned with the best interests of the child and be ever alert to protect those interests. He felt that counsel should clarify his relationship with the client at the outset and "stress that the best interests of the child will control the ultimate decision."
However, no matter how commendable such an attitude on the part of counsel may be, it ignores the reality of the situation. One only needs to refer back to the three common types of issues that confront courts in this area to appreciate that the interests of the parents can, and often do, conflict with the interests of the child. Accordingly, it is unrealistic to expect counsel for a party whose interests do not coincide with the interests of the child to give precedence to the latter. Indeed, to allow the child's interests to control his advocacy may in itself lead to a conflict of interest. There may even be a breach of ethics on the part of counsel who takes such a stance. Rule (v) of the Canadian Bar Association Code of Professional Conduct provides:

"The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, he should not act or continue to act in a matter where there is or is likely to be a conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgement of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client."

The role of counsel for a party is clear. He is employed to obtain the best possible result for his client. What is the best possible result might involve the giving up of a short term advantage for the greater long term good of the child. But many clients will not see it this way.
To them the only acceptable result is to "win"; i.e., to gain a legal decision which on its face establishes a positive and definite superiority of position over the other side. To gain, in short, "custody" as against "access"; or, of the judge tries to dampen down this contest position by awarding joint custody, by claiming victory if care and control has been gained over the other side. Judges and lawyers often go to great lengths to discourage this sort of approach, and it is often strongly and correctly put that no party ever wins a custody case and that there is a danger that the child will be the eventual loser. But the courts are dealing with ordinary human beings with ordinary human failings, and not rational angels. And a lawyer, no matter how he may strive with his client to persuade him in conference to a different solution, is ultimately bound by his client's instructions. Once the avenues of settlement are closed and the lawyer is told to fight, he must fight: fairly and ethically, but at the same time vigorously, conscientiously and boldly to attain the result desired by the client, even if that result does not accord with the lawyer's personal views. Accordingly, it is a misconception to say that counsel for the respective parties can meet the needs of the children in a dispute concerning their custody. The adversary system just does not allow them to be placed in that dilemma. 159
As regards the protection that the court can offer, I have adverted on more than one occasion to the need for the court to remain aloof and not descend into the arena of the proceedings. The objectivity of the arbiter should never be placed in question. However, I do concede that where there is no independent representation of children, the court has the ability to look after the interests of the children to some extent. The difficulty though, is that there are severe limitations on what a court can do. For example, it cannot act in the manner that independent counsel does in pre-trial situations and, most importantly, it strictly cannot call evidence or make investigations on behalf of the child. It is dependent on the evidence offered by the parties, the reliability of which is often highly questionable. The gravity of a dispute in a custody case cannot be resolved by blind faith in the court's ability, after hearing the evidence presented by the parents, to determine the best interests of the child. No-one would have raised the issue of whether the parental testimony is in fact objective in relation to the child. Thus, I do not feel that a court can be considered a viable substitute for independent legal counsel. He is the key to the introduction of objective evidence as to the best interests of the child.
(e) It is all very well to talk of the need for independent representation of children, but the obvious question that arises is who is going to bear the cost? The answer is clear where there is a system of Government-employed advocates, but if independent representation becomes mandatory in all cases, as I suggest in the following subsection, then the Government may not be too willing to undertake the entire burden. However, to shift the cost to the parties may be impractical, given the fact that the disintegration of a family unit stretches financial resources to the limit anyway. Moreover, the more highly qualified lawyers may not be prepared to take the risk of their fees remaining unpaid, with the result that the child may not receive the skilful representation that is required.

Clearly, placing the financial burden on both parties, or just the unsuccessful party, would prevent some disputes from reaching the courts but, in fact, they may be the very ones where separate representation is needed. Accordingly, it seems to me that there can be no penny-pinching where the welfare of children is concerned. The State should pick up the tab, even though this means that the public is bearing the cost of resolving what is essentially a dispute between individuals. Surely the public has a vital interest in ensuring that children are placed in the situation that
will best guarantee their development as responsible members of the community.

(9) MANDATORY OR DISCRETIONARY

It will be apparent by now that, in my opinion, the use of independent legal counsel for children should be mandatory in all custody disputes. Indeed, I consider that children should have a statutory right to such representation. It appears to me that there will always be a need for counsel, no matter how straightforward the case may appear, and particularly if the adversarial nature of custody proceedings remains. In this regard I have the support at least of Susan McKeown who, in a recent paper prepared for the Alberta Institute of Law Research and Reform, recommended that an Office of Amicus Curiae be established, and that representation by this Office be made mandatory in custody disputes. Similarly, the Ontario Law Reform Commission envisaged that it's Law Guardian should always act in proceedings involving an evaluation of the best interests of children.

However, in Canada, it is rare to find such statements, and the general attitude is that courts should have a discretion to order legal representation of the child where it would be in the child's best interests. The catch is that, in my opinion, the best interests of the child always require
separate representation.

The case of J v J\textsuperscript{167} provides a recent illustration of this general attitude to child advocates. There, the subject child was not represented before the trial judge and an appeal was taken on the ground that the failure to order such representation warranted a new hearing at which the children would be represented. The argument was that the rights of children are affected by a custody order and they are entitled to have legal counsel to protect those rights. It was

"suggested that it was time that the court should 'deossify' the procedure in custody cases and should require that in all cases ... a machinery should be devised whereby the children could have their own lawyer to act for them."\textsuperscript{168} 

However, the appellate court rejected these submissions, saying\textsuperscript{169}:

"We are not persuaded that the procedure of the courts requires 'deossification'. There may indeed be cases where it is desirable that children should have separate representation, but we do not think the case before us is such a one. Where it is thought desirable, however, there is ample scope in the rules and practice of the courts to allow for appropriate representation to be supplied ... We do not think it would be sound to give illustrations of those rare cases when separate representation might be useful. The question should be resolved by a trial judge in the exercise of his discretion. We demur, however, from the suggestion that such separate representation should be a matter of course because we are of the view that it is not desirable, in the usual case, to involve children in choosing between parents who might exert pressure on them in making a difficult and traumatic selection of one against the other."
Unfortunately, this latter comment indicates that the court was labouring under a misconception as to the role that independent counsel plays in representing children. As we have seen, counsel does far more than simply convey to the court the preference of the child *in vacuo*. Indeed, he can be valuable in protecting children from the influence of the parents.

Thus, the inference that can be drawn from this case is that one reason for the rejection of the mandatory use of separate representation of children was the lack of understanding of the part that counsel can play in the proceedings. If this assumption is correct then the concept of legal representation for children will continue to flounder, because until the courts themselves accept that counsel is required in all cases, it is unlikely that there will be general acceptance of the proposition.

The issue, of course, can be framed in terms of children's rights; i.e., should a child have a natural right to be represented where his or her interests will be affected by the outcome of the proceedings. Now, expressed in this fashion, there has been almost total acceptance by Law Reform Commissions, Royal Commissions, and commentators, that this is a natural right of children. For example, the British Columbia Royal Commission on Family and Children's Law.
included amongst its 12 rights of children,

"the right to ... legal assistance in relation to all
decisions affecting guardianship, custody, or a
determination of status."

The Commission even went so far as to recommend that if this
right was not complied with, then the decision would be void
and a new hearing required. The eminent authors, Foster
and Freed, also argue that a child should have a legal right
"to be heard and be listened to", and this right includes
the right to be represented in legal proceedings. However,
neither courts nor legislatures have recognised this alleged
basic right of children. In *Mierins v Mierins* the
corollary relief provisions of the Divorce Act, 1968, were
challenged as being in violation of Sections 1 (a) and 2 (e)
of the Canadian Bill of Rights. One aspect of the
challenge was that because the children were not represented in
the claim for their interim maintenance, they were being
denied their rights. The court disposed of this argument by
simply emphasising that the Divorce Act does not give any
right to a child to apply for maintenance. Accordingly, in the
eyes of the court, there could be no question of a right to
representation. I suggest that this is a very narrow approach
indeed to the issue of separate representation of children,
and if carried to its logical conclusion it would mean that
where a child had no **locus standi**, representation could not be
provided. However, this is simply not so, and courts, in
ordering separate representation, have no regard to whether
the child has *locus standi* or not. Yet, it does raise an interesting question as to whether children should have the right to institute proceedings for custody. Naturally, if they were invested with this right, there could be no doubt concerning their right to representation. The adversary process postulates that each interested party will have counsel.

Do children, then, have *locus standi* to institute proceedings for custody? It is quite clear that under the Divorce Act, 1968, a child has no standing to make an application; relief can only be sought by a parent. However, the situation may be different under the British Columbia Family Relations Act, 1978. Section 35 (1) of that Act simply says that,

"(o)n application a court may order that one or more persons may exercise custody over a child or have access to the child."

There is no statement as to who can make such an application, and it is arguable that children have this ability. However, it is likely that the child will still require a "next friend" for the purposes of making the application itself.

There would seem to be no inherent reason why a child should not have the standing to institute proceedings in this area. Afterall, it is the child who is affected the most by a custody order. Moreover, in the context of this paper, the
optimum level of input from the child into the decision-making process would in fact be the institution of the application for custody itself.

If a child has the standing to institute proceedings, then I suggest that he or she should also be able to apply to vary a pre-existing order for custody made on the application of one of the parents. Unless the child was separately represented at the previous hearing, he or she should not be bound by what occurred there. The child would not have been a party and his or her views, thoughts and feelings may not have been aired, or if they were, they may not have been afforded any weight.

However, there is one difficulty with providing children with the ability to institute proceedings. A child might make an application at a time when the family unit was still a viable organisation. Accordingly, unless restrictions were imposed on the circumstances in which a child could bring an action, the concept could easily be criticized as an unwarranted intrusion by the State into family relationships. In this regard it is interesting to note that if I am correct in suggesting that the Family Relations Act, 1978 permits a child to bring a custody suit, there are no limitations in that Act as to when the action can be brought.
In any event, on the reasoning in Mierins v Mierins, it would seem arguable that a child has the right to separate representation in proceedings taken under the Family Relations Act, 1978, a proposition which no doubt will surprise a great many people. In fact, there is not even such a right in the Australian jurisdiction. There, the Family Law Act, 1975 as amended, permits a child to bring an application seeking an order for separate representation, but whether the application is granted or not is still within the discretion of the judge.

However, it remains to be seen what will eventuate under the Family Relations Act, 1978; and, in the meantime, courts in Canada will continue to treat the question of separate representation for children as a matter of discretion.

(10) REPRESENTATION FOR EACH CHILD IN THE FAMILY?

In the discussion thus far no distinction has been made between the situation where the placement of only one child is in dispute, and the situation where more than one child is the subject of the custody proceedings. The question that arises is whether in the latter instance each child should have individual representation. In my opinion, it simply depends on whether the interests of the children are opposed in any way. If so, then separate counsel are required. Fortunately,
though, the interests of siblings are rarely opposed, and it is very unusual for them to be separated by the court. However, I sympathize with counsel who is appointed to act for a large number of children, especially if they are quite young. He will undoubtedly need all the assistance he can find.

CONCLUSION

The inescapable conclusion from this examination of the concept of separate representation is that independent legal counsel is a vital cog in placing children in accordance with their best interests. However, it is important to stress that counsel for the child has a difficult and complex task in presenting the wishes, thoughts and feelings of the child to the court. Children are necessarily different, and it is impossible to formulate a plan for counsel to follow which will be applicable in all cases. The point of divergence between each child is the capacity to communicate and to reach a competent decision. In the regard, there are three basic types of children that can confront counsel; a child competent in all respects, a child incompetent in all respects and a child who is capable of expressing a preference but incapable of reaching a competent decision. Counsel needs to tailor his role according to these different capacities; for example, in the first category his role as an adversarial advocate is to be emphasised, whereas in the second and third categories his
roles as *amicus curiae* and social worker come to the fore. The unanswered question though, is how does counsel determine the capacity of the child in order that he can adopt the appropriate stance. Or, alternatively, how does counsel determine when to represent the wishes of the child, and when to represent his own conception of the child's best interests. The question is similar to the one that the judge himself must address when determining what weight to accord the wishes of a child expressed during an interview. Yet, little assistance is gained from this experience because, of necessity, it must be a subjective evaluation in both cases. There is even a paucity of relevant empirical data from the behavioural sciences on which to base acceptable criteria. Of course, as we have seen, Leon suggests that it is preferable to have rebuttable presumptions concerning capacity based on such evidence that is available, rather than leave it to the untrammeled discretion of counsel (or a judge) to determine how to represent a child (or what weight to accord a child's views). Nevertheless, it is noteworthy that he concludes with the following comment:

"In any given case, the applicability of the presumptions could be challenged. It would be the lawyer's duty to exercise discretion and well-informed judgement in determining whether a child does not possess the presumed capacity."

This is the real dilemma for counsel, and even this confirms the need for separate representation in all cases. A child must fall into one of the categories referred to above, and
thus, there will always be a role to play for independent legal counsel in order to ensure the input of the child into the decision-making process.

THE UTILIZATION OF BEHAVIOURAL SCIENTISTS

In recent times the pendulum has gradually swung from a concentration on the physical factors of a child's development to an emphasis on his or her psychological needs. This is the great strength of the theories of Goldstein, Freud and Solnit, which, in effect, call for the judicial evaluation of a child's psychological best interests.

However, judges, lawyers and court officials are generally ill-equipped to meet this need without assistance, and it is here that behavioural scientists have such an important role to fulfil. Just as counsel for the child is a necessary link in the chain leading from the child to the judge, the behavioural scientist must act as an intermediary conveying the child's psychological needs and views to both counsel and the judge. He apprises them of how the child thinks, what his or her expectations are, how he or she is being affected by the disintegration of the family unit, and what is in store for the future. Indeed, in the case of
Wakaluk v Wakaluk, 194 Bayda J. considered that the procedure to be favoured for conveying the wishes of the child to the court was

"(a) procedure involving a trained and competent third party, independent of the parents, charged with the responsibility of ascertaining the child's opinions and preferences using such techniques as are most likely to yield genuine feelings and wishes, and be least harmful to the child, over such period of time as may be necessary, and thereafter reporting to the court, by giving testimony or otherwise ... "195

Of course, social services play an important anterior role as well. Litigation should only be considered as a last resort for the resolution of custody disputes, and alternative facilities such as counselling cannot be stressed enough. Indeed, the world-wide trend in Family Courts is for counselling to be provided by personnel attached to the court itself. The aim of such counselling is to assist parents and children to adjust to changed circumstances and to work towards the most satisfactory solution with the least acrimony and tension as possible. 196 However, there are disputes which cannot be resolved by this initial form of counselling and require arbitration by a court. It is here that the second function of behavioural scientists comes into play and with which this section is primarily concerned.

However, the role of the scientist does not cease there either. There is a third function to be fulfilled. Following
the resolution of a custody dispute there is very often a need for on-going assistance from behavioural experts, particularly in a supervisory capacity. The necessity for supervision can occur in several types of cases. For instance, it may be felt that the custodial parent has certain areas of weakness in regard to his or her care of the child of which he or she should be made aware; or the parent with access may have been shown in the course of the case to have disturbed the child by certain conduct which he may assure the court will not be repeated, but which the court may feel should be fortified by observation; finally, the court may be convinced that both parties have shown inadequacies as parents, not sufficient to involve the child being removed, but serious enough to cause concern; and in those cases the judge may decide that some form of on-going supervision is desirable.

There exists a very real problem though in the relationship between the legal profession and behavioural scientists. Lawyers have a basic distrust of social scientists and their conclusions. For a long time it was extremely difficult for lawyers to accept that such experts had any part to play in custody disputes, and, on the other hand, social scientists were quite vocal in their criticism of legal theory in this area. It was felt that child placement should not be the province of lawyers and the courts.
This antipathy led many people to doubt the efficacy of having counsellors attached to a Family Court and working closely with the legal profession. Lawyers are trained in a basically adversary system, counsellors in a basically conciliatory one. The mixture of brimstone and treacle seemed inherently unlikely to succeed. The experience in Australia was that at the commencement of the Family Court, many lawyers were at best suspicious and at worst openly contemptuous of the counsellors attached to the Court; while many counsellors were dubious or frankly terrified of lawyers. There has been a gradual rapprochement though, and the remarkable result in the last 2 years has been that some lawyers practising in the jurisdiction are, if anything, too enthusiastic about the use of behavioural scientists. It would seem that the crux of the problem initially was ignorance of each other's role. Thus, as each built up an understanding of the other's methods and problems the ice began to melt and the resolution of child custody disputes became a joint interdisciplinary effort.

However, this does not always mean that lawyers seek the aid of counsellors for altruistic reasons. In most cases the motives are probably mixed. After all, a lawyer is employed to obtain the best possible results for his client, even if that result does not accord with his personal views. The conscientious family lawyer is thus in a difficult situation. He may call for counselling because he believes that it will
assist the problem even if that involves his client being persuaded to give up certain notional advantages. But he might also suggest counselling for baser but quite understandable and certainly not unethical motives. He may feel that the counsellor will come to the same conclusion as the client, and, if that be so, his case is in so much the stronger position if a contest develops. He may do it because he thinks the other side will ask anyway and he should gain a tactical advantage by being the first to ask. He may do it simply because he believes it pleases some judges who might otherwise ask why he did not.

It is also interesting to consider the development and growth of the interaction between judges and counsellors, again, particularly those attached to Family Courts. I regard this relationship as an extremely important one for the input of a child into the decision-making process. It is obviously a joint learning exercise with both sides feeling their way. Counsellors need to appreciate both the problems of judges in exercising their very wide discretion in this area, and how they can contribute to the decision-making process. On the other hand, judges need to be aware of the services that counsellors can provide and direct them as to how best those services can assist. Again, in Australia, as much as counsellors were dubious and fearful of the legal profession, they were doubly so in respect of judges. Thus, it is taking
much longer to create a close rapport between the two, but hopefully this will occur in the very near future.

There is no doubt that there has been an ambivalent attitude by courts to the opinions of behavioural scientists. Of course, there is this barrier existing between the two professions, but it seems that more than that there is a fear in some judges of surrendering the decision-making process to the so-called experts. This attitude is illustrated by the following extract from the judgement of Lacourciere J. in Gauci v Gauci:

"The court will, of course, treat the opinion of a highly respected child psychiatrist with great respect; however, its delicate functions in matters of this kind, as well as in other areas cannot be surrendered or delegated to any expert, however qualified. In the decision-making process, such opinion is considered as a helpful factor, to be weighed and assessed along with all other relevant evidence. After a lengthy trial, and a thorough evaluation of the issues, the decision of the court on the child's welfare will be based on more complete and reliable information than that available to Dr. Goldstein after an hour-long interview with the plaintiff, her son and her common-law partner."

Of course, it might be said that Lacourciere J. legitimately disregarded the opinion of the expert because of its incompleteness, but I would suggest that even if no such criticism of the opinion could be made, the tenor of the judgement indicates that he would not simply accept the opinion; he would still weigh and assess it along-side all the other evidence.
There have been even more extreme positions taken by a judge when considering the evidence of a social scientist. For example, in *Martiniuk v Martiniuk and Kowerchuk*, there was an extensive report presented to the court by the Head of the Division of Psychology at University Hospital, Saskatoon, Saskatchewan. In this report the Doctor indicated that the presence of the natural father was a source of severe anxiety and emotional disturbance for all of the children, and that continued forced visits would only further alienate them. However, the judge disregarded this evidence entirely and awarded access to the father, saying that the Doctor's opinion was mere speculation. Incomprehensibly though, after thus rejecting the assistance of an eminent psychiatrist, the judge launched into a dissertation pointing out his own deficiencies and the law's limitations in determining child placement. In his own words:

"No book of knowledge contains clear-cut answers as to whether I have reached a correct or in-correct decision. Like so many decisions that have to be made in matrimonial matters, knowledge of the law, limited as it may be, is of a secondary nature and has played little part in the decision arrived at. I cling to no precedent nor authoritative text as supporting the result I have arrived at. In deciding this problem, it has been a matter, after weighing and considering all of the evidence, of drawing on such experience, reason and common sense that I have at my command, admittedly limited in each instance. I am mindful that in light of the evidence of Dr. Shepel and his supporting brief that perhaps there is some risk involved in deciding as I have. On balance, I have concluded that that cannot deter me from ordering as I feel I must do, and, of course, responsibility for the decision must rest with me."
On the other hand, instances can be found where courts have unreservedly adopted the views of behavioural scientists. In Lebre v Lebre, O'Driscoll J. said this:

"Having seen all the parties, having adjourned the matter from time to time in order to be in receipt of the best help I could in order to come to a conclusion on the matter of access and custody, I unhesitatingly adopt the views of Dr. Broder." Moreover, in the case of Re Squires Berger J. not only accepted the evidence of a psychiatrist and a social worker without question, but also placed a great deal of emphasis on literature dealing with the effects of maternal deprivation.

In my opinion there is no reason why a court should not act solely on a recommendation made by a competent expert, as long as such recommendation is soundly based. By taking this course I suggest that the court is not abdicating its responsibility at all. At the very least there must still be a conscious decision by the judge whether to accept the expert's opinion or not. It must still be stacked up against all the other evidence given in the case.

The real problem though, in overcoming the ambivalence of the courts lies with the nature and quality of expert opinions proferred to them. I will explore this in more depth later in this paper, but it is no wonder that courts are not imbued with any degree of confidence in psychiatric evidence. Typically, each party calls a behavioural scientist
to espouse either that party's worth as a parent or that the needs of the child can best be met by granting custody to that party. The judge is thus bombarded with evidence based on similar general principles but leading to a different result according to which party called the "expert". Unfortunately, psychiatrists and psychologists tend to act as advocates for the party calling them and this perpetuates the adult-orientation of a custody dispute. What the court desperately needs is evidence from impartial consultants.  

When a matter proceeds to trial a social scientist can be used in one of two basic ways, or in a combination of both. He can be requested to provide a written report concerning the subject child, he can be requested to give oral evidence in court, or he can be required to do both. I will deal with each basic function in turn.

(1) **WRITTEN REPORT**

A report can be requested either by the judge himself, by counsel for one of the parties, or by counsel for the child. It can also take various forms. It can be simply a gathering of information or it can include recommendations. It can be based solely on interviews or it can extend to qualitative
investigations of the child's environment. If it is the former, then the interviews might only be with the child, or might extend to one or both of the parties, or even to all possible care-givers. If it is the latter, then the investigations might only be of the child's immediate surroundings, or might extend to possible future environments and those of other care-givers.

(a) FACTORS AFFECTING THE VALUE OF A REPORT

(i) COMPLETENESS

The obvious difficulty with so many permutations is that the court must be circumspect in evaluating a written report and be forever mindful of the context in which the same was prepared. It seems to me that unless the report is specifically designed to deal with one isolated aspect of the child's situation, a court should not attach a great deal of weight to any report that is not based on at least an interview with the child and both parties.\textsuperscript{211} The report should attempt to create for the court a picture of the child, its personality, its fears, its hopes, and how it interprets its own future relationships with both parents and any surrogate parents. This cannot be done unless all parties concerned are seen by the social scientist.\textsuperscript{212} Unfortunately though, it is quite common-place for a party to produce a report from a
psychiatrist or a psychologist which recommends placement with that party, only to find that no contact was made with the other side. Indeed, it can happen that a report is prepared without the child even being seen. The non-custodial parent may have retained a psychiatrist or a psychologist, but the custodial parent may refuse to see him or allow the child to be interviewed. This is a product of the adversary system where, for the most part, it is the parties themselves who decide both which matters will be in dispute and what information will be presented to the court in the form of evidence to act as the factual basis for the court's decision. This emphasises the value of independent counsel for the child. His concern is that the court is apprised of all the relevant unbiased information necessary to reach a decision which will enhance the interests of the children. Thus, he should obtain a report that comprises an assessment of all prospective environments, and a party would be very brave indeed to refuse to see a behavioural scientist at the request of such counsel, or to prevent the child from being interviewed. His chances of success would then be very limited indeed.

(ii) INDEPENDENCE

Apart from this need for completeness, it is also essential for the report to attract the greatest weight for the behavioural scientist to be seen to be independent from
any one party. Again, this is directed at the report that is commissioned by just one party. Here it is only natural for the psychiatrist or psychologist to lean in favour of the party retaining his services, and this is evidenced by the fact that a court is often confronted with reports obtained by each party which are in total conflict. It is enough to say that reports in this category have been obtained by one party with a view to supporting the case of that particular party.

This notion of independence was uppermost in the minds of Professors Gosse and Payne in their research paper prepared for the Law Reform Commission of Canada, but in another context. They recommended that if a social scientist counsels the parties in an attempt to bring about an agreement as to custody arrangements, but is unsuccessful in this regard, he should not be involved in the preparation of a report for the court. The reason for this is said to be that

"(a) counsellor may have become overly identified with the claims of one of the parents, particularly if he feels that the other parent is responsible for the failure to achieve conciliation." Accordingly, he may not be able to provide a totally unbiased opinion for the court.

This has also been recognised in the Australian jurisdiction. Under the Family Law Act, 1975 as amended, two types of conference can be held; one which is strictly a
confidential counselling session,\textsuperscript{217} and one which is reportable.\textsuperscript{218} In the former, the counsellor cannot disclose at any later stage to the court or anyone else what has transpired. Such a condition assists the parties to full disclosure and frankness, and allows the parties to look upon the counsellor as a confidential friend and not a potential enemy who will disclose admissions. The disadvantage is that if the conference fails, the counsellor can be of no use to the court in subsequent proceedings, because he must remain forever silent as to what he knows as to the faults and virtues of the parties as custodians.

On the other hand, a reportable conference is just that. The parties know that the counsellor may be asked subsequently what went on in the conference and for his own observations as to the suitability of the parties as custodians. The advantage here lies in the fact that if the parties do not come to any agreement, the counsellor can assist the court from his own assessment of the parties based upon his observations during the conference. The disadvantage is at times to destroy that frankness and confidence in the counsellor which might substantially assist in the resolution of the problems.

However, it is quite common to combine both types of conference in the one matter; i.e., if the confidential
conference fails, a reportable conference is then held. But of course, different counsellors are employed at each stage in order to ensure total independence.

The attitude of the English Court of Appeal in the case of *B(M) v M(R)*,\(^{219}\) is also very instructive on this question of independence. There, the father obtained a report from a pediatrician without consulting the mother or the court. The Court of Appeal quoted with approval the remarks of Cross J. in the case of *Re S (infants)*,\(^{220}\) which they considered applied equally in cases arising within the Divorce jurisdiction of the court where the welfare of a child was concerned. Cross J. had said this:\(^{221}\)

"When a child is made a ward no important step in the child's life can be taken without the court's consent. To my mind the examination of the ward by a psychiatrist with a view to the report being put in evidence in the case is such a step. If both sides agree that an examination is necessary and agree on the person or persons to conduct it then normally no doubt there would be no reason for the court to refuse to follow their wishes. If they disagree, however, then it would seem right that the official solicitor should be appointed guardian *ad litem* of the ward - as was done in this case - and that he should decide, subject to the views of the judge, whether or not an examination is needed. Further, if he decides that it is needed then, as it seems to me, he should instruct the psychiatrist or psychiatrists in question so as to ensure that he or they have all the relevant material and can see both parents. I have no doubt that the psychiatrists who give evidence in wardship cases are persons of the highest integrity, but if they are instructed on behalf of one party their views are bound to be coloured to some extent by that party's views."
The Court of Appeal then concluded as follows:

"I think it was unfortunate, though I do not want to be unduly critical, that in this case the pediatrician who was instructed only by one party, and only had advantage of hearing that party's views. When similar situations arise in the future, I would strongly urge that parents who are in dispute with each other should at least co-operate in jointly instructing a doctor or pediatrician or psychiatrist in the event of its being thought desirable to obtain an expert opinion."

Apart from the recognition of the problems associated with only one party obtaining a report, the particular aspect of this approach which is deserving of praise is the use made of independent counsel for the child in orchestrating the need for, and the preparation of, a report.

(iii) CONFLICTING OPINIONS

One unfortunate aspect that affects the weight that a court attaches to the opinion of a behavioural scientist is that there can be entirely different schools of thought as to the consequences of a given situation. In other words, in the area of custody of children, it is common to find experts reaching different conclusions as to where the best interests of the children lie, albeit there may be no dispute as to the basic facts. Nor will this simply be because the scientist has not made a thorough investigation, or because he is retained by one particular party. Conflicting opinions can
and do occur where the pre-conditions of completeness and independence are satisfied. The explanation is that current psychological theories just do not allow for valid and reliable predictions of human behaviour.  

This is particularly so when the child has a relationship and psychological attachment to each of the contesting parties. Here, as Mnookin says:

"Even with the best trained experts, the choice would be based on predictions that are beyond the demonstrated capacity of any existing theory. While the psychologists and psychiatrists have made substantial therapeutic contributions, they are not soothsayers capable of predicting with any degree of confidence how a child is likely to benefit from alternative placements."

Moreover, it must be appreciated that there is generally a marked difference of opinion amongst scientists as to the correctness or otherwise of the theories that form the basis of their recommendations. As examples of this one need look no further than to the divergence of views amongst social scientists concerning the psychoanalytical theories of Goldstein, Freud and Solnit, and the supposed link between parental deprivation and a child's psychological development and well-being, two matters which I have previously explored in this paper.

Thus, a judge can be placed in a dilemma. There may
be two soundly-based, comprehensive, and independent reports before him, but with differing recommendations, and he has to decide which one to adopt. He may seek a further expert's opinion, but there is no guarantee that such opinion will support either of those already obtained, and it may very well compound the dilemma. In these circumstances, the judge is simply left to rely on his own assessment of the situation, assisted though, by the insight provided by the reports into the world of the child.

However, that the judge can be left to his own devices in this way need not be viewed in a negative fashion because, as we have seen, one danger of the indeterminacy of the best interests principle is that the decision will be handed over to behavioural experts with little or no appreciation of such practical matters as the stability and integrity of the family. Checks and balances are required when behavioural experts are involved and, consciously or not, judges and the legal profession provide the same. Mnookin has aptly remarked that

"(h)aving custody disputes determined by embracing more and more of the niceties of psychological and psychiatric theories requires careful analysis of the limits of these theories, their empirical bases, and the capacity of our legal system to absorb this new doctrine."

In this light it is even more understandable why courts
have been hesitant to blithely accept the opinion of an expert in this area. There would always be the thought in the back of the judge's mind that the theory on which the opinion is based may not be one which is totally accepted by other experts.\textsuperscript{228} Unfortunately though, this doubt will continue to exist until the study of a child's psychological development becomes a precise science. In the words of Skolnick\textsuperscript{229}:

"...there is a tension between the tentativeness with which scientific findings should be regarded and the needs of policy-makers for clear-cut principles upon which to base decisions."

(b) OBTAINING A REPORT

Because of the need for both completeness and independence in a report, it is imperative that the judge himself is able to order or request a report directly, and not be left to rely on counsel for the parties, or even counsel for the child, to provide the same. Moreover, it is equally as important that the judge be able to order or request the report of his own motion, and not have to depend on an application being made.

However, prior to 1974 judges in British Columbia had no direct statutory authority in this regard, and they were left to develop their own practices for obtaining reports. Indeed, this situation even pertained in divorce suits because there were no provisions in the Divorce Act, 1968,\textsuperscript{230} dealing
The practice developed in the Supreme Court of British Columbia was to rely on Section 63 of the Supreme Court Act in calling for reports from the Superintendent of Child Welfare. However, it seems to me that this was straining the interpretation of that section to use it for that purpose. The intendment of the section is obviously to allow a judge to have part of the matter before him investigated by a Court-appointed arbitrator at a separate hearing, the prime example being a reference of the question of maintenance to a District Registrar.

The lack of direct statutory authority was partially remedied in 1974 by the Unified Family Court Act. Section 9 of that Act permitted a judge to direct an investigation and report in respect of a family matter. However, the direction could only be made on application and was only applicable in Provincial Court proceedings. Nor were these deficiencies remedied by the Family Relations Act 1978, which repealed the Unified Family Court Act. Section 15 of that Act allows for an investigation and report, but again, only on application, and in proceedings under the Act itself. Accordingly, there is still no direct statutory power for a judge in British Columbia to obtain a report on his own motion, and his power to respond to an application for a report...
is limited to proceedings under the Family Relations Act, 1978.

Of course though, the question of statutory authority is purely academic as far as the Supreme Court is concerned, because a judge of that court can always fall back on his inherent equitable jurisdiction to protect children. This parens patriae power would undoubtedly extend to authorizing the court to request an investigation and report concerning the subject child.

Throughout this confusion though, one fact is clear, and that is the importance of the Superintendent of Child Welfare. His practice in supplying reports has altered over the years. Initially, they were only provided on the condition that the judge alone saw their contents, but this practice was strongly disapproved of in the case of Re Moilliet on the ground that the reasons for the condition did not justify the waiving of the usual court procedures for the presentation of evidence. These reasons included the fear that social workers could not fulfil their therapeutic role if it was thought that the report would be made public.

Nevertheless, as a result of this decision the Superintendent adopted a system of open reports. He now arranges for social workers in the field to gather the necessary information and forward the same to his Office.
There, an official compiles the report which is made available to the judge. Unfortunately, the obvious disadvantage of this practice is that there can be no cross-examination on the report. There is no way of testing the validity of the assumptions made by the persons responsible for its preparation.

This disadvantage would indeed be troublesome if all reports came from the Superintendent, but, although his role must be appreciated, it must also be noted that since the Unified Family Court commenced operation, and albeit the same is established by Provincial legislation, counsellors attached to that Court have responded to requests for reports in other than Provincial Court matters, such as divorce suits. The advantage of reports from this source is that they are prepared by one counsellor who is then available for cross-examination.

From this discussion it is clear that there is a dire need for a rationalisation of the provision of reports, and judges dealing with custody disputes at all levels should be furnished with statutory authority to order or request a report, both on their own motion and on application. This is in fact the case in Australia where Section 62 (4) of the Family Law Act, 1975 as amended, allows a court to adjourn the proceedings.
"until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable." 240

c) WHICH BEHAVIOURAL SCIENTISTS?

The question might be raised as to whether reports should be obtained from social scientists attached to the court itself, or at least employed by the Government, or whether behavioural scientists in private practice should be retained. This is a similar question to whether counsel for the child should be drawn from private practice or from Government-employed advocates. However, I do not consider that the issue is as crucial in this area, and as long as the author of the report has the necessary qualifications and is available for crossexamination, it will only be relevant in a minimal number of situations. Crossexamination is the key though, because it overcomes the reason often-cited for physical segregation of investigative services from the court, namely, the alleged lack of objectivity in reports obtained from court-attached staff.

The question of who would be appropriate to prepare a report can sometimes be governed by the type of report required, or by the fact that the child is suffering from particular emotional problems. Thus, there may be a need for the expertise of a psychiatrist or psychologist, and no
counsellor attached to the court has the necessary qualifications. The practical problem, of course, is the cost factor, and this alone would require the use of court-attached staff wherever possible. However, this is not meant to denigrate such staff in any way because in fact, in time, and with experience, they will become particularly attuned to what the judge requires in a report. This will have the advantage of avoiding unnecessary delays in the disposition of custody matters, an advantage which is vital to the future well-being of the child. The experience in Australia is that almost all reports are obtained from the counsellors and welfare officers attached to the Family Court, and it is only where a child has previously been seen by a private psychiatrist or psychologist that a report is sought from such an outside expert. It might be argued that the reason for this is that the court only has power to order a report from its own welfare officers, but it is plain that if the court sees the need for a report from a private expert it has ample persuasive powers to encourage the parties to obtain such a report.

However, to say that reports of private psychiatrists and psychologists are rarely utilized in Australia in the resolution of custody disputes is not to be interpreted as meaning that they take little or no part therein. In fact, it is relatively common for such behavioural scientists to give oral evidence in court, having been called to testify by one
of the parties.

(d) THE TYPE OF BEHAVIOURAL SCIENTIST REQUIRED

At this stage it should be clear that, along with counsel for the child, behavioural scientists working in this area need to be a special breed. In particular, they need to be au fait with the workings of the court and the approaches of the judges.

A common problem with reports presented by experts is that they have been prepared without any regard as to how evidence is to be presented in court, or the likely admissibility of such evidence. The rules against the use of hearsay evidence are invariably violated, and, as we shall see, this creates enormous problems relative to the treatment of the report by the court.

There is also no opportunity to consult with the judge in the preparation of a report. This is unlike some areas where social scientists are usually employed. There are no "patients" or "clients", and the process does not include consultation with others in the absence of the "patient" as to what is best for the welfare of that person.
RECOMMENDATIONS OR NOT?

The content of a report is obviously an important matter, and the prime consideration here is whether a recommendation should be made by the social scientist, or whether the report should simply be a gathering of information. I suggest that a well-reasoned and soundly-based recommendation is a definite advantage to a judge. Whether he accepts the recommendation is entirely within his discretion, but it does indicate to him what the psychological interests of the child demand. However, as we have seen, judges are sometimes imbued with a fear of abdicating responsibility to so-called "experts" and many prefer not to call for a recommendation. Indeed, when a recommendation is forthcoming without any direction from the judge, it seems that he goes out of his way to emphasise that the same is only one factor to be considered. This attitude can be no better illustrated than by the remarks of Bouck J. in Saxon v Saxon when he confirmed that Section 63 of the Supreme Court Act authorised a Court to call for a report from the Superintendent of Child Welfare. He said this:

"My interpretation of the intention behind this Section is that while a registrar or official or special referee may hold an inquiry and report back to the court with a recommendation, so long as the court does not allow its final decision to be made by those who conducted the inquiry or made the recommendation, such a procedure is perfectly proper ... The report is only one of the factors which a court may take into consideration and in doing so
it is not delegating its judicial functions to those who are in charge of its preparation."

This approach is obviously fueled by the fact that there is a natural distrust of any conclusions drawn by social scientists. On the other hand though, it seems to be common for judges to accept recommendations of behavioural scientists where the same are specifically sought; at least, this is the experience in Australia.

The problem, of course, is where the recommendation in the report conflicts with the court's conception of what is in the best interests of the child. This can occur particularly where one party is attempting to upset a relatively long-standing custodial arrangement, or where there has been a pre-existing de facto custodial situation. Except in rare instances the evidence presented to the court by the behavioural scientist will be that a disruption in the continuity of the child's existence will have a detrimental effect on the child's development. The precise effect will depend on the phase of development of the particular child. On the other hand though, the court might be swayed by such things as the ability of the applicant to care for the child in a physical sense more adequately than the present custodian. The court then faces a dilemma in disposing of the opinion of the expert, particularly if the report is comprehensive and impartial. Of course, if it were otherwise, then this would provide the court with an easy solution.
Nevertheless, there are several options open. First, the court might look to the inherent ambiguity of expert evidence in this area. This ambiguity lies in the fact that the evidence can be interpreted to two ways. For example, in the situation where a parent has left the child in the care of third parties and subsequently seeks the return of that child, the evidence might be that the child is happy and settled with the third parties. This evidence can indicate either that the child should not be removed from the psychological relationship he has established with the third parties, or that he is capable of adequately adjusting to a change in environment, namely, from the parent to the third parties, and thus, should be able to cope with a further change. However, more often, the court rids itself of the dilemma altogether by emphasising that the opinion of the expert is to be given no more weight than the other evidence presented, and the outcome must be decided after a consideration of the whole of that evidence. In the case of Hill v Hill a psychiatrist examined the parties at the request of the judge and recommended both in his report and in his oral testimony that the children should remain with the mother where they had been all along. However, the judge chose to disagree with this recommendation finding that the mother's relationship with her de facto husband was destructive and harmful to the welfare of the children. He did this by referring specifically to other sworn evidence and exhibits tendered at the hearing.
Conflict can arise in the area of access as well. In the case of *Tassou v Tassou*\(^{250}\) the court disagreed with the recommendation of the psychiatrist that the father have no access. In reaching this conclusion the court criticised the psychiatrist's assessment of the parties and found, in effect, that the actions of the mother were the cause of the father's aberrations.

This case is also a particularly unfortunate one from the point of view of the theme of this paper. One very important basis of the psychiatrist's recommendation was that as a result of his interviews with the children, he found

"that they were somewhat alienated by their father's attitude towards them and disliked him as a result."\(^{251}\)

This assessment was naturally conveyed to the judge, but he chose to disregard these views of the children, which, if accepted, would have meant the father having no access. In my opinion this is a prime example of the input of children into the decision-making process being stultified. I see behavioural scientists as being in a peculiarly advantageous position to act as mediums through which the courts can be apprised of the views, thoughts and feelings of the children in the context of their psychological well-being. Yet, the court in this case did not allow this to occur.\(^{252}\)

Another particular area of conflict when access is in issue is where contact with the non-custodial parent may have
an unsettling effect on the mind of the child and have a disturbing influence on his normal routine. Here, behavioural scientists invariably recommend that access be denied, but consistent with their liberal attitude to access, courts generally lean towards permitting contact between the child and the non-custodial parent even in these circumstances. For example, in *Ader v McLaughlin et al.* the opinion of the psychiatrist was that reintroduction of the mother would result in problems for the child, ranging anywhere from stress to serious emotional disturbance. Yet, the court saw fit to award access to the mother.

From this discussion it is clear that both in matters of custody and access the opinion of behavioural scientists will always bow to the assessment of the court, unless, of course, they are *ad idem*.

In any event, there are still advantages in recommendations being made, and one distinct advantage is that the prospects of settlement are markedly increased as a result. However, for settlement to actually take place it is obviously important that the recommendation is a sound one and is likely to be accepted by the court. Again, this emphasises the need for a comprehensive and independent report as opposed to one obtained solely through the auspices of one party. It also highlights the role of independent counsel as the
controller of the proceedings. Not only is he able to obtain the requisite report, but he is in a position to organise a conference with all parties in order to consider the report and recommendation. In my experience, settlement generally follows such a conference. Unfortunately though, where there is no such independent counsel, it is not always the case that counsel for the parties will take it upon themselves to bring the parties together to consider an independent report obtained either at the direction of the judge or by agreement between the parties. Moreover, even if there is a conference, the adversarial stances taken by both sides may be counterproductive to settlement. The party whom the recommendation does not favour will be convinced that the same is wrong and will want to press on with legal proceedings. Unless his or her counsel is a remarkable lawyer, there will be no-one present at the conference who can lift the recommendation from the status of being just another psychologist's opinion, to being the likely result of litigation. Even having the person who prepared the report present at such a conference would not necessarily alter the situation. He would be in a position to defend the report but in my experience something more is needed. The ideal, of course, would be to have both the author of the report and independent legal counsel present. But where this is not possible the only viable alternative to independent legal counsel would be the presence of a court official. For instance, in Australia, a pre-trial conference
can be held before a Registrar of the Court, and this generally has the desired effect. It might be suggested though, that the best approach is for a judge to preside over such a conference, and particularly where the report has been obtained at his direction. However, the difficulties with this are firstly, the call on judicial time given heavy court calendars, and secondly, the danger of the judge descending into the arena of the proceedings and of having to disqualify himself from further hearing the matter.

However, these restrictions do not appear to affect Mr. Justice Haines of the Ontario High Court, who has developed his own system of settling custody disputes by the use of psychiatric reports. Indeed, the order that he makes has become known as the "Haines Order" and has been utilized by other Ontario judges. It is described by Professors Gosse and Payne as follows:

"This is a procedure whereby Mr. Justice Haines calls Counsel for the warring parents into his chambers and uses his very great influence to convince the parties to consent to a psychiatrist interviewing the parents, the children if necessary, and whomever else the psychiatrist deems fit, with a view to preparing a psychiatric report containing recommendations as to custody and access. If the parties are content with the report and are willing to abide by it, that is the end of the matter and an order is usually taken out on consent, disposing of the custody and access issues. If the parties do not agree with the report, or if either of them dispute it, the trial proceeds (usually some three or four months later) and the psychiatrist is available to be crossexamined at the hearing, on his report which has by that time, been filed with
the court. I understand that this procedure frequently results in settlement of custody and access disputes."

Whether this is an acceptable method of settling custody disputes is debateable but at least it does not preclude the parties from continuing to trial and it has the advantage of providing necessary expert testimony for the court to consider. One distinct disadvantage of the technique though, is that if the parties do remain apart and the trial is substantially delayed, the child will be affected by such a delay, and perhaps markedly so. In any event, the "Haines Order" is not in common use outside of Ontario, and in the usual run of cases a judge plays no part in conferences called to consider psychiatric reports.

(f) CONFIDENTIALITY

Although there is a definite link between settlement and making parties aware of the contents of a report, there may be instances where it would be detrimental to follow the latter course. The report may contain material which would have a deleterious effect on the relationship between one party and the subject child, or might contain material that would be psychologically damaging to one party. Indeed, it might even discourage candid responses, or any response at all, on the part of sources who feared identification.
This raises the issue of the confidentiality of the report. The issue exists at two levels. Firstly, whether the behavioural scientist should include everything in the report that is revealed during his investigations and, secondly, if all is revealed, whether the parties should be permitted unrestricted access to the report. The former question is common to all reports but the latter question only arises in respect of reports ordered by a judge, and perhaps in respect of reports obtained by independent counsel. This is because where a report is obtained by one party only, that party will obviously be aware of the contents, and the other party will be entitled to receive a copy of the report pursuant to Section 12 (2) of the Evidence Act.258

(i) THE CONTENTS OF THE REPORT

The scientist can be placed in the dilemma of being informed of something by the child on the condition that he does not disclose the same; or it may be information from someone other than the child which affects the child's welfare. Prima facie, it would seem that the scientist cannot call in aid any common law notion of privileged communications as can independent counsel when faced with this situation, and if he does not include the information in the report he can be compelled to reveal the same in court. However, there are some court decisions which throw doubt on this traditional
approach and suggest that if legal privilege does not attach, at least the court may respect the confidentiality of the relationship on the grounds of public policy. In this regard, it must be remembered that a judge has a discretion to refuse to receive evidence which would otherwise be admissible. The problem though, is that the majority of these cases have arisen in the situation of a counsellor attempting to reconcile or conciliate the parties to a marriage. Here, there is never any intention of a report being made to the court, and in fact that would probably defeat the whole purpose of the exercise. Thus, a distinction could perhaps be drawn on this basis. However, the fact of the matter is that many of the same public policy arguments apply, such as the need to encourage full disclosure, and the need to protect the relationship between the scientist and the child. Accordingly, there would seem to be every reason for extending the principle to cover the dilemma sometimes encountered by a behavioural scientist in reporting to a court in a custody dispute. The history of the principle is that it has not been a static one. For instance it has been used to overcome Section 21 of the Divorce Act, 1968. That Section provides as follows:

"(1) A person nominated by a court under this Act to endeavour to assist the parties to a marriage with a view to their possible reconciliation is not competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as the nominee of the court for that purpose.
(2) Evidence of anything said or of any admission or communication made in the course of an endeavour
to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings."

Now, although this section has been strictly construed, courts have not found much difficulty in refusing to compel Counsellors outside the section from giving evidence on the basis of the general discretion referred to above. Thus, there is a precedent for using the principle to escape legal strictures. However, the same problem arises here in that this section is concerned with attempted reconciliation or conciliation, something quite different from an investigation and report in a custody dispute.

Of course, legislation could provide a cloak for the Counsellor in these circumstances, but as we have seen the legislation in British Columbia in the area of social services is far from satisfactory. Section 3(3) of the Family Relations Act, 1978, protects a Family Court Counsellor where he is giving advice and assistance to the parties to a dispute under that Act. It provides as follows:

"Subject to the law of Canada, where
(a) a family court counsellor receives under sub-section (2) evidence, information, or communication in confidence from a person who is a party to the proceeding, or from a child, and,
(b) the person who gave the evidence, information, or communication to the family court counsellor under sub-section (2) does not consent to the family court counsellor disclosing the evidence, information or communication,
the family court counsellor shall not disclose the
evidence, information, or communication in a proceeding in a court or tribunal, and no person shall examine him for the purpose of compelling him to disclose that evidence, information, or communication."

However, no such protection is given to an expert who is directed to make an investigation and report under Section 15 of the same Act. The Divorce Act, 1968\textsuperscript{265} of course, is silent about social services in custody disputes. Therefore, the legislation affords little or no protection, and it is unwise for the behavioural scientist to make any promises concerning non-disclosure in order to obtain relevant information. If such a promise is made to a child, and is subsequently broken, the child may be hesitant about trusting adults again. The only alternative for the social scientist is to fully apprise whoever is providing the information of the risk that disclosure may be required, albeit this may destroy the willingness of that person to confide in the scientist generally.\textsuperscript{266}

This conundrum exists as well in the Australian jurisdiction. Where a report is ordered by a judge pursuant to Section 62 (4) of the Family Law Act, 1975 as amended,\textsuperscript{267} the counsellor may be required to divulge anything that was said to him during his investigations. However, judges are loathe to allow this to occur when it will entail a breach of confidence, and all other avenues of obtaining the particular information will be explored. For example, in a case of
Evans v Evans the judge had ordered a welfare officer's report, and, pursuant to this direction, the children, the parties, the surrogate parents and the extended family group of the children were interviewed and a report prepared which was tendered in evidence by counsel representing the children. In the report the welfare officer referred to the dilemma in which she was placed as a result of the fact that the children, during the interviews, requested her not to tell the father that they had told her certain things because they were frightened. She obtained this information as a result of gaining the confidence of the children and by undertaking not to disclose that information to the father. Not surprisingly she was concerned at the possible consequences of breaking that confidence. Accordingly, the judge directed counsel for children to endeavour to ascertain from them what the information was, whether it would be relevant or important to the determination of the issues before the court and, if it was, to ascertain if it was possible to obtain the consent of the children for the information to be disclosed. Unfortunately, counsel was not successful in this regard, but at a subsequent interview with the welfare officer the children consented to the information being revealed.
(ii) **DISCLOSURE OF THE REPORT**

As we have seen, the second question regarding confidentiality is also a delicate one. Where the report is ordered by a judge from the Superintendent of Child Welfare pursuant to Section 63 of the Supreme Court Act or the *parens patriae* power, the report would be made available to him in the first instance, and he has then to decide whether to release the report to the parties either in whole or in part. On the other hand, if the report is obtained under Section 15 of the Family Relations Act, 1978 subsection (3) of that section provides that a copy of the report must be served upon every party to the proceeding prior to providing the court with the same. However, the court may grant an exemption from this requirement where satisfied that the circumstances warrant. The difficulty though, is how will the court know that the report contains some information that should not be revealed? The court will have to rely on the person providing the report to raise this matter even though there is no procedure laid down for this course of action.

The practice with respect to the disclosure of reports varies across Canada. The Law Reform Commission of Canada has pointed out that

"(it) range(s) from extending full rights to the
parties to inspect the report and subject its authors to cross examination, to the withholding of reports at the discretion of the judge."

However, the majority opinion is that reports should always be disclosed to the parties. Even the Law Reform Commission concluded that

"investigative reports should be made available to the lawyers of the parties or, if the parties are unrepresented by counsel, then to the parties themselves." 275

It is a principle of natural justice that the judge should not consider evidence which is likely to be of a highly suspect nature without the parties having the opportunity of questioning the validity of that evidence. As we have seen, not only can predictions of behavioural scientists be unreliable but their reports invariably contain hearsay evidence. Now, it is conceded that because of the peculiar nature of custody disputes, infringement of the hearsay rule is legitimate 276 in order to allow necessary evidence from the social sciences to be put before the court, but only if all interested parties have an opportunity to consider the report, crossexamine the author concerning his sources of information and, if necessary, introduce evidence in rebuttal. 277

The highwater mark of this approach is the British Columbia case of Re Moilliet 278 where it was held that reports submitted to a court should not be confidential and exempt
from the rules of evidence except where justice can only be done by permitting such a course of action. As we have seen, the report in that case was obtained with the consent of both parties from the Superintendent of Child Welfare, but was not made available to either party or their counsel. It was furnished by the Superintendent on the condition that it would only be viewed by the judge. The court felt that this practice was

"highly improper and that the document should not have been placed before the learned trial judge subject to any conditions of privacy and confidence or exemption from the rules of evidence."  

After considering the authorities, the court concluded:

"It is my respectful opinion that the considerations tending to support the condition imposed by the Superintendent of Child Welfare do not justify the breach of the time-tested rules as to evidence in open court, evidence taken in the absence of the parties or their counsel, unsworn evidence and hearsay evidence and the lack of the acid test of crossexamination of witnesses and of the opportunity to a learned trial judge to hear and to see witnesses as they testify."  

However, I suggest that doubts can be cast on the applicability of this principle in the situation where the judge decides that certain information should not be revealed to one or both of the parties. If the judge does not rely on this information to reach his decision then I suggest that Re Moilliet is distinguishable on the ground that the principle is concerned with protecting a party against whom an adverse decision is made upon information which that party
has not seen and has had no opportunity of challenging or contesting. However, even if this principle is raised squarely, I feel that there are considerations applying in custody disputes which justify allowing the judge a discretion whether to reveal the information or not. There are several arguments that can be utilized here. The obvious one is that the general exception to the principle applies; surely justice cannot be served by detrimentally affecting the relationship between one parent and the subject child or by causing psychological damage to one party. However, I am loathe to rely solely on this exception because it is not as well established as one would like. On the other hand, there is no doubt that there is an exception when dealing with wards of the court. In the words of Viscount Haldane L.C. in Scott v Scott:

"The case of wards of court ... stands on a different footing. There the judge who is administering their affairs in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and over-riding principle to regulate his procedure in the interest of those whose affairs are in his charge."

Now, the wardship jurisdiction in England is the equivalent of the parens patriae jurisdiction in Canada, and, accordingly, at least where the court is acting pursuant to its inherent equitable jurisdiction, the judge would
appear to have a discretion whether to disclose or not. But the important point is that similar arguments are applicable in the resolution of all custody disputes. The paramount consideration is still the welfare of the subject children, and just as this overrides any principle of natural justice in the case of wards of court or where the court is exercising its parens patriae jurisdiction, it should have the same effect in other custody disputes. In the words of Lord Devlin in *In Re K (infants)*:\(^{285}\):

"Where the judge sits purely as an arbiter and relies on the parties for his information, the parties have a correlative right that he should act only on information which they have had the opportunity of testing. Where the judge is not sitting purely, or even primarily, as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail."

However, this is not to give carte blanche to the judge to refuse to reveal the contents of a report. If he intends relying on that part of the report that is not to be revealed he must be circumspect in assessing the reliability of the information and be as certain as he can as to the detrimental effect of divulging the same. The principles of natural justice are not to be lightly discarded.

Finally, it is possible to raise doubts about the correctness of *Re Moilliet* on the ground that with the exception of *In Re K (infants)*,\(^{286}\) the authorities relied upon were cases dealing either with the power of the court to
hear proceedings in camera or the appropriateness of a judge relying on information received in an interview with the subject child. At the very least, the latter situation appears to have been treated differently in the case of Saxon v Saxon, 287 from that of the provision of confidential reports, and the former situation is hardly an analogous one. Moreover, In Re K (infants) does not provide a particularly difficult stumbling block to my submission, because although that case was concerned with confidential reports being supplied in respect of wards of court, as we have seen, there should be no impediment to extending the reasoning in such cases to custody disputes generally. 288

Legislative intervention is obviously desirable to clarify the position of the judge. The question though, is on which side of the line should legislation fall? For the reasons outlined above, I suggest that it should fall on the side of allowing the court a discretion whether to divulge the report, or parts thereof, to one or both of the parties. 289 This is the case in the Australian jurisdiction. Regulation 117 of the Family Law Regulations, 1975 as amended, 290 provides, inter alia, that where a report has been obtained

"the court may 291
(a) furnish copies of the report to the parties or their legal practitioners, or to a legal practitioner separately representing a child ..."

All reports are initially forwarded to the judge who then has
an absolute discretion whether to distribute the same to the parties in whole or in part.

Of course, it is all very well to provide a court with such a discretion, but the question then becomes, how should the same be exercised? Obviously it is a difficult task for a judge to decide whether any part of a report should be divulged or not, and it simply adds to the onerous burden placed on the arbiter of a custody dispute in any event. I have already adverted to the fact that the court should be careful to ensure that the information is reliable and that revealing the same would be detrimental in some way, but, apart from this, the only guideline for the judge to fall back on is to do what is appropriate having regard to the best interests of the child. However, the author of the report can be of great assistance to the judge here and ease his burden by indicating in the report itself whether or not revealing any of the contents to the parties will be detrimental in some respect.

Conversely, the fact of the judge having this discretion may go part of the way to relieving some of the pressure on the author of the report when information is divulged to him on the condition that it is not generally made available. The author could include the information in the report just to apprise the judge of the same, and then rely
upon the judge to exercise his discretion in not revealing the details to the parties.

However, whether courts have this discretion or not, at least one thing is certain, and that is the fact that courts will receive reports and accord great weight to their contents. This is clearly contrary to the traditional method of presenting evidence under the adversary system, and is one area where the law has recognised and acted on the need for alterations to the system to ensure that custody disputes are resolved in accordance with the best interests of the children. Indeed, in Australia the Family Law Regulations, 1975 as amended, go even further and allow the court, with the consent of the parties, to

"(a) dispense with such procedure and formalities as it thinks fit; and
(b) inform itself on any matter in such manner as it thinks just notwithstanding any rules of evidence to the contrary."293

However, as we have seen, this is not to say that courts place reports on pedestals, unable to be challenged by the parties, or for that matter by the subject child himself. Where the contents of a report are disclosed, and unless the report is one prepared by the Superintendent of Child Welfare, the author of the same is always liable to be crossexamined.294 The aim of such crossexamination is either to indicate that the conclusions or recommendations made in the report are not
soundly based, generally as a result of inadequate or erroneous background material, or that different conclusions are possible given the basic facts.

The case of *Tooley v Tooley*\(^{295}\) provides an excellent example of the value of cross-examination in this area. The question of access was in issue, and the opinion of the psychiatrist presented in his affidavit was that the child would be very disturbed to meet his father. However, in cross-examination counsel for the father was able to extract from this same psychiatrist the opinion that any disturbance to the child could be significantly reduced with the assistance of a behavioural expert, and that there would even be ways of the child finding out who his father was without any disturbance whatsoever. It also became clear in cross-examination that the mother had not fully informed the psychiatrist of the facts, in particular, that the father had attempted to see the child on a number of occasions and that he had sent money and gifts for the child. The psychiatrist indicated that if he had known these facts he would have insisted on interviewing the father at the very least. In the end result the court allowed the father's appeal, holding that these revelations greatly weakened the initial opinion of the psychiatrist that access should be denied, and on which opinion the trial judge had acted.
Interestingly enough, in the early stages of the Family Court of Australia, there was a tendency to consider that because counsellors were officers of the court, they should not be crossexamined. However, although a small minority of judges still disallow or discourage crossexamination of counsellors, the majority take the view that crossexamination, if sought, should almost invariably be allowed, and furthermore that such crossexamination may be extremely valuable. If crossexamination is not permitted in cases where the observations or opinions of the counsellor are challenged, criticism may be, and indeed, has been made that the courts are determining cases based on evidence which neither party has had the opportunity to test, and indulging in some kind of "trial by report".

The counsellors themselves were initially and understandably reluctant to be crossexamined, but their attitude now is that this is a legitimate request by the lawyers, and indeed is a very useful exercise in reminding counsellors of the value of accurate reporting and also the advisability, indeed, the necessity, of being in a position to advance reasons for any expression of opinion on matters relating to the issue before the court.

Of course, apart from the right to crossexamine, a party (or the child through counsel) can adduce evidence
challenging what has been said in the report or what has been said in crossexamination.

This again highlights the importance of both completeness and independence in the preparation of a report. If both of these conditions are met then the only possibility of challenge is on the ground that unsupported or dubious psychoanalytical theory had been utilized in reaching the conclusion.

(g) **MANDATORY OR DISCRETIONARY?**

The question can be asked whether welfare reports should be mandatory in all custody disputes. From an idealistic point of view the answer can only be in the affirmative. Given the adversary system presently utilized to resolve such disputes, and the inexpertise of judges in the social sciences, justice simply cannot be done to the child without input from the behavioural sciences. At the very least there should be evidence before the court as to the psychological factors at play and how they relate to the child's physical environment. Certainly, this should occur in all disputed custody matters and, as I have previously suggested, it should also be the case where a consent order is sought by the parties. It is not essential though, that such evidence be in the form of a written report, it can just
as easily be oral evidence given by the behavioural scientist, an aspect which I canvas later in this section.

However, the practicalities of a mandatory requirement must also be considered. The first aspect is the cost. A veritable army of scientists would be required to cope with the numbers, and it would probably only be feasible where the court system incorporated extensive counselling and welfare services. Secondly, the quality of the reports would be of concern. As we have seen, only comprehensive, independent, and soundly-based reports are of value to a judge, yet with a high demand there would be a danger of the same becoming formal and restricted in their content, especially if there were not enough qualified people to cope. Accordingly it may be that these practical considerations are prohibitive of requiring mandatory reports.

In this regard reference can be made to the experience in Ontario. There, legislation renders it mandatory for the Official Guardian to make an investigation and report in every divorce suit where there are children of the marriage. Until 1972 investigations by means of personal interviews were carried out in all cases, but then the system was radically altered. Instead of investigations being carried out by interviews in every case, the parties were sent a questionnaire to be completed and returned to the office of the
Official Guardian. Social workers then examined the answers and if it was felt that no particular problems existed, a short report to that effect was forwarded to the court. However, if problems were indicated, such as a dispute over custody or access, an investigation was implemented and a report submitted. This alteration in procedure was introduced to reduce the cost of the programme to the Province and to reduce the work-load of the children's aid societies who undertook the investigations and prepared the reports on a contract basis.

The aim of this mandatory procedure in Ontario is obviously to ensure that the interests of the children of divorcing parents are adequately protected. However, it is extremely doubtful whether it achieves this purpose. In the first place, relying on answers to the questionnaire to determine whether problems exist in respect of children of a marriage is quite ludicrous. In the second place, it appears that where an investigation and report does in fact take place, there is no guarantee that there will be more than a single interview with each of the parents or that the investigating personnel have adequate qualifications. Indeed, outside the large urban areas, married women who have a background of nursing, teaching, or some tertiary education, are commonly employed on a contract basis.
Of course, if there is a real dispute as to custody or access, the same will necessarily have to be resolved by the court at some stage, and there is nothing to prevent the judge from seeking further reports as to the subject children. Yet, this is to render the mandatory scheme both a waste of money and a waste of personnel resources, unfortunate results indeed.

It is illustrative to consider the view of the judges of the Supreme Court of Ontario as to the value of the Official Guardian’s report prior to the change in procedure in 1972. In his empirical study Bradbrook found as follow:

"Remarkably diverse statements were made by the judges as to the value of the Official Guardian’s report when determining custody litigation. Two of them commented that the report is always helpful in that it gives an objective view of the type of home involved. They feel that it is especially useful in view of the enormous number of cases to be tried and the limited amount of time that can be spent on each one. The remaining eleven judges, however, are of the opinion that although the report is potentially useful, in that it is the only impartial piece of evidence presented before the court, its present value is not great because of a number of failures in the present procedure. The main objection was that, contrary to the opinion of their other two colleagues, the social workers lack objectivity. Apparently, too many of them are biased in favour of one of the parties and try to act as advocates for this party without having any real grounds for their views. According to one judge, between ten per cent and twenty-five per cent of the reports are made on the strength of an interview with only one of the parties; in these cases, objectivity is, of course, impossible. Other objections to the present system of Official Guardian's reports are that the social workers are not practical and engage in too much 'formalised double-talk'. All the judges seem resentful of those workers who attempt to dictate to the judge what conclusions he should draw from
the facts presented; this is regarded as an intrusion into the judge's right to adjudicate."

The obvious alternative to having mandatory reports is to leave it to the discretion of the judge. Indeed, this was the preference of the majority of judges interviewed by Bradbrook, and has been the suggestion of the Law Reform Commission of Canada. However, as far as the judges are concerned, their view must be understood in the context of the criticisms made of the Official Guardian's report in divorce cases, and I am confident that if they could be assured of receiving a comprehensive, independent, and soundly-based report, their views would be different.

In any event, if my submission concerning the appointment of independent counsel in all cases is accepted, then the judge will have little say in the matter, because such counsel would invariably commission an independent report. In some instances though, counsel might deem it advisable to obtain the report via an order from the judge, and here the latter would be in a position to exercise his discretion. However, it would be hoped that the judge would rarely reject such an application, and rather, would grasp the opportunity to provide instructions and guidelines as to the issues which he considers important and which he wants investigated. Interestingly enough, one of the judges in Bradbrook's survey specifically remarked that by adopting this procedure he found
that the deficiencies of the report system were no longer present. However, in the general run of cases, the judge should be able to rely on independent counsel to present the necessary evidence before him.

It is clear that there is still a long way to go before reports from behavioural scientists reach the position of prominence in the resolution of custody disputes that they have the potential for. There is a need for more concentrated research in the area of child development to give an aura of precision to the opinions of practitioners of the social sciences. At the very least the reports should exude completeness and independence in order that courts can be confident in relying on the findings made. However, the most important aspect of all is that the report be seen both as a vehicle for conveying the wishes, thoughts, and feelings of the child to the court and as a means of providing the court with an insight into how best the psychological welfare of the child can be assured.

(2) ORAL EVIDENCE

Much of what I have said in relation to written reports applies equally as well to oral testimony given by behavioural
scientists. They are both methods of apprising the court of the psychological influences at play. However, there are some important differences as well:

(a) Oral evidence tends to be given more by private psychiatrists and psychologists than by court-attached or otherwise Government-employed staff. The latter tend to be those who provide the written reports.

When a judge requires an expert opinion he will rarely request that the opinion be provided orally. He will order or direct a written report, and in most cases he will utilize the court-attached staff.

Thus, when a court is faced with oral evidence from a psychiatrist or a psychologist, more often than not it will be from an expert called by one party only. As we have seen, courts are understandably reluctant to accord very much weight to such opinions. However, another very real objection that some courts have to the use of such behavioural scientists is the notion that children who are perfectly normal and not emotionally disturbed should not be referred to psychiatrists or psychologists. This attitude is illustrated in the following extract from the judgement of Selby J. in the Australian case of Neill v Neill:

"I would have thought that the principal function
of the psychiatrist was the treatment of the mentally ill. Perhaps to such specialists no-one is normal, but sitting in this jurisdiction I will not encourage the practice of taking children for psychiatric examination for the sole purpose of obtaining evidence in custody applications."

In addition the eminent English jurist, Lord Goddard, had this to say in 1959:

"I would especially ... beg Justices to remember that the sending of children for examination by psychiatrists may do more harm than good, as it is apt to make children think they are interesting cases when they are only naughty boys and girls. Resort to the psychiatrist should be the exception and not the rule." 306

Of course, courts are far more receptive to evidence from the social sciences today than they were in 1959, or even in 1966 when Neill v Neill was decided, but there is still this valid concern to prevent the child from being shunted from one psychiatrist to another, merely in an attempt to shore up the case of one party.

However, this is not to say that the court cannot be assisted by expert evidence from psychiatrists or psychologists. Apart from when the child is actually suffering from an emotional disorder, there are many situations where there is a very grave danger of such a condition developing, depending upon which parent custody will be awarded to. The prime example is where the mother is living in a homosexual relationship and the court is asked to award custody of the child to her. I suggest
that a judge would be foolish to attempt to make a decision in such a case without the benefit of psychiatric evidence as to the possible effects of the homosexual relationship upon the child. Unfortunately though, this type of fact situation is a prime candidate for conflicting psychiatric evidence, depending on which party calls which psychiatrist. Accordingly, it will be necessary for the judge, or preferably legal counsel for the child, to obtain the necessary evidence from an independent psychiatrist. However, this is not to say that as a matter of course the court will accept this latter evidence over and above the evidence of the psychiatrists called by the parties. It will still be necessary for the judge to weigh all the evidence before him in order to reach his decision.

(b) To have expert evidence presented orally rather than by report fits more into the traditional adversary pattern of court proceedings. The psychiatrist is generally called to testify by one party, and the rules of evidence are usually adhered to strictly.

The reason for the latter circumstance is that the expert is there in court giving his evidence just like any other witness, whereas, with a report, the contents are generally presented as a fait accompli. Moreover, it may not be readily apparent that the conclusions reached
in a report are premised on hearsay evidence, for example. With oral evidence this would be revealed in cross-examination.

(c) Unfortunately, with oral evidence there is no real opportunity for the judge to control what is or is not revealed to the parties. The British Columbia Evidence Act\(^{308}\) only goes as far as requiring a written statement of the opinion of the expert, and the facts on which the same is based, to be furnished to every party who is adverse in interest to the party tendering the evidence at least 14 days before the expert testifies. There is no requirement that the written statement be submitted to the judge, but even if there was, it would be extremely doubtful whether the judge could prevent the expert from presenting certain parts of this evidence, or even prevent him from testifying at all.

(d) By having the scientist in the witness-box, the judge has the advantage of direct contact in assessing the opinions proffered. How important this can be is illustrated by the case of More v Primeau.\(^{309}\) There, a child psychiatrist whose written report had been filed with the court, was called to give evidence by the judge himself. This revealed several problems concerning the report, and in the end result, the recommendation of the expert was
rejected. One matter which weighed heavily with the judge was that as a consequence of his observations of the psychiatrist in the witness-box, he concluded that "she was simply unable to comprehend fully the position" of the natural mother. Unfortunately, this would not have become apparent if only the report was utilized.

(e) A final contrast between oral evidence and a written report is that the possibility of settlement is not as great with the former. There is little opportunity to hold a conference where the opinion of the expert can be discussed with the parties. Instead, it is a case of relying on the contact that the expert has with the parties and the child to generate some thoughts of settlement. However, rarely will this be successful. Alternatively, after the expert testimony has been given, the judge could take it upon himself to adjourn the proceedings to enable the parties to consider the evidence. Hopefully, counsel for the child would then arrange a conference or, if for some reason the child was unrepresented, counsel for the respective parties should take the lead of the judge and attempt to bring their clients together.

From this discussion of the differences between a behavioural scientist presenting a written report and testifying in court,
it can be seen that the former is more effectual in achieving the aims of introducing such evidence. Although both methods can provide the necessary input from and concerning the child, a report has the added advantage of promoting a settlement before litigation is joined. It also provides the court with more flexibility in dealing with the evidence of the scientist. However, there is no reason why the two methods cannot be combined, and in fact this occurs to a large extent when the author of the report is cross-examined as to the contents of his report.

The use of behavioural scientists in the decision-making process is fortunately becoming more prevalent, whether the involvement be by way of the provision of a written report or by way of oral evidence. However, the rationale for such evidence had not yet become the fact that the same is ideally suited as a vehicle for increasing the input of the child into the decision-making process. Such evidence has been viewed more as a means of providing the court with the opinion of an expert as to the possible environments in which the child might be placed. In other words, the emphasis is on the question of what can each potential custodian provide. Admittedly, this is a legitimate use of expert evidence, but in my submission it is possible to lose sight of the fact that
it is the child that has to live in the environment that is chosen, and the concern of the expert should be to regard the possibilities from the viewpoint of the child.

(ii) **DIRECT METHODS**

**EVIDENCE BY THE CHILD**

One obvious medium through which the court can receive input from the child is by way of evidence from the child himself. This can take the form of an affidavit filed in court, or *viva voce* evidence given during the hearing.

However, lawyers and judges are hesitant about utilizing either of these methods, and particularly the latter. As Bayda J.A. said in *Wakaluk v Wakaluk*

"To call the child as a witness and ask direct questions to establish his preferences is a procedure that should be discouraged."

It is traumatic enough for a child to be involved in a custody dispute let alone being placed in the witness box. Both the short term and long term impact on the emotional stability of the child can be quite marked. The difficulty if that once the child is called as a witness, he or she is subject to the ordinary rules of evidence. There will not only be probing questions on behalf of the party who calls the child, but crossexamination will be permitted. Even if
the child is called by independent counsel, the other parties are entitled to crossexamine.

The possibility of crossexamination is also a reason for the reluctance concerning the use of affidavit evidence. The child-deponent is potentially liable to be put into the witness box and crossexamined concerning the contents of the affidavit. Indeed, crossexamination in these circumstances may be more exacting, because, whereas the child is generally left to his or her own devices when called to give oral evidence, it will invariably be the case that the affidavit is not the sole work of the child. Where the affidavit is prepared on behalf of one of the parties there will be input from that party and his or her lawyer, and even where the affidavit is filed by the child advocate, his influence on the contents will not be insubstantial. Moreover, the court will be aware of this, and either consciously or unconsciously will allow more leeway in crossexamination than might otherwise be the case.

This also highlights the principal reason for the dislike of affidavit evidence, namely, the concern that the contents are not the child's freely expressed thoughts and wishes. There is far too much potential for abuse for a court to accept an affidavit at face value. Indeed, this is relevant to the question of oral evidence as well. In
Wakaluk v Wakaluk the Saskatchewan Court of Appeal upheld the trial judge’s refusal to allow the children to testify as to their wishes. The trial judge felt that the children had been influenced to the extent that their wishes were not their own.

There is a suggestion by Brownridge J.A. in that case that the presence of independent counsel might justify the reception of evidence from the children. However, although I agree that such counsel would lessen the risk of children being influenced by one of the parties, there still remains the trauma of having to give evidence. I emphasise that there is very little that counsel can do to offset this grave impediment to calling a child as a witness.

There is also an inherent defect in having the child give evidence in court. Apart from the fact that the child may be overwhelmed by the entire situation, it is extremely doubtful whether he or she will provide the judge with what he wants; the wishes, thoughts and feelings of the child concerning the question of custody. With both parties present it would be rare for the child to speak freely about the issue at hand. He would more than likely be non-committal, and where he was not, the judge should be wary of accepting the evidence as being an expression of the child’s own views.
Of course, the level of acceptance of both affidavit and oral evidence from the child will depend to a large degree on the age and maturity of the child, but it is impossible to be dogmatic. There are two aspects here. Firstly, whether the child is required to give evidence under oath, and secondly, if evidence is given, the weight which should be accorded to the same. I have dealt with the latter aspect previously, but suffice to say that both matters are in the discretion of the judge. In fact, where children of tender years are concerned the discretion is given statutory form in British Columbia. Under Section 6 of the Evidence Act, where such a child is tendered as a witness

"and the child does not, in the opinion of the judge ... understand the nature of an oath, the evidence of the child may be received, though not given upon oath, if in the opinion of the judge ... the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; but no case shall be decided upon such evidence alone, and such evidence shall be corroborated by some other material evidence."

Although there is no definition of "tender years" in the Act, at common law it was necessary to ascertain whether the child had the capacity to swear an oath only when the child was under 14 years of age. It would seem that this situation continues to apply under the present legislation.

The requirement of corroboration is also an interesting
one because it would seem to follow that the judge could not allow the child's wishes and preferences to be determinative of the question before him, unless some other material evidence pointed in the same direction. Presumably though, evidence from a behavioural scientist would be sufficient to satisfy this requirement.

It is also important to stress that this discretion reposed in the judge by Section 6 is addressed to the issue of the child's competency to give evidence, and by no means provides him with the power to prevent a child from giving evidence simpliciter. Indeed, it is highly debatable whether a court has such a general discretion anyway. One commentator has recently suggested that courts derive the same from their inherent equitable jurisdiction, but no authority is cited for this proposition. Moreover, as we have seen, in Wakaluk v Wakaluk both the trial judge and the Appeal Court considered that such a discretion existed, but again no authorities were referred to. On the other hand, Wright J. in Taberner v Taberner did not seem to feel that he had this discretion, because he specifically decried the lack thereof in the case before him.

Clearly the judge should have the power to prevent a child from giving evidence if it is not in the child's interests, and although there is no specific authority for doing so, it
would not be inappropriate to look to the court's inherent jurisdiction for this purpose. As Wright J. said in Taberner v Taberner, a case where each party wanted to call a child of the marriage, it is

"not only reasonable but desirable and necessary that the judge should have some discretion to prevent the dispute between the parents from becoming ... a dispute on oath between children as to the parents' merits and conduct."325

In this regard it is interesting to compare the Australian situation. Regulation 116 (5) of the Family Law Regulations provides that

"(a) child who is under the age of 18 years shall not be called as a witness or remain in a court exercising jurisdiction under this Act unless the court otherwise orders,"

and, pursuant to Regulation 116 (6),

"except with the prior leave of the court in which proceedings under the Act are pending or are being heard, an affidavit made by a child who is under the age of 18 years shall not be filed for the purpose of those proceedings".

Thus, a judge has a seemingly unlimited discretion to protect a child from unnecessary and harmful involvement in the proceedings.
INTERVIEWS BY THE JUDGE

This is another obvious medium through which the court can receive direct input from the child, and it is in quite common use throughout Canada, the United States of America and Australia. 327

Prima facie, a private interview by the judge would appear to be the natural solution to the difficulties associated with the child giving evidence in court. It retains the advantages of allowing the judge to weigh the statements of the child and to assess at first hand his or her maturity and ability to make a reasoned choice, yet saves the child from the trauma of having to appear in court.

However, to many it is not the remedy that it may seem. There is an aversion to the idea of a judge receiving secret evidence which may form the basis of his decision, and which neither party has had the opportunity to test or contradict. As we have seen, 328 this involves a principle of natural justice which is rooted in the adversary system, and in order to conform to the same, courts have found it necessary to impose conditions on the use of the interview procedure in ascertaining the views of children.
In the case of *Re Allan and Allan* the British Columbia Court of Appeal commented unfavourably on the trial judge's approach to interviewing children. It appeared that not only had he obtained information during the private interview on which he had based his decision, but also that one of the counsel had been refused permission to attend. In these circumstances the Court of Appeal felt that the information should have been disclosed in order that the parties might have had the opportunity of controverting it. However, *Re Allan and Allan* was considered in the case of *Saxon v Saxon* and distinguished on its facts. There, it was held that it was not improper for a judge to interview children privately

"if both parties through their counsel consent and so long as he does not allow the comments of the children to be the sole basis upon which he writes his judgement."  

The court seemed to indicate that disclosure of the information obtained was not necessarily required in all circumstances. It referred with approval to a number of Australian decisions which treated non-disclosure as a necessary evil of achieving the purpose of a private interview.

Thus, the position is not entirely clear in British Columbia, and courts continue to adopt varying practices. For example, in *Kroll v Kroll* the interview was conducted in the presence of counsel and a court reporter, and counsel
were even permitted to question the child. This obviously satisfied the objections raised in *Re Allan and Allan*, but at the same time one wonders whether any more was achieved than if the child was simply put into the witness box. It seems to me that one aim of the judge interviewing a child in chambers is to attempt to create a relaxed and informal setting in which the child will feel free to express his wishes, feelings, thoughts and preferences. Surely this cannot be achieved if counsel, the parties, or even other court officials, such as a court reporter, are present. Moreover, even if the judge sees the child alone it is giving with one hand and taking away with the other to require the judge to disclose what the child tells him, either with a view to having contradictory evidence called, or, even worse, having the child crossexamined. There is also danger that the child will be placed with a parent who has been informed of the child's criticisms. This may have serious repercussions for the future relationship between the child and that parent.

One solution for the judge may be to have the parties through their counsel not only consent to a private interview but also waive the right to crossexamine or controvert whatever information is elicited. In these circumstances there would then be no need to disclose the information at all. The possibility of such an extensive waiver was contemplated in *Re Allan and Allan*. There the court
found\textsuperscript{340} that

"(t)he parties by their counsel had waived the right to be present while the evidence was taken and to examine or cross-examine these infants. However, the waiver does not go beyond that."

In other words, the right to controvert had been retained, and disclosure was therefore required. However, although this procedure may be available, it seems that Appeal Courts will take a dim view of a judge pressurising counsel to agree to a total waiver of rights.\textsuperscript{341}

Other alternatives can be mentioned, such as the practice adopted in the Ontario case of Guy v Guy.\textsuperscript{342} There, the judge interviewed the children in the presence of a court reporter who transcribed the conversation. However, the judge requested the parties not to seek a transcript of what was said until the final resolution of the matter, if at all. Alternatively, a judge could simply say that he does not base his decision in any respect on what is said during the interview. This was the procedure adopted by McDonald J. in Currie v Currie\textsuperscript{343} and clearly obviates the need for any disclosure.

The dilemma here is the same as exists where disclosure of the contents of a welfare report is sought. There is a conflict of two basic principles; on the one hand there is the right of the parties to meet the evidence upon which a decision
will be made, and on the other, there is the need to safeguard the child's interests. Courts have oscillated between these principles, but have generally come down in favour of the former. However, as in the area of welfare reports, I consider that a court should have a discretion, firstly, as to whether there should be an interview, secondly, as to what conditions should be imposed, and thirdly, as to whether any information will be disclosed to the parties. Such a discretion was recognised by the Nova Scotia Supreme Court in the case of Kelly v Kelly.  

There, one ground of appeal was that the trial judge had failed to disclose to the parties or their counsel the text of his conversation with a 5 year old child of the marriage. The court responded as follows:

"Throughout the years judges have acquired much experience in evaluating the evidence and conversations of children whether under oath or otherwise and the law has determined that because the attitude of children to truth and reality differs widely from that of adults, a wide discretion should be given to judges ... In my opinion the facts of the instant case make it expedient that the trial judge should have a talk with the young child; he was justified in all the circumstances in keeping secret to himself what had transpired in that conversation".

In so deciding, the court referred to the English Court of Appeal decision in Re K (infants), which was subsequently reversed by the House of Lords but without detracting from the dicta concerning the judge's discretion when interviewing. Both Upjohn and Davies LL.J. there considered that a judge had a discretion whether to disclose what was said by the child or not.
In the exercise of this discretion the only guiding principle is the best interests of the child, but two warnings are necessary. First, the judge should be wary indeed before displacing the principles of natural justice, and second, the judge should apprise the child of the fact that his or her views may be disclosed to the parties. I adverted to this need for openness when dealing with the relationship between the child and independent counsel, and the same arguments that I employed there are applicable to this situation. Similarly, it would be quite imprudent for a judge to promise a child that nothing which was said would be made known to anybody else. The problems which such a promise can create are well illustrated by the case of H v H. There, the judge had made such a promise, and placed the notes of the interview in a sealed envelope. The matter went on appeal, but the Appeal Court's hands were tied, as were those of counsel for the parties. Because of the promise by the judge his notes could not be looked at by anyone, including the members of the Appeal Court. Therefore, all the material on which the case had been decided could not be placed before that court, and the only alternative was to send the matter back for a new trial.

In the Australian jurisdiction the situation is quite different, but as equally complex. There, the Family Law Regulations, 1975 as amended, permits the judge to
interview a child either alone, or in the presence of a welfare officer or another person specified by the judge. However, in Regulation 116 (3) Parliament has decreed that

"evidence of anything said at the interview shall not be admissible in any court."

The problem then becomes in what way can the judge utilize the information elicited from the child? It could be argued that he cannot rely on it as a basis for his decision, because Parliament has given total recognition to the parties' rights of natural justice in Regulation 116 (3). In other words, rather than say that the information is to become part of the record, and allow parties to contradict the same, Parliament has declared that it is not evidence and it is not to be relied on by the judge in reaching his decision. However, it is quite clear that Australian judges do in fact rely on the express wishes of children in reaching their decisions. Indeed, how else can a judge comply with Section 64 (1) (b) of the Act, and give effect to the wishes of a child over 14 years of age, other than by acting on those wishes. Alternatively, it might be that the judge cannot disclose what he is told by the child. This view would be supported by the Full Court of the Family Court of Australia. In the case of In the Marriage of Ryan the court referred to the practice under the previous legislation as being that the interview was always regarded as confidential. The court felt that this applied under the new Act as well and was
reinforced by Regulation 116 (3). Yet, the court allowed of one exception. Part of the prior practice was for the judge to make notes of the interview, and then to seal them, only to be opened by an Appeal Court. This allowed the Appeal Court to know what the children had said about their wishes and how the interview influenced the judge's decision. The court felt that this practice should be continued and would not offend Regulation 116 (3). However, in fact, it is confidentiality that is the exception, and the common practice of judges in the Family Court is to first interview the child and then later confer with counsel concerning the results of the interview. Accordingly, it is probable that a judge has a discretion to utilize the information in any way he feels appropriate, but the same is inadmissible in court for the purposes of subjecting the child to cross-examination.

It is also debatable whether parties can call evidence to contravert what the child says. Reading the sub-regulation literally, if anything said is not admissible in evidence, there would be no need to present evidence in rebuttal, but, given the judges' actual reliance on what is said, it may be necessary for the same to be controverted where possible. Indeed, as a matter of practice, judges do allow evidence of this nature to be given. Thus, at the very least it is questionable whether Regulation 116 (3) performs any useful function in this area.
It is also interesting to note Regulation 116 (4) which prevents the judge from interviewing the child unless the child's independent counsel consents to this course. Some judges in fact go further and refuse to interview a child unless both parties provide their consent as well. This is in accord with the guidelines laid down in the British Columbia decision of Saxon v Saxon. On the other hand though, the Full Court of the Family Court of Australia has indicated that the judge's discretion is unfettered, and an interview could still be held over an objection.

The trend in the United States of America has been to remove by legislation any discretion that the court has. For example, under a recent Illinois Statute it is mandatory for a court reporter to be present, and for the transcript to become part of the record in the case. This legislation is almost identical to a provision in the Missouri Dissolution of Marriage Code, and stems from Section 404 of the Uniform Marriage and Divorce Act, which, apart from providing the judge with a discretion to permit counsel to be present, requires the record of the interview to be taken and to be part of the record of the case. I suggest that this is an unfortunate development from the point of view of the child, and is one which should not be followed in Canada.
The existence of a discretion not to disclose information received from the child is yet another example of the difference between ordinary litigation and a custody dispute. There is a clear need for an ameliorated approach to the strict rules of evidence and procedure in the latter situation. In the words of the trial judge in *In Re K (Infants)*:

"In the ordinary *lis* between parties, the paramount purpose is that the parties should have their rights according to law, and in such cases the procedure, including the rules of evidence, is framed to serve that purpose. However, where the paramount purpose is the welfare of the infant, the procedure and rules of evidence should serve and certainly not thwart that purpose. Over a very large field in infant cases, the procedure and rules of evidence applicable to a *lis* between parties serve that purpose admirably and are habitually applied, but they should never be so rigidly applied as to endanger or prejudice the very purpose which they should serve."

Of course, the preceding discussion assumes that judges are capable of undertaking the task of interviewing children, and of assessing what they say. Unfortunately, this is an enormous assumption to make, and behavioural scientists, in particular, consider that judges are ill-equipped to handle this delicate exercise. Not only must the judge descend from his lofty position of arbiter, but he must utilize interviewing skills which are generally foreign to him, and possess the ability to assess the character and personality of a child. There is no denying that judges are
able to "read" the character and personality of witnesses presented to them, but it must be remembered that this is not a courtroom setting and that these are not ordinary witnesses. There is no opportunity for the judge to be given a balanced outlook by the parties. As one commentator has said:

"... there is no readily visible method of verifying the child's statements, nor of challenging the judge's own emotional or value-determined response to them. What protects the judge from himself and his own reactions, if the child's behaviour, appearance, language, attitude, and general demeanor offend or distress him? What assistance does he have with an unco-operative child who sits looking sullen or frightened and refusing to talk? How does he 'interpret' such behaviour, as an aid to decision? Does the child's behaviour reflect a perception of the judge, as a person in authority? or his feelings about the parent with whom he is presently living? or unexpressed anger toward the absent parent? How should that influence decision?

And on the other side of the coin, does the child who is all too ready to talk, who smiles quickly and seems 'happy', and forthcoming really provide the information that is needed? Sparkling children in a tense and unhappy situation are a contradiction of sorts. This behaviour should ring a warning bell: the 'bright' behaviour may be masking a depression far more serious than that revealed in the unpleasant behaviour cited first. It is not easy to know the difference."

Moreover, it is not a simple matter for the judge to step down from his lofty position, and nor may it be a desirable one. I have emphasised throughout this paper that, given the adversarial system, it is unwise for the judge to descend into the arena of the proceedings in search of the best interests of the child. There is a danger where the
child is interviewed in private that this will occur, and the judge will become in a sense an advocate for the child. However, this is not to say that there should be no interviews. Rather, a judge who undertakes this task must be aware of this danger and be conscious at all times of the context in which the information is received. In the words of Chisholm, \(^{367}\) he must retain his "compassionate objectivity."

Although serious doubts can be cast on both the ability, and the advisability, of a judge conducting a private interview with a child, I suggest that the real concern is whether a single interview will achieve its purpose. Even where a judge is in fact well-equipped to interview children, it is expecting a great deal for him to elicit both reliable and helpful information in the short space of time that is usually available.\(^{368}\) No matter how relaxed and informal the judge attempts to be, the aura of authority will still be present. The child will invariably have a basic distrust of the judge and his motives which will not easily be broken down.\(^{369}\) However, a breakthrough is essential, because without a relationship of confidence and trust the judge will be unable to reach the child and evoke the required response. I have already referred to this need when discussing separate representation of children. There, I indicated that it takes time to establish the relationship, and the situation is no different between judge and child. Yet, time is what the
judge has little of, and the danger is that he will misinterpret the child's superficial reactions. The child may simply be responding according to his feelings at that particular time. Again though, this is not to say that there should be no interviews. Rather, it emphasises the need for caution on the judge's part when assessing the results of the interview. In the words of Lusink J. in an unreported Australian decision of In the Marriage of Grozden:

"(I)t is a practice which, I believe can be of great assistance so long as one remains aware of the inherent dangers, and tempers what one is told with caution."

Of course, one solution to the hazards of the judicial interview might be to have a behavioural scientist present to "interpret" for the judge. However, apart from the fact that the presence of another party might inhibit any free interchange that could take place, the judge will already have before him a comprehensive report from the scientist. Moreover, one of the advantages of the interview is to allow the judge to form his own impressions of the child and compare the same with the evidence that has been given, including the welfare report. On the other hand though, one person who will be of great assistance to the judge will be the child advocate.

Given that judicial time is short, and that there
should be no unnecessary delays in resolving a custody dispute, it would seem preferable for the judge to be able to ascertain beforehand whether an interview should take place, and, if so, with what purpose in mind. Here, I suggest, independent counsel for the child can be of assistance. With the aid of the evidence of the behavioural scientist he will be in a position to say whether a child is capable of making a reasoned choice or not, and whether, in any event, the judge will be able to glean something concerning the child's character and personality from an interview. In this way independent counsel can further ease the heavy burden placed on the judge in child placement matters.

The attitude of the judges themselves to interviewing children is also particularly illustrative, and Bradbrook's well-known empirical study reveals a marked divergence of opinion. He found as follows:

"There was less agreement amongst the judges as to whether the child should be consulted as to his personal preference for a custodian, and at what age this should be done, if at all ... One of the elder judges emphasised that he never interviews the children at any age because of the danger of them being influenced by the parent with possession before the trial. According to him a parent could easily bribe the child with presents if he or she expresses a preference to the judge for that particular parent: the more indulgent parent is not necessarily the better custodian. The opposing stand was taken by three of the other judges, who believe that every child over the age of nurture should be consulted. They believe that they can detect when the child is saying what he has been told to say as opposed to
when he is speaking his own mind. The remaining judges took an intermediate stand, stating that the older the child the more likely they are to consult it, but that they do not make a habit of this practice in every case. The majority took the line that the opinion of a child over the age of 10 years carried great weight in every case, but that under the age of 10 years the weight attached to the opinion depends on the circumstances; in the latter cases the child's opinion usually only settled the case in borderline situations, whilst in the former cases, the opinion overrides all but exceptional evidence suggesting a contrary judgement.

It can be seen that the main concerns of the judges are the tender age of the child\textsuperscript{376} and the question of parental influence.\textsuperscript{377} Both are obviously legitimate concerns, but I suggest that their presence should not rule out interviews entirely. Indeed, as I have submitted previously, with the appointment of independent counsel, there will be less likelihood of parental pressure being placed on the child both prior to and during a trial. It is also impossible to be dogmatic about the age of a child being the determining factor.\textsuperscript{378} Rather, the decision-making capacity of the child is the more relevant circumstance here. In any event, there is the advantage of personal contact to be borne in mind when considering the value of the interview procedure. After all, the child is the centre of the dispute, and if he or she is not called to give oral evidence, the judge will have no personal contact with the child whatsoever.
Unfortunately, many critics of the use of this device as a means of providing input from the child, overlook this latter advantage. They concentrate solely on the question of whether the wishes and preferences of the child can be ascertained by the judge. The most common argument in this regard is that the judge is ill-equipped to exercise this function and accordingly the same should be left to the social scientists.\textsuperscript{379} Now, admittedly such experts may have better qualifications in the field of child psychology than a judge, but they cannot provide him with the insight into a child’s character and personality that can flow from personal contact. In other words, even if the interview is unsuccessful as a means of ascertaining the child’s wishes and preferences, the judge may still come away with some sense of the character and personality of the child.

Even judges sometimes fail to appreciate this aspect, and this is illustrated in Bradbrook’s empirical study.\textsuperscript{380} However, there have been some recent Canadian decisions indicating more awareness on the part of the judiciary.\textsuperscript{381} In \textit{Wakaluk v Wakaluk}\textsuperscript{382} Bayda J. felt that the interview procedure was not a particularly satisfactory one for ascertaining

"the opinions and preferences (of the child) respecting the parent he wishe(d) to live with",

but he specifically refrained from commenting on the
desirability of the procedure

"for the purpose of finding out first hand something about the child's character and personality."

Again, in More v Primeau Blair J.A. had this to say:

"I also interviewed Mark in my Chambers. Before doing so I advised counsel that I did not intend to question him about his wishes about the outcome of this trial. I also had no illusions about my ability to determine the true wishes of a child in such a short discussion conducted under all the emotional pressures surrounding this trial. I simply wanted to see what kind of a boy he was and I am delighted to be able to confirm the description in the psychiatrist's report ... As a result of this interview, I am fortified in the performance of my duty by the belief that this young boy, who had endured so much, will be able to accept and live with whatever decision might be made in this case."

Moreover, the presence of independent counsel for the child must not be forgotten. His existence is predicated on the need for the interests of the child to be presented to the court. He is expected to apprise the court of the wishes, preferences, thoughts and feelings of the child, and in this task he is assisted by evidence from behavioural scientists. Accordingly, if he performs his duty adequately there would generally be no need for the judge to interview the child with the aim of ascertaining their wishes and preferences. The interview will have the primary purpose of allowing the judge to assess the children at close quarters in the light of all the evidence that has been given. In this way, the judicial interview dovetails neatly into the integrated approach that I suggest should be taken in all custody disputes.
However, this does not necessarily dispose of other criticisms that have been made of this procedure.\textsuperscript{387} There still remains both the problem of whether one interview in the unnatural setting of the judge's chamber is sufficient, and the danger of the judge placing his objectivity in question.\textsuperscript{388} As I have previously suggested, the answer here can only be for the judge to be aware of these deficiencies and allow for them when tallying the results of the interview. No better illustration of the correct judicial approach to this matter can be seen than the attitude displayed above by Blair J.A. in the case of \textit{More v Primeau}.\textsuperscript{389}

Finally, given that there should be interviews by the judge the question then becomes whether the same should be mandatory in all cases. The British Columbia Royal Commission on Family and Children's Law would perhaps answer in the affirmative bearing in mind their recommendation that children should have a right to be consulted in all decisions, but I am not so convinced. Whether an interview is conducted should depend to a large degree on the age and maturity level of the child, and what the judge hopes to achieve. In other words, if the judge is looking for a reliable statement from the child as to his wishes, it would be fruitless to interview a child who lacked the capacity to make a reasoned choice.\textsuperscript{390} On the other hand, if the aim is merely to have some first-hand contact with the child, and perhaps gain some insight
into his personality and character, then age and maturity would not necessarily be relevant, and the judge may very well conduct an interview on this basis in every case. However, the judge must proceed with caution, because although a private interview in chambers will be less traumatic to the child than appearing as a witness in court, the child may still suffer emotional harm. This can occur either because the judge approaches the interview incorrectly and places the child under pressure to make a choice or to answer all of his questions, or because it is viewed by the child as another step in the agonising process of determining his or her placement. Thus, the judge’s discretion whether to interview or not is an important one and should be retained.
Throughout this paper the assumption underlying the need to increase the input of the child into the decision-making process has been that such process is adversarial in nature. The theme is that given this existing method of child placement, there should be more emphasis on the child himself. However, it is necessary to briefly consider whether there is a viable alternative to the system which would obviate the need for the utilization of the procedures examined thus far.

As is generally the case with a traditional approach, it is felt that the grass is greener on the other side of the mountain, and there have been many suggestions designed to do away entirely with the existing system. However, the major concentration has been on the judge as the ultimate decision-maker. There can be no doubt that the judge must be a person of exceptional character. He must be able to see past the prejudices of the parents and come to grips with the needs of the child. He must be prepared to put aside any reaction of sympathy for an innocent parent, he must be receptive to both the wishes of the child and evidence presented by behavioural scientists. The decision is invariably painful and difficult to make, affecting as it does the future physical and psychological well-being of the child. There is a duty not only to the child but to society as a whole to provide the
child with the best opportunity to develop into a responsible member of the community. Obviously it is rare to find a judge with this combination of qualities, but the aspect which concerns most critics is the lack of training in the social sciences of almost all the judiciary.\textsuperscript{393} It is felt that only a person \textit{au fait} with the intricacies of child psychology is capable of making the right choice in this situation. Thus, it is advocated that the decision-making process be handed over to the experts.

In my opinion, one answer to this proposal is that before anyone is able to determine where the child should be placed, it is essential to establish the facts, a task peculiarly within a judge's capabilities. The social scientist studies emotions and attitudes rather than actual happenings, and his techniques are not adapted to determining facts. Moreover, his predictions of future behaviour can be grossly inaccurate.\textsuperscript{394} Diagnosis and prognosis of a child's welfare in alternative custody situations therefore must depend largely upon past facts.\textsuperscript{395}

Of course, the nature of the "facts" to be determined is controlled by the type of dispute under consideration. There can be no denying that many of the "facts" in issue in a custody dispute are different from those in issue in most traditional adjudications. Mnookin\textsuperscript{396} refers to this as
the difference between "person-oriented" and "act-oriented" determinations. The former requires "an evaluation of the 'whole person viewed as a social being' ", while the later requires determination of some event. However, whatever the nature of the fact, there must still be a process for ascertaining the same, and I suggest that judges, assisted by an adequate information base and aware of the peculiar nature of the issue at hand, are best suited for this purpose.

Of course, after judicial fact-finding it could be argued that the ultimate determination might be made with more objectivity and skill by an expert, or a panel of experts, trained in the social sciences, than by a judge. Admittedly this argument has some force, but to be effective the panel must include the judge or he must be a consultant to the lone expert in order to ensure due weight to his findings of fact and to counteract the tendency of some behavioural scientists to discount facts which do not fit in with their analysis. Moreover, the question then becomes, who has the ultimate say vis à vis the judge and the expert(s)? I suggest that given the inexactitude of the social sciences, the logical choice can only be the judge. Thus, a situation is reached where the judge determines the facts, and is ultimately responsible for not only applying the law to the facts, but for applying the opinions of the experts to the facts. Now, it seems to me that this is no different from the process envisaged in this paper,
and we have simply turned in a full circle.

There is also the inherent danger that I have mentioned before in turning the decision-making power over to the alleged experts. This danger is that they will treat the natural parent/child relationship in a cavalier fashion with a too-ready acceptance of the concept of psychological parenthood. Checks and balances are needed, and, intentionally or not, these are provided by the judges and lawyers involved in child placement. Indeed, it is significant that Goldstein, Freud and Solnit, the celebrated proponents of concentrating on the psychological influences at play, refrained from recommending participation by psychiatrists and other experts in the decision-making function. Instead they were concerned to ensure that the child received independent legal representation. In any event, the so-called experts may already have too great an influence in custody disputes as a result of the indeterminacy of the best interests test.

Attacks on the process itself have sprung from many directions. One oft-made criticism is that the adversary system perpetuates the conflict which brought the parties to litigation in the first place. It achieves this by placing them in diametrically opposed roles, and this is seen as entirely inappropriate for the resolution of custody disputes.
Commentators have highlighted, in particular, the devastating effects that the process can have on the child. The rationale underlying the system is that the truth will emerge when two competently represented parties each with full information of the facts, fairly present their case in its best possible light, for decision by an independent arbiter. However, to succeed, a party generally has to have the child "on side" and it is felt that the insecurity and pressure to take sides can be very harmful to the child's well-being.\textsuperscript{401}

There can be no denying that the system per se exhibits these deficiencies when it comes to the resolution of custody disputes, but the message contained in this paper is that the system can be made to work in a way which will produce the best placement possible for the child with the least detriment to all concerned.\textsuperscript{402} For instance, it is suggested that by the use of such procedures as independent representation, not only will the child receive the necessary protection, but also the fact that the adversary model does not necessarily allow all relevant information to be presented to the court will be overcome.

However, as I have said, proposals have been made to scrap the adversary process altogether, or rather to provide an alternative forum for the resolution of custody disputes. A recent move in Toronto spawned by Irving and Schlesinger\textsuperscript{403}
is to adopt a process based primarily on mediation. There are two key elements here:

"First, a system of conciliation, as a necessary pre-condition to any court-sanctioned divorce or separation proceedings, and second, the availability of arbitration as an alternative to the courts should the parties be unable to resolve their differences at the conciliation stage." 405

The conciliator is to be completely independent, but with an overriding responsibility to ensure that the welfare of the child remains the central focus. His role is to "serve as catalyst, encouraging the parties to identify areas of disagreement and to settle their own dispute." 406

Everything said is confidential and the conciliator cannot be called as a witness in any subsequent court proceedings.

In the proposal, the alternative of arbitration itself involves a choice, namely, between binding arbitration and advisory arbitration. 407 With the former, the parties agree to be bound by the decision, but with the latter, the parties are free to reject the decision and proceed in the courts. However, whatever the type of arbitration, "the object is to find the best possible remedy to a social problem." 408 To this end, the arbitrator is left to set his or her own rules and control the conduct of the proceedings.

This is the process to resolve the initial placement
of the child, but the model alters somewhat when changed circumstances cause further conflicts. Here, there is still to be conciliation, but, if this fails, only arbitration can be resorted to. Moreover, the same person is to preside at both stages, and the arbitration decision is only binding if the parties accept the same. If they do not, then, and only then, can the courts be resorted to.

The principal advantage of the conciliation process is that it allows the parents to work together to arrive at a recommendation for their own child. Similarly, the attractions of arbitration are viewed in terms of providing a more open and flexible method of dispute resolution. However, I wonder at the need for the introduction of such an alternative system. It seems to me that the proposal is not unlike the result of the model outlined in this paper. Admittedly, I have concentrated on the available methods of ameliorating the adversary process, but I am in no way suggesting that each custody dispute must be subjected to that process in a courtroom situation. It is quite clear that this is to be viewed as a last resort and that every effort is to be made to settle the dispute as quickly and as amicably as possible, yet with the interests of the children clearly in focus. The emphasis should be on conferences between all interested parties both before the institution of proceedings and pre-trial. This is my conciliation process, and it is
perhaps appropriate to dwell a little on this aspect.

As I have adverted to previously, the most important participants in these settlement attempts will be counsellors and the child advocate. Unfortunately though, it is not possible to have the latter appointed until proceedings are instituted. The parties could take it upon themselves to engage an independent counsel, but this is rarely done, and, where it is, we have seen that doubts can exist as to the independence of the counsel retained. Accordingly, counsellors, and preferably those attached to Family Courts, should play a major role in assisting the parties to resolve their differences before litigation is contemplated. If a successful resolution is reached, and a consent order is sought, then the courts, and possibly a child advocate, will become involved at that stage. There is a responsibility on the judge to ensure that the consent order sought is in fact in the best interests of the child, and that it does not simply cater to the interests of the adult parties.

Where proceedings are commenced though, independent counsel should be appointed immediately, and he should then instigate conferences aimed at reaching a settlement, or, at the very least, clarifying the issues in dispute.

It may also be appropriate, or indeed necessary where
one party is being difficult, to have conferences before a judge or a court official. In British Columbia there is no specific power under the Family Relations Act, 1978,\(^{414}\) to order such a conference, but in the Supreme Court, Rule 35 of the British Columbia Court Rules covers the situation. It has generally been found that pre-trial conferences are extremely successful in resolving both custody and access disputes, and the procedure is used extensively in other Provinces such as Ontario\(^ {415}\) and Alberta.

In Australia, Regulation 96 of the Family Law Regulations, 1975 as amended,\(^ {416}\) empowers the court or a registrar to order a conference between the parties. In fact, the practice is to hold a conference in almost all custody matters that come before the court. They are generally presided over by a registrar and, as in Canada, the success rate is quite high.

The only question that arises in this area is whether a conference before a judge or a court official should be mandatory in all custody disputes.\(^ {417}\) In British Columbia and Ontario they are not mandatory, but in Alberta the Rules provide that a conference must be held before an action is set down for trial. The Law Reform Commission of Canada has also recommended that in divorce actions where children are involved, there should be an immediate "assessment conference" held by
the court. \textsuperscript{418}

In my opinion it is not essential that a conference be held before a judge or a court official, but it is important that the court has the power to order such a conference. However, the critical factor is the appointment of independent legal counsel for the child, and the only way of ensuring such representation may be to require an informal meeting before a court official immediately following the commencement of proceedings. Once appointed, the court can rest assured that all avenues of settlement will be explored by the child advocate.

Thus, it can be seen that conciliation is already a viable component of the existing system, and I suggest that there is no need to consider an alternative process based solely on this aspect. Indeed, Mnookin has intimated\textsuperscript{419} that, "existing evidence on 'conciliation courts' should caution against a view of mediation as a bold and heroic scheme destined to solve most of the custody disputes adjudicated today."

It now becomes a question of whether the arbitration alternative is a more appropriate solution than the integrated approach suggested in this paper. In my opinion, the answer, can only be in the negative because it is impossible to avoid the use of the judiciary. The point to note here is that the
mediation proposal is centred around the concept of conciliation, with arbitration very much taking a back-seat. It is significant, I suggest, that the court is forever lurking in the background as being the ultimate resource in resolving the dispute. It is even illusory to suggest that the court is excluded when the parties agree to be bound by the arbitration, because, although there is no empirical data, I suggest that parties will not want to close out their options and will rarely, if ever, agree to a binding arbitration. Indeed, the authors themselves foresee this as a distinct possibility.  

Thus, there will always be the potential for a two stage process, arbitration followed by court proceedings, as opposed to one court action only. This immediately creates the problem of delay in finalisation, a factor recognised as having a detrimental effect on all concerned. 

It seems to me that there is very little to recommend arbitration in lieu of a court process which incorporates the various devices discussed in this paper. The latter can adequately provide the openness and flexibility which has sent commentators scurrying unsuccessfully to find an alternative. Certainly, arbitration is not the answer. 

In order to further illustrate this it is appropriate
at this stage to briefly consider another proposal which has been developed and which uses arbitration more as a central concept. The scheme is one suggested by Dr. Kubie and has the following elements: joint custody of the child to the parents, the appointment of a confidential adult-ally for the child, and a committee chosen by the parents to decide questions on which the parents are unable to agree. It is expected that the parents will generally be able to agree about the placement of the child and its continuing care and supervision, but where there is disagreement the committee will make binding decisions with the assistance of the child's adult-ally. The advantages are said to be informality, a saving of time, money and resources, and an inducement to the parties to compromise. However, there are problems. The major difficulty is that an agreement between the parties incorporating this procedure would not prevent ultimate recourse to a court. Moreover, there will always be the danger that the members of the committee will be unable to reach a unanimous decision, and what is to happen then? Informality is also beneficial to a degree, but without rules of evidence and procedure the committee would soon find itself making decisions on unreliable or irrelevant data. Finally, it is inconsistent to suggest that the presence of the committee will be an inducement to settle, when access to this body is relatively easy. In all these respects a court has the advantage, and, when combined with the presence of independent
counsel and adequate pre-trial procedures, it seems totally unnecessary to go to the lengths required by this proposal.\textsuperscript{425} Independent counsel is the key, he instigates the attempts to settle the dispute, he performs the task of Kubie's adult-ally, he marshalls the necessary evidence from the behavioural sciences, and he ensures that the child's interests are well protected. The only aspect beyond his control is the time factor, but this could be remedied by Government action to increase court staff.

Other proposals that have been made generally entail the use of panels of experts with or without a legally trained member. In my opinion, such models are totally inadequate, given the need for judicial fact-finding, the inadvisability of handing the decision-making over to the professionals, and the need for an ultimate arbiter.\textsuperscript{426}

The eminent jurist, Henry H. Foster, Jr., has recently propounded the retention of the adversary system (appropriately adapted to serve the special needs of custodial determination) as opposed to substituting an expert for the court.\textsuperscript{427} He talks of "the problem of experts gone mad"\textsuperscript{428} when they are given a free hand in custody disputes. He feels that social scientists have a part to play in this area, but only if they are subject to a strict application of the adversary process, and in particular, thorough crossexamination. As an
illustration of this need for a system of checks and balances, Foster refers to the following observation of Dr. Andrew S. Watson:

"There was an amazing difference between these two groups of records. Those in which adoption was contemplated clearly had been studied more thoroughly, the data were well organised, and well articulated goals and procedures for handling were set forth. The foster care records, on the other hand, were chaotic and nearly impossible to analyze in any detail. The same workers had handled both sets. It was obvious that mere awareness that the adoption cases were to be subjected to an adversary procedure with a judge evaluating the data was sufficient to increase professional proficiency. It was apparent that the impact of authoritative surveillance is of some importance, even to professionals."

However, Foster does allow for one inroad to be made, and that is the arbitration of post-divorce disputes as to custody and visitation. Yet, it is only a slight concession because it is understood that the ultimate issue - the best interests of the children - remains the court's responsibility. He sees this as an answer to delays caused by crowded court calendars.

Unfortunately, as we have seen, I do not feel that arbitration is necessarily the answer to the problem of delay, but I am in complete agreement with his general conclusion that,

"so long as they are responsive to social change, and are willing to hear and check out the insights and experiences of behavioural scientists,"
"are the best tribunals to hear custodial disputes."

This aspect of receptiveness is one that I have stressed before, and its importance as the necessary corollary to the utilisation of devices such as independent representation cannot be overlooked. Even Goldstein, Freud and Solnit recognised the need to overcome the "problem of resistance by judges and other decision-makers in law to our knowledge about child development."

It seems to me that the real difficulty in finding an adequate alternative is that it is not necessarily the identity of the arbiter that makes the difference, but rather it is the basis on which the arbiter's decision is made. Given that all the tests so far developed are vague and indeterminate, and repose an almost unlimited discretion in the decision-maker, changing the latter will not automatically make the placement a wiser or more exact one. The emphasis should be on the decision-making process itself, and, in particular, on providing the arbiter with an adequate and balanced information base. This will then ensure that he is placed in the best position possible to make the right decision. Now, I feel that this can best be achieved within the adversary system if the procedures discussed in this paper are incorporated therein.
1. See Forer, "No-one Will Listen" (1971), for a strong and bitter criticism of the failure of police and juvenile authorities to listen to children.

2. See Chapter 1 supra.


5. The Law Reform Commission of Canada in its report on Family Law (1976) recognised (at PP. 51-52) that for a court to effectively resolve a custody dispute there must be input from three sources. Firstly, "(t)he court should be able to obtain objective information about the family situation by having the power to order a formal investigative report" (at P. 51).
   Secondly, "(t)he court should be empowered to order that a mental health professional such as a psychiatrist or psychologist interview both parents, the children if necessary and other persons as may be required, and report his or her findings to the court" (ibid).
   The final source of information would be from the children themselves, either directly or through an advocate.


10. Ibid


17. Skolnick, supra, footnote 7.


20. See Tribe, "Childhood, Suspect Classifications, and Conclusive Presumptions : Three Linked Riddles, (1975), 39 Law and Contemporary Problems" 8, at PP. 13-15, where he refers to criticisms of the suggestion that rules of thumb in respect of childhood should be repudiated and
replaced by the need to show incapacity in each case. The argument is that mechanical rules, despite their imperfection may be preferable to logically sounder but harder to apply subjective standards. Tribe rejects this and develops the theme that individualized determination of child-related controversies involving fundamental rights is essential, even to the extent that there cannot be rebuttable presumptions (this is part of his "moral flux" theory).

21. Skolnick, supra, footnote 7 at PP. 46-47, suggests, that, "... a sensitivity to age differences may reflect an attempt on the part of those charged with the management of children to make their tasks easier - a 'rationalization of childhood' in the interests of making the child's behaviour more predictable and manageable". However, this has little or no relevance to determination of capacity in the context under discussion. Also see Tribe, ibid, at P. 10.

22. Supra P. 78-79
23. Supra, footnote 7, at P. 433
24. Ibid
25. Idem
26. Ibid at P. 432. Also see Bersoff, supra, footnote 14.
27. Idem
30. Indeed, there are some experimental findings that go the other way. It has been shown that certain perceptive abilities are lost with maturation. See Gaines, "Matrices and Pattern Detection by Young Children", (1973), 9 Developmental Psychology 143.

31. Skolnick, supra, footnote 7, at P. 55-57.
32. Supra P. 140
33. Rutter "Maternal Deprivation Reassessed" (1972); Skolnick,
However, it is difficult to be dogmatic, and it must be appreciated that psychologists have oscillated between the theory that development is purely a matter of biological maturation and the theory that children are passive recipients of the demands and teachings of their culture. Also see Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy", (1975), 39 Law and Contemporary Problems 227.

34. See Mnookin in his forward to (1975), 39 Law and Contemporary Problems at P. 3

35. Ibid, at P. 4

36. It is interesting to note that the concept of childhood as we know it may not have existed at all. See Skolnick, supra, footnote 7, at PP. 64-67.

37. Skolnick, ibid, at P. 52 et seq.


39. Ibid, at P. 14

40. Baldwin, supra, footnote 38, at PP. 591-592

41. Supra, footnote, at PP. 67-69

42. See Kraus and Glucksberg, "The Development of Communication - Competence as a Function of Age", (1969), 40 Child Development 255.

43. See Leon, supra, footnote 7

44. Supra, footnote 7, at P. 69

45. Goldstein, Freud and Solnit, supra, footnote 3, postulate that whether the guideline is best interests or least detrimental alternative, the child should have full party status and the right to be represented by counsel (Chapter 5). They rightly view it as crucial "to the informed implementation of the guidelines to child placement" (at P. 66). Similarly Foster and Freed consider that independent representation by counsel "is the most significant and practical reform that
can be made in the area of children and the law" (Foster and Freed, "A Bill of Rights for Children", (1972) 6 Fam. L. Q. 343, at P. 356.

46. Cf. the decision of the New York Supreme Court in Doe v Doe (1977), 4 Fam. L. Reporter 2100.

47. Of course, this is assuming that the child is willing to raise the issue in the first place. Unfortunately, children often say nothing, either because of fear, embarrassment or poor judgement.

48. Chisholm, "Obtaining and Weighing the Childrens Wishes; Private Interviews with a Judge or Assessment by an Expert and Report" (1976), 23 R.F.L. 1, at P. 11,12.

49. Official Guardian Act, R.S. 1948, c. 242, Section 4. N.B., the Public Trustee is the Official Guardian in British Columbia.

50. The illogicallity of this when compared with the need to act through a guardian, ad litem in civil cases is emphasized in a recent unpublished article by Professor F. Maczko of the University of British Columbia, entitled "Legal Representation of Children".


52. (1975) 2 W.W.R. 268

53. (1975), 11 O.R. (2d) 622

54. (1976), 27 R.F.L. 214

55. In the recent Ontario case of More v Primeau, (1977), 2 R.F.L. (2d) 254, the judge would have appointed the Official Guardian as counsel for the child if the trial has not already commenced. In 1973 the Ontario Law Reform Commission recommended that an office of Law Guardian be created. He would be given the task of forming an independent opinion as to the best interests of the child and assisting the court to reach its own determination on those interests (Report on Family Law; Part iii -"Children" (1973) at P. 128). However, this recommendation has not yet been acted upon. What has been done though is to provide in Section 8 of the rules of the Family Law Reform Act, 1978 (S.O., 1978
c. 2) that a court can give such directions for the representation of a child as the court considers proper. This at least provides legislative authority for the appointment of independent counsel, but who that counsel will be is still not clarified.

56. *Re Reid and Reid*, supra, footnote 53; *In Re Jordan* (1973), 2 F.L.D. 71. For United States authority see *Wendland v Wendland*, (1965), 138 N.W. 2d 185; *Barth v Barth* (1967), 225 N.E. 2d 866, and *Zinni v Zinni* (1968), 238 A. 2d 373. A further alternative suggested by Professor Dickens in his article entitled, "Representing the Children in the Courts" in Baxter and Eberts, (Eds.) "The Child and the Courts", (1978), 273, is the use of the Attorney-General of each Province. He argues that for "the Attorney-General of a Canadian Province to appear as *amicus curiae* in a Family Court to promote the cause of children seems ... to be within the tradition of his office." (at P. 279).

57. In its 1972 Working Paper on the Family Court the Alberta Institute of Law Research and Reform recommended that the *amicus curiae* should have the right to cross-examine witnesses and to bring the case back to court if the child's interests are not being appropriately met by his custodian. In the United States counsel appointed pursuant to the inherent equitable jurisdiction of a court participates in the hearing with the same rights and opportunities as counsel for the parties. See generally *Speca and Wehrman*, "Protecting the Rights of Children in Divorce Cases in Missouri", (1969), 38 Univ. of M-K. C. L. Rev. 1, and *Hansen*, "Guardians *Ad Litem* in Divorce and Custody Cases: Protection of the Child's Interests," (1964), 4 J. Fam. L. 181 and "The Role and Rights of Children in Divorce Actions"(1966), 6 J. Fam. L. 1.

58. A social worker attached to the Family Court has sometimes been appointed as *amicus curiae*, but this is a rare occurrence.

59. Supreme Court of Alberta, File No. 41784


61. Supra, footnote 56
62. Supra, footnote 46


66. S.B.C., 1978, c. 27.

67. Maczko, supra, footnote 50

68. Supra, footnote 49.

69. Emphasis mine. There have been other methods actually utilised in British Columbia, but with no explanation of the basis on which the representation was arranged. For example, in Re Hall, (1975), 3 F.L.D. 178, the Superintendent of Child Welfare appeared for the child, the Superintendent in turn being represented by counsel. Rae J. treated this counsel as being amicus curiae and commented as follows (at P. 178):

"Recently in custody cases the interests of the child, as distinct from those of the parents, have often been so represented. For myself I must say the practice is to be commended."

70. Act No. 53 of 1975


72. It is interesting to note that Dickins, supra, footnote 56, at P. 294, considers that a judge should not rely on the child's counsel to any greater extent than he would rely on counsel for any other party. He said this:

"The judge must carefully observe his duty of listening to all sides, and should no more presume that the advocate for the child has comprehensively identified the child's best interests than that a parent has done so. The judge should acquire more profound and relevant evidence through a child advocate, but the decision as to disposition of the child remains his."
Unfortunately, I consider this approach tends to militate against the *raison d'être* of counsel for the child.


74. *Maczko*, supra, footnote 50

75. The Law Reform Commission of Canada recognised this, and in its Working Paper on the Family Court (supra, footnote 64) strongly recommended that "(C)ounsel for the child should be independent of the court", (at P. 40), but still have access to its ancillary services.

76. See infra P. 180 et seq.

77. See infra P. 172-176


79. See infra P. 171

80. Indeed, this appears to be the trend in Canada with the proposed Law Guardian in Ontario, the proposed Office of Amicus Curiae in Alberta, the family advocates in British Columbia, and the proposal of the Law Reform Commission of Canada for an agency of full or part-time lawyers.

81. Supra, footnote 56, at P. 280.

82. The New York Law Guardian provides an example of such a combination. According to *Dickins*, supra, footnote 56, at P. 287, such Guardians provide "a concept of legal representation, divisible into three separate activities:

(i) as an advocate, the Guardian defends his client's legal and constitutional rights;

(ii) as a Guardian, he takes into consideration the general welfare of the child as well as his legal rights;

(iii) as an officer of the court, he has the duty of interpreting the court and its objectives to both child and parent, of preventing misrepresentation of facts, of making full disclosure to the court of all relevant facts in his possession, of working closely with the court's probation and other ancillary services to reach a proper disposition and,
where necessary, to help in getting a child or family to understand and accept the purposes of such disposition."

(for a detailed discussion of the New York Model of Law Guardian see Isaacs, supra, footnote 78).

Similar functions are envisaged for Ontario's Law Guardian. See Ontario Law Reform Commission Report on Family Law, supra, footnote 55, at PP. 123-130. However, in the area of juvenile delinquency some commentators feel that these roles are diametrically opposed and that counsel's ineffectiveness is due to the pressures to perform the same. See Catton and Leon, "Legal Representation and the Proposed Young Persons in Conflict with the Law Act", (1977), 15 Osgoode Hall L.J. 107, at P. 113.

83. Leon, supra, footnote 7, at P. 406 suggests that the role of counsel for the child should be determined according to the capacity of the child to give instructions and to reach a competent decision. In other words, if a child has both capacities then he

"should be provided with counsel who has a duty to represent (his) views in court proceedings using forceful and effective trial tactics" (ibid).

If a child has neither capacity then

"counsel should provide the court with whatever information he is able to secure" (ibid).

If the child can express a preference but not make a competent decision then

"counsel should focus his efforts on the (child's) best interests, while giving due attention to (his) wishes." (ibid).

84. Cf. the submission of Bersoff, supra, footnote 14, at P. 29, that

"the primary function of representation should be to place children with their preferred future custodian."

85. There is no question here of this approach having the consequence of the child receiving less than full party status. The type of child I am referring to here is one who cannot give intelligible instructions in any event. C.f. infra P. 167-168.


87. The danger of placing that responsibility on the judge is to force him to assume two immiscible roles -
advocate and arbiter - to the ultimate detriment of both.

88. Chisholm, supra, footnote 48, at PP. 11,12

89. Commentators are split on this issue. Some, like Foster, suggest that withdrawal may be the best option (Foster, "Trial of Custody Issues and Alternatives to the Adversary Process", in Baxter and Eberts (Eds.), "The Child and the Courts" (1978) 55, at P. 63). Yet others, like Bersoff (supra, footnote 14, at P. 32-37) argue that children cannot be said to be represented unless their self-perceived interests are advocated. Also see Mullighan, "The Lawyer's Viewpoint" (1976), 48 N.Y. State B.J. 451.

90. Cf. the recommendation of Law Reform Commission of Canada in its Report on Family Law (1976) at PP. 52-53, 64-65. In recognizing the difficult position of counsel where the younger child is unable to give instructions or where the older child's wishes may not be valid or well-considered, the Commission would have counsel act in the best interests of the child after having considered the child's wishes, reports and other information. Counsel's duty would be to the child, but it would ultimately be for counsel to formulate the position which he advocates.

91. Cf. Leon, supra, footnote 7, at P. 386, where the view is expressed that if the child is able to reach a competent decision on the relevant issue, there should be no doubt that the duty of counsel is to "represent the child's position with zeal".


93. (1976), 29 R.F.L. 200

94. Ibid at P. 202

95. Act No. 53 of 1975

96. Section 64 (1) (b). There is insufficient jurisprudence as yet to indicate whether the "special circumstances" proviso will be given a liberal interpretation

97. Supra PP. 78-79, 142-143
98. Supra, footnote 7, at P. 433


100. Supra, footnote 56

101. It has been said that:
"Children have a way of seeing through things and a manner of expressing themselves that can be both disarming and disturbing. A lawyer cannot effectively assist a child without being prepared to invest a good deal of his own psychological security in the task. An attorney rendering advice to a client is not normally confronted with 'I won't!' or 'Who do you think you are, my father?' Yet, how he reacts to these demands on his patience and understanding may vitally effect his ability to render service ..." (Sanford J. Fox, "Cases and Materials on Modern Juvenile Justice" (1972) at P. 684).

102. See Westman and Cline, "Divorce is a Family Affair" (1971), 5 Fam. L. Q. 1,7. The authors contend that a lack of understanding of events is the greatest hazard for a child of divorce.

103. Supra P. 166-167

104. This is yet another example of a child having less than full party status.

105. (1976) 5 W.W.R. 271

106. R.S.B.C. 1960 c. 213 (Section 42 en. 1974, c. 87 s. 24 (b)).

107. R.S.B.C. 1960 c. 303

108. Section 7 (2) provides as follows:
"Every person who has reasonable grounds for suspecting that a child
(a) has been or is being abandoned, deserted, or maltreated; or
(b) is otherwise in need of protection, shall, notwithstanding any claim of confidentiality or privilege that may exist or be made,
(c) forthwith make a complete report of the circumstances to the Superintendent; and
(d) when subpoenaed and called to give evidence in a proceeding, give such evidence of the
circumstances as the court may require".

109. Supra, footnote 50.

110. In Section 5 of the proposed British Columbia Family and Child Services Act it is interesting to note that much the same wording as appears in Section 7 (2) of the Protection of Children Act is retained. However, by sub-section (5) a solicitor who "is or has been consulted in the course, or in anticipation, of a proceeding under this Act, ... is not obliged to report ... where to report would breach a claim of confidentiality or privilege that would, for the purposes of the proceeding, exist in the absence of this Section".

111. (1975), 20 R.F.L. 211

112. Also see Rowe v Rowe (1976), 26 R.F.L. 91. C.f. Doe v Doe, supra, footnote 46.


115. Supra, footnote 55


117. It is interesting to compare this case with In Re R (1976), 30 R.F.L. 221, where the judge was prepared to accept the inevitable delay in order to have the children separately represented after the commencement of the hearing.

118. Communication will always be a major difficulty, but opinions do vary. One researcher has found that direct interviews can be used effectively as a research tool with 4 year olds, although pre-school children may persistently "test" adults by refusing to respond, or by deliberately distorting responses (Yarrow, "Interviewing Children" in Handbook of Research Methods in Child Development, Paul H. Mussen ed. (New York, 1960), at P. 565). During the middle years of childhood, from approximately 6 to 10 years of age, although children improve their communication and conceptual capacities, clinicians note "an intensified resistance (among these children)
to revealing their feelings, concerns and attitudes to adults" (ibid, at P. 566). Even the adolescent may display "a resistance to adult attempts to probe his private world" to the extent that this characteristic "has acquired the status of a stereotype" (ibid, at P. 567).

119. In the Australian jurisdiction, if for some reason the parties fail to attend a conference, counsel can obtain an order from the court that a pre-trial conference be held (Regulation 96 of the Family Law Regulations, 1975 as amended (Statutory Rules 1975 No. 210 as amended)). Such a conference would be presided over by a judge, a registrar or deputy registrar of the court, and although some of the intimacy and informality would be lost, similar results can be achieved.

120. C.f. the empirical data in Professor Mazco's article, supra, footnote 50.

121. Ibid

122. Although this is the case in Australia, in British Columbia he is strictly appointed by the Attorney-General, but usually at the request of the court.

123. Supra, footnote 50.

124. In the British Columbia decision of In Re Jordan, supra, footnote 56, McKay J. chose to appoint counsel for the child in the capacity of amicus curiae. It appeared that his only task was to call as a witness a social worker who had interviewed the parents, the child and all relevant parties. However, this evidence proved quite helpful to the judge.


126. Supra, footnote 82, at P. 131.

127. We have already seen how a child does not fulfil the traditional role of a party in many respects. Further examples of this phenomenon are that counsel is neither appointed by the child nor can he be removed by the child. Thus, it does not appear possible to install a child as a party to the action in the fullest sense of that word.

128. C.f. Johnston v Johnston, supra, footnote 111, and Rowe v Rowe, supra, footnote 112.
129. S.B.C., 1978, c. 22


131. In the words of Smith Co. Ct. J., in D v D, supra, footnote 86, at P. 329, the input of the child advocate was particularly "relevant and helpful", coming "from a source outside of the adversarial context."


133. Supra P. 45

134. E.g., see Wakaluk v Wakaluk, supra, footnote 6. Mnookin, supra, footnote 33, at P. 261, identifies inadequate information as one of the fundamental obstacles in custody resolution. In addition, the Law Reform Commission of Canada was concerned enough to recommend that where children are involved, "the process of dissolution of marriage should have ... sources of information and expert advice available to the court in addition to evidence from the parties." (Report on Family Law (1976), at P. 64).

135. Kerr v McWhannel (1974), 16 R.F.L. 184. Although this case was concerned with the Divorce Act, 1968 (R.S.C., 1970, D. 8), such an order can be made by virtue of the inherent jurisdiction of the Supreme Courts of the Provinces (Humphreys v Humphreys (1970), 3 N.S.R. (2d) 317)

136. E.g., K v K (1976) 2 W.W.R. 426

137. For cross-examination which was effective in this regard see Re Keuhn, supra, footnote 92, at P. 82.

138. Foster, supra, footnote 89, at P. 64, records an apposite quotation from "a very wise New York judge, Justice Bernard Boteim" as follows: "A judge agonizes more about reaching the right result in a custody issue than about any other type of decision he renders."

139. Supra P. 166-167

140. Indeed, it is sometimes said that disputes concerning
custody are really no more than disputes over access, and that the latter is the real issue.


142. (1978), 7 F.L.D. 134. This is an example of the many cases that appear in the Law Reports where the child is separately represented but where there is no indication of how such representation came to be.

143. Ibid, at P. 135

144. Emphasis mine. Also see *Kroll v Kroll*, supra, footnote 141.

145. Ibid

146. Supra P. 190

147. Supra, footnote 112

148. Ibid at PP. 95-96

149. Ibid. I feel that Reid J. was over-reacting here in condemning early involvement of solicitors. His remarks must be taken in the context of counsel for the child having been retained by the father, a situation which most would agree is far from satisfactory.

150. This is more than a proposal in New York. There, counsel appointed under the Domestic Relations Law are specifically required to formulate a report and make recommendations concerning the interests of the child (Section 215 - b and Section 215 - c). However, this is in addition to representing the child at necessary hearings. C.f., the practice in Prince Edward Island of appointing a Queen's Proctor to submit a report to the court, but without making any recommendations.

151. In *In the Marriage of Todd* (1976) 1 Fam. L.R. 11,109, Watson J. stressed the role of the representative as an officer of the court, with both the power to make an independent investigation and the duty to report confidentially to the court as an unbiased and impartial observer.

152. In *the Marriage of Pailas*, (1976) 1 Fam. L.R. 11,545; *In the Marriage of Demetriou* (1976) 2 Fam. L.N. No. 3.
153. That section reads as follows:
"The court may adjourn any proceedings referred to in sub-section (l) until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and may receive the report in evidence."


155. Ibid at P. 37

156. Supra P. 148-149

157. The Law Reform Commission of Canada has also recognised this. See Working Paper No. 13, "Divorce" (1975), at P. 49.


159. Yet, courts have in fact required this. For example, in Clarkson v Clarkson, (1972) 14 F.L.R. 313 (N.S.W. Sup. Ct.), Selby J. said this:
"The task of counsel is a difficult one for, whilst owing a duty to his client - a duty which may be discharged by bringing out the points which indicate that to grant custody or access to his client would be in the interest of the child whilst granting them to his opponent's client would be inimical to those interests - he must always remain aware that the child's interests come before those of his client. It is therefore necessary to adduce all available evidence which might have a bearing on the matter." (at P. 315).

160. See Chisholm, supra, footnote 48, at PP. 7-8

161. But, c.f. the attitude taken by courts in Missouri as reported in Speca and Wehrman, supra, footnote 57, at P. 16.

162. It is interesting to note that Ellsworth and Levy, supra, footnote 7, at PP. 214-215, rejected the concept of independent representation primarily because of the expense involved. At present, the State pays for this
service both in British Columbia and Australia.


165. There are many jurisdictions in the United States where the appointment of legal counsel is mandatory in custody proceedings; e.g., the Milwaukee County Family Court appoints counsel in every case where custody is at issue. However, it is interesting to note that Section 310 of the United States Uniform Marriage and Divorce Act (an Act approved in 1970 by the National Conference of Commissioners on Uniform State Laws) provides the court with a discretion to order separate representation.

166. For example, see Law Reform Commission of Canada, Report on Family Law (1976) at PP. 52-53. However, note Foster's denigration of both alternatives (Foster, supra, footnote 89, at P. 68 footnote 7).

167. (1978) 1 W.W.R. 8

168. Ibid at P. 11.

169. Ibid at PP. 11-12

170. Another example of this can be found in Sanness v Sanness (1977), 6 F.L.D. 61, at P. 62. There, the judge felt that a trial advocate should only be appointed where there was a great deal of hostility between the parties.

171. Foster, supra, footnote 89, at P. 60, indicated that for a mandatory system of independent representation to work, there must be approval by the court, the bar and the community.

172. Supra, footnote 64, at P.7.
173. Ibid at P. 16
174. Foster and Freed, supra, footnote 45, at P. 347
175. Ibid at P. 355
176. Even in the United States a general right to representation has not yet been recognised, although it has been in the case of delinquency proceedings (In Re Gault (1967), 387 U.S. 1).
179. R.S., 1960, c. 44
182. S.B.C., 1978, c. 27.
184. However, in Alberta, under para. 10 (2) (b) of the Family Court Act, R.S.A. 1970, c. 133, and Section 42 of the Domestic Relations Act, R.S.A. 1970 c. 113, a child himself may make an application for a custody or access order "with or without any person interested on his behalf".
185. Supra, footnote 177
186. Act No. 53 of 1975
187. Section 65
188. Bersoff, supra, footnote 14, at P. 42
189. Supra, footnote 7
190. Ibid at P. 433
191. E.g., see Daley, "Custody, the Social Worker, and the Court", (1975), 18 R.F.L. 14, at P. 15, where he suggests: "... that the total child must be considered, not
only the physical needs of the child, and the parents’ ability to provide financially, but of more importance, the emotional and social well-being of the child."

192. Supra, footnote 3

193. In the words of Finlay and Gold, :
"What guarantee is there that assumptions made by the judge are correct, particularly in matters involving disciplines other than the law, such as medicine, psychiatry and psychology? ... (I)s there a possibility of an injustice being done because the court’s perception of a given situation may be out of keeping with modern scientific knowledge?"


194. Supra, footnote 6, at P. 304

195. Unfortunately though, in promoting this procedure Bayda J. downgraded one other method of conveying the wishes of the child, namely, an interview with the child. I suggest that each method is useful for its particular purpose and a combination of methods will produce the best result possible. See supra P. 137.


197. See Chisholm, supra, footnote 48, at P. 11

198. Foster, footnote 89, at P. 55

199. Bradbrook’s illustrative study of the attitudes of the Judges of the Supreme Court of Ontario revealed that they were almost evenly divided on the value of psychiatric evidence (Bradbrook, "An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario Regarding Adjudication Laws", (1971), 49 Can. Bar. Rev. 557). He reports (ibid at P. 563) :
"(O)ne half seems enthusiastic about the value of this type of scientific study, whilst the other half are of a more sceptical frame of mind and admit that they attach little weight to evidence of this nature in all but exceptional cases. It was admitted by all but two of the latter half, however, that psychiatric evidence can occasionally
be extremely important in discovering vital information which would otherwise be hidden from the court. An example of this is the mother prone to nervous breakdowns."

200. (1971) 1 O.R. 393, at P. 397

201. Also see J v C, (1970) A.C. 668, where Lord MacDermott in referring to the effects of a change of custody said this (at P. 715):

"I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinions."


203. (1978), 2 R.F.L. (2d) 39

204. Ibid at P. 47

205. (1973), 34 D.L.R. (3d) 32

206. Ibid at P. 38


208. (1974), 16 R.F.L. 266

209. This was brought into sharp relief in the United States as a result of the celebrated case of Painter v Bannister, (1966), 140 N.W. (2d) 152. As we have seen (supra P. 51), the expert witness relied on by the court there was the only one called, and Foster, a vocal critic of the decision, reports that in a subsequent panel discussion this witness admitted that he got carried away, that he said many things he had not intended to say, that he engaged in a free-wheeling discussion and a lot of conjecture, and that a full scale investigation might have proved him wrong (Foster, "Adoption and Child Custody: Best Interests of the Child? (1972) 22 Buffalo L. Rev. 1, at P. 5; Foster, supra, footnote 89, at P. 57).

210. On the other hand, there is a school of thought that
there is no such thing as an "impartial" expert. It is said that even court-appointed experts have personal biases and these dictate the conclusions drawn. See Foster, supra, footnote 89. However, although this may be inescapable, an expert can still be impartial as regards the individual views of each party.

211. See Leatherdale v Ferguson (1964), 50 W.W.R. 700, where Gun J.A. said this (at P. 703):
"The production of an affidavit from a prominent child psychiatrist in Winnipeg, who took his affidavit stating his views after one interview with these children, is hardly the proper way to determine the well-being, the peace of mind, the feeling of security, the physical comfort, and the long-term emotional stability of these children. It is a poor substitute for the viva voce evidence of the people who are growing up with, and having daily contact with the children."

Also see Case v Case (1974), 18 R.F.L. 132


214. Ibid at P. 183


216. Act No. 53 of 1975

217. Section 62 (1)

218. Section 62 (4)

219. (1968) 3 All E.R. 170

220. (1967) 1 All E.R. 202

221. Ibid at P. 209

222. Supra, footnote 219, at P. 174

223. As was said in Corbett v Corbett, (1970) 2 W.L.R. 1306, at P. 1309:
"In the event, as is to be expected when expert
witnesses of high standing are involved, there was a very large measure of agreement between them on the present state of scientific knowledge on all relevant topics although they differed in the inferences and conclusions which they drew from the application of this knowledge to the facts of the present case".


225. Ibid at P. 287.

226. Supra P. 28-29

227. Supra, footnote 33, at P. 287

228. For a comparison of five sample theories with competing implications see Mnookin, ibid at P. 258, N. 161.

229. Skolnick, supra, footnote 7, at P. 40.


232. R.S.B.C., 1960, c. 374. That section reads as follows: "63 (1) Subject to Rules of Court and to any right to have particular proceedings tried by a jury, the Court may refer any question arising in any proceeding (other than a criminal proceeding) for inquiry or report to any Judge of the Provincial Court of British Columbia, District Registrar, Master, or special referee.

(2) The report of any Judge of the Provincial Court of British Columbia, District Registrar, official or special referee may be adopted, wholly or partially, by the Court, and if so adopted may be enforced as an order to the same effect."
(3) Proceedings before a Judge of the Provincial Court, District Registrar, Master, or referee on a reference, and the report and the powers of the Court with respect to a report shall, where applicable and as nearly as possible, conform to and be exercised in accordance with the Rules of Court ...

233. *Saxon v Saxon*, supra, footnote 201; *Re Moilliet*, (1966), 58 D.L.R. (2d) 152. Also note *Knowles v Knowles*, supra, footnote 202, where not only was a report sought from the Superintendent, but also from a private psychiatrist.

234. S.B.C., 1974, c. 99

235. S.B.C., 1978, c. 22

236. Supra, footnote 233

237. It is interesting to note that under the United States Uniform Marriage and Divorce Act (supra, footnote 165) the court can only order an investigation and report if a parent or the child's custodian so requests (Section 405 (a)). I consider that this is unnecessarily restrictive.


239. Act No. 53 1975

240. Section 62 (2) of this Act also permits a court to "make an order directing the parties to the proceedings to attend a conference with a welfare officer to discuss the welfare of the child and, if there are any differences between the parties as to matters affecting the welfare of the child, to endeavour to resolve those differences."

241. *Finlay and Gold*, supra, footnote 193, at P. 91


243. Supra, footnote 201
244. Supra, footnote 232

245. Supra, footnote 201, at P. 738

246. E.g., see More v Primeau, supra, footnote 55. Indeed, some courts simply disregard psychiatric opinion as being too speculative, regardless of its completeness. See Martiniuk v Martiniuk and Kowerchuk, supra, footnote 203.

247. For a discussion of the attitude of courts in England to expert evidence in this area see Michaels, "The Danger of a Change of Parentage in Custody and Adoption Cases" (1967), 83 L.Q.R. 547


249. It is interesting to note that in the end result the order of the court was that if the mother ceased her association with her de facto husband, she should have custody, but if this condition was not complied with, then the father should have custody.

250. (1975), 23 R.F.L. 351

251. Ibid at P. 352

252. Other examples of this arose in Knowles v Knowles, supra, footnote 202, and Martiniuk v Martiniuk and Kowerchuk, supra, footnote 203.


254. Similarly, see Martiniuk v Martiniuk and Kowerchuk, supra, footnote 203.

255. This is also the experience of Carl Rothschild, a Vancouver psychiatrist who has often appeared in court in custody cases. See Rothschild, "Guidelines for the Psychiatrist’s Involvement in Child Custody and Access Matters" (1976), 18 B.C. Medical J. at P. 390.

256. E.g., Lieff J. made such an order at the pre-trial hearing in More v Primeau, supra, footnote 55.

257. Supra, footnote 213, at P. 192

258. R.S., 1973, c. 31
259. Note though, that R v Wray (1970) 4 C.C.C. 1, has limited this discretion in criminal cases but it is unclear as to its effect on the discretion in civil custody disputes.


261. R.S.C., 1970, D. 8

262. In Robson v Robson, (1969), 7 D.L.R. (3d) 289 and Cronkright v Cronkright, (1970), 14 D.L.R. (3d) 168, it was held that the section is inapplicable when the statements are not made in the course of a reconciliation attempt and when the counsellor is not one appointed under Section 8 of the Act (Section 8 (b) provides for a court appointment of a marriage counsellor or some other suitable person to assist the parties with a view to reconciliation). However, there is some dissension concerning this holding and in a subsequent Ontario case of Shakotka v Shakotka, supra, footnote 260, Grant J. refused to follow the previous decisions saying that Section 21 (2) applies regardless of to whom the communications are made.

263. Cronkright v Cronkright, ibid. N.B., if Grant J.'s interpretation of Section 21 (2) in Shakotka v Shakotka, ibid, is the correct one, then that sub-section would cover this situation. Moreover, in Robson v Robson, ibid, although the court refused to prevent the counsellor from giving evidence, it was only because there were particular circumstances present which outweighed the public policy considerations and not because of a rejection of the notion that the court had a discretion in the matter.

264. S.B.C., 1978, c. 22

265. R.S.C., 1970, D. 8

266. It is interesting to note that prior to Re Moilliet, supra, footnote 233, this was one of the reasons for the Superintendent of Child Welfare making it a condition of furnishing reports that the same would only be seen by the judge. However, this is no longer possible as a result of that case.

267. Act No. 53 of 1975
268. An unreported decision of the Family Court of Australia at Adelaide handed down on the 1st February 1978.

269. In the report the welfare officer did not specify which party frightened the children in order to protect them as much as possible.

270. Supra, footnote 232

271. Although Section 12 (2) of the British Columbia Evidence Act, supra, footnote 258, provides that the written opinion of an expert is admissible in evidence per se if a copy has been furnished to every party who is adverse in interest to the party tendering the same at least 14 days before the opinion is given in evidence, I suggest that this does not apply where the judge himself has ordered or directed the preparation of a report.

272. S.B.C., 1978, c. 22

273. Section 15 (4)


275. Ibid, at P. 49. Also see Gosse and Payne, supra, footnote 213, at P. 199. Ellsworth and Levy, supra, footnote 7, at PP. 213-214, Mullighan, "The Lawyer's Viewpoint" (1976), 48 N.Y. State B.J. 451, and in the context of pre-disposition reports see Catton and Leon, "Legal Representation and the Proposed Young Persons in Conflict with the Law Act" (1977), 15 Osgoode Hall L.J. 107, at PP. 124-125. Note that in the United States due process limitations prevent consideration of secret reports by a judge. For example, under Section 405 (c) of the Uniform Marriage and Divorce Act, supra, footnote 237 and 165, reports must be sent to counsel and to any unrepresented party at least 10 days prior to the hearing. In addition the investigator must make his entire file available to counsel and any unrepresented party.

276. Law Reform Commission of Canada, Report on Family Law (1976); In Re K (infants), supra, footnote 276. But note that in Re Brady's Infants, (1970), 10 D.L.R. (3d) 432, the court suggested in obiter that the report might have been inadmissible because the conclusions were based solely on hearsay. C.f. the United States where creating an exception to the hearsay rule and rendering
reports admissible is still a problem in many jurisdictions. See Foster, supra, footnote 89, at PP. 58-60 and Leavall, supra, footnote 163.

277. This is inherent in legislation such as Section 12 of the British Columbia Evidence Act, supra, footnote 258.

278. Supra, footnote 233. Note that there is a suggestion in Saxon v Saxon, supra, footnote 201, at P. 738, that a report obtained pursuant to Section 63 of the British Columbia Supreme Court Act, supra, footnote 232, is not caught by the principle in Re Moilliet.

279. Supra P. 232

280. Supra, footnote 233, at P. 153

281. Ibid at P. 159

282. The exception originated in Scott v Scott, (1913) A.C. 417, a case dealing with the power of a court to hear proceedings in camera, but it does not appear to have been taken up subsequently to any marked degree.

283. Scott v Scott, ibid; In Re K (Infants), supra, footnote 276.

284. Ibid at P. 437

285. Supra, footnote 276, at PP. 240-241

286. Ibid

287. Supra, footnote 201


289. C.f., the treatment of pre-disposition reports in juvenile matters. Waterman, "Disclosure of Social and Psychological Reports at Disposition", (1969), 7 Osgoode Hall L.J. 213. It is interesting to note that Section 17 (5) of the proposed Young Persons in Conflict with the Law Act provides the judge with a discretion whether to reveal the contents of a pre-disposition report to the child or his parents. However, he must provide the child's lawyer with a copy. For criticism of this see Catton and Leon, supra, footnote 275, at PP. 124-125.

291. Emphasis mine

292. No guidelines are provided in the Australian legislation, but ostensibly the best interests of the child are determinative.

293. Regulation 108 (2). Rules of Evidence, of course, are the nemesis of custody determinations because they are designed to limit the amount and type of information that the court receives.

294. Section 12 (5) of the Evidence Act (B.C.), supra, footnote 258, provides that:
"Where the written statement of an expert is given in evidence in a proceeding, any party to the proceeding may require the expert to be called as a witness."

295. (1972), 7 R.F.L. 317. Also see More v Primeau, supra, footnote 55, at P. 268.

296. Leavall, supra, footnote 163; Gosse and Payne, supra, footnote 213.

297. Supra PP. 55-56

298. Section 6 (2) Matrimonial Causes Act, 1971 (R.S.O., 1970, c. 64, as amended by 1972, c. 50, S. 1). This can be compared with legislation in the State of Colorado which provides for mandatory welfare or probation department investigations, with a report to the court, in all cases involving custody disputes, whether the dispute arises in an action for divorce or in any subsequent proceeding (10 Colo. Re. Stat. Ann. Ch. 46-1-5 (Supp. 1967)).

299. Supra, footnote 199, at PP. 561-562.

300. Bradbrook points out though (ibid at P. 562), that the legal profession were in favour of mandatory reports. At the November 1969 meeting of the Ontario Sub-Section on Family Law of the Canadian Bar Association the members voted by a majority of 4 to 1 in favour of compulsory reports in all cases involving children.

Commission of Canada, Report on Family Law (1976), at PP. 51-52

302. Supra, footnote 199, at P. 562.

303. See Re S (infants), supra, footnote 220, where Cross J. felt that it should be left to the Official Solicitor to decide whether the child should be psychiatrically examined and a report presented.

304. Supra P. 223-224

305. (1966), 8 F.L.R. 461, at P. 462. Also see Re S (infants), supra, footnote 220.

306. Lord Goddard in his preface to Giles, "Children and the Law" (Penguin, 1959). On the other hand, it is interesting to compare this with the suggestion that there should always be an investigation of the mental normalcy of proposed custodians. This derives from studies which conclude that one of the most important factors in the development of a child, who is in the exclusive custody of his or her mother, is the mental stability of the mother. See McCord, McCord and Thurber, "Some Effects of Paternal Absence on Male Children", (1962), 64 J. of Abnormal Social Psychology 361, at P. 364. Also see Finlay and Gold, supra, footnote 193, at P. 94, and Gove v Gove (1978), 4 Fam. L. Reporter 2181.

307. Of course, pursuant to Section 12 (5) of the Evidence Act (B.C.), supra, footnote 258, the author of a report is liable to be called as a witness to give oral evidence as well.

308. Section 13.

309. Supra, footnote 202

310. Ibid at P. 268

311. Indeed, the Law Reform Commission of Canada rejected this procedure in its Working Paper on Divorce, supra, footnote 64, at P. 50

312. Supra, footnote 6, at P. 304.

313. However, there have been some enlightened approaches to this dilemma. For example, as we have seen (supra P.
169), in Hatzioannidis v Hatzioannidis, supra, footnote 93, the children filed affidavits indicating that they did not want to live with their mother anymore. Galligan J. then permitted counsel for the mother to interview the children to ascertain for himself whether or not they were firm in their decision. He also requested the Official Guardian, who happened to walk into the courtroom, to speak to the children and provide them with independent legal advice. Through all this the children stood by their initial decision, and Galligan J. eventually gave effect thereto.

314. Supra, footnote 64

315. Ibid at P. 297

316. Interestingly enough, research has indicated that the reports of children are generally reliable. See Leon, supra, footnote 7, at P. 432.

317. Supra, footnote 258


320. Wilson, ibid, at P. 214

321. Supra, footnote 6

322. (1971), 5 R.F.L. 14

323. A similar dichotomy of opinion exists in the United States of America. A number of courts have held that it is reversible error not to receive a child's testimony, particularly if the child has reached the age of discretion. ((1978), 4 Fam. L. Rep. 2357). Yet, other courts have held that it is within the discretion of the judge on the basis that the sole issue is what will serve the best interests of the children (Dings v Dings, (1964), 161 S (2d) 227; Murdoch v Murdoch, (1978), 4 Fam. L. Rep. 2347).

324. Supra, footnote 322

325. C.f. Austin v Austin, (1970), 2 R.F.L. 136 at PP. 139-140.
326. Statutory Rules No. 210 1975 as amended


328. Supra P. 251

329. (1958), 16 D.L.R. (2d) 172

330. Supra, footnote 201

331. Ibid at P. 737

332. Idem at PP. 735-736

333. In the past there have been instances of the judge interviewing the child in the presence of both counsel and a court official (In Re Carlson (1943) 3 W.W.R. 104), and in the presence of a court official alone (Re McGhee (1941) 2 W.W.R. 303; Kramer v Kramer and Merkelbag (1966), 56 W.W.R. 303).

334. Supra, footnote 141

335. Perhaps the most common approach in British Columbia today is to interview only with the consent of counsel (Clark v Clark (1977), 5 F.L.D. 493; Manning v Manning (1974), 3 F.L.D. 56; Sanness v Sanness, supra, footnote 170, Re Keuhn, supra, footnote 92). However, recent examples can still be found where counsel are present during the interview (Wenuik v Wenuik (1977), 5 F.L.D. 387; Pelech v Pelech (1976), 4 F.L.D. 400; Re Adoption Nos. 63-09-034215 and 60-09-022601 (1975), 22 R.F.L. 333).

336. Supra, footnote 329

337. H v H (1974) 1 All. E.R. 1145

338. It is also a common practice in the United States. See generally Foster, supra, footnote 89.

339. Supra, footnote 329

340. Ibid at P. 182

341. Austin v Austin, supra, footnote 325

342. (1975), 22 R.F.L. 294
343. Supra, footnote 60, at P. 52
344. (1968), 66 D.L.R. (2d) 696
345. Ibid at PP. 698, 699
346. (1962) 3 All. E.R. 1000
347. Supra, footnote 276
348. Indeed, Stone suggests that the House of Lords decision in In Re K (Infants) is authority for the proposition that "a parent is not absolutely entitled to see all the evidence before the court in relation to a custody application" (Stone, "The Welfare of the Child", in Baxter and Eberts (Eds.) "The Child and the Courts" (1978) 229, at P. 241). The judge has a discretion to decide whether disclosure of the evidence to the parent will be for the child's welfare or not.
349. Supra, footnote 346, at P. 1009
350. Ibid, at P. 1012
351. Supra, footnote 337
352. Regulation 116 (1) and (2). Statutory Rules No. 210, 1975.
353. In the Marriage of Ryan, (1976) 2 Fam. L.R. 11,510
355. Supra, footnote 353, at P. 11,518
356. This practice was criticized in H v H, supra, footnote 337, on the ground that lawyers cannot properly give advice on the question whether there should or should not be an appeal if, when the matter comes before the Appeal Court, they may be faced with some communication from the judge who heard the case which affected his judgement but which did not appear in the reasons he gave.
357. Supra, footnote 201
358. Also see H v H, supra, footnote 337

360. It has now been held that it is not possible for the parties to waive this requirement (De Young v De Young (1978), 4 Fam. L. Rep. 2702).

361. Supra, footnote 165

362. The Illinois Statute provides that counsel must be present unless otherwise agreed.

363. As quoted by Lord Devlin in the House of Lords (supra, footnote 276, at P. 240).

364. E.g., this was assumed in the extract quoted from Kelly v Kelly, supra at P. 282

365. See Leon, supra, footnote 7, at P. 434; footnote 292, where he sets out the approaches to interviewing suggested in the psychiatric literature.

366. Chisholm, supra, footnote 48, at P. 6

367. Ibid at P. 7

368. Wakaluk v Wakaluk, supra, footnote 6

369. See Leon, supra, footnote 7, at P. 429, where he refers to research indicating the difficulties of communicating with children of varying ages.


371. Judgement handed down 26th March 1976


373. More v Primeau, supra, footnote 55, at P. 260

374. Indeed, as we have seen, in the Australian jurisdiction independent counsel has total control over whether the judge interviews the child. Regulation 116 (4) provides that unless such counsel consents, the judge is prevented from seeing the child.
375. **Bradbrook**, supra, footnote 199, at PP. 559-560

376. C.f. **Shapiro v Shapiro**, supra, footnote 92

377. Also see **H v H**, (1976), 22 N.S.R. (2d) 67, at P. 75


379. See **Leon**, supra, footnote 7, at P. 396, and the authorities cited therein. Also see "Alternatives to 'parental right' in Child Custody Disputes Involving Third Parties", (1963), 73 Yale L.J. 151, at P. 163.

380. Supra, footnote 199

381. Some English and Australian Courts have also recognised that this is a legitimate aim of interviewing children. In **In Re K (infants)**, supra, footnote 346, Upjohn L.J. expressed it in this fashion (at P. 1009):

"... he may legitimately interview them in order to discover, so far as is possible in one interview, their personalities and outlook and so assist him in his final determination of the matter."

(Also see per Davies L.J. at P. 1012). The Full Court of the Family Court of Australia has put it even more explicitly. In **In the Marriage of Ryan**, Supra, footnote 353, at P. 11,516. they said this:

"The private interview has a two-fold function. On the one hand it enables the judge to form an impression about the children and their personalities and characteristics. On the other, it provides the judge with the opportunity to discover the wishes of the children and their views about custody ... The distinction between the two functions of the private interview is an important one, though it is some times blurred in practice."

382. Supra, footnote 6, at P. 303

383. Supra, footnote 55

384. **Ibid** at PP. 260,261

385. Also see **Funk v Funk** (1978) 6 W.W.R. 137, where the judge refrained from asking the child to make a choice or to pressure her for her views. Unfortunately though, the judge did not find the interview very helpful anyway.
386. The Law Reform Commission of Canada recognised this, but unfortunately overlooked the value of an interview for other purposes (see Working Paper No. 13, "Divorce", at P. 50) Australian Courts have taken a similar attitude. In In the Marriage of Pailas, supra, footnote 152, at P. 11,550, McCall J. said this: "In this case, however, the added reason for declining to interview the children was that they were separately represented. When counsel has been appointed to represent children it is my belief that the court must rely upon such counsel to accurately ascertain the wishes of the children to the best of his ability and to communicate them to the court in the way he thinks best. I would think that it would only be in an exceptional case where children are separately represented that a judge would see fit to interview the children himself."
(Also see In the Marriage of Ryan, supra, footnote 353, at P. 11,519). In any event, because of Regulation 116 (6) of the Family Law Regulations, (Statutory Rules No. 210, 1975 as amended) children cannot be interviewed without the consent of independent counsel.

387. One criticism that it does answer though, is Steinberg's suggestion in his essay, "Representation of Children in Matrimonial Disputes" in Baxter and Eberts (eds.) "The Child and the Courts" (1978) 95, at P. 97, that "very few adults have the emotional competence to address a judge, with respect to a point which involves their entire future - that's what counsel are hired to do. Why should we require this of children, who are supposedly less able to express themselves than adults".

388. See Chisholm, supra, footnote 48

389. Supra, footnote 55

390. Fifth Report, Part iii - "Children's Rights" (1975), at P. 7. Note that the Commission also recommended that if the children were not consulted, the decision should be void (ibid at P. 16).

391. Clark v Clark, supra, footnote 335

392. Ner Littner, "The Effects on a Child of Family Disruption and Separation from One or Both Parents",
(1973), 11 R.F.L. 1 at P. 13; Solnit, "Child-Rearing and Child Advocacy" (1976) Brigham Young U.L. Rev. 723, at P. 733; Foster, supra, footnote 89, at P. 60. However, not all psychiatrists feel that this is an incorrect approach. Lee Salk, Professor of Psychology at Cornell University indicated at the A.B.A. Annual Meeting in New York in August 1978, that children can be asked to choose without harming them if we can "put the burden on the parents to make clear their continuing love for the child" ((1978) 4 Fam. L. Reporter 2664).

393. E.g., see Goldstein, Freud and Solnit, supra, footnote 3, at PP. 49-52; Kay, "A Family Court : The Californian Proposal" (1968), 56 Calif L. Rev. 1205; Watson, supra, footnote 212, at PP. 61-64; Finlay and Gold, footnote 193, at PP. 83,84.

394. Mnookin, supra, footnote 33, at P. 287

395. Although Mnookin, ibid, at P. 251, saw the resolution of custody disputes as involving a prediction of future events, he conceded that past events were relevant insofar as they enabled the court to decide what was likely to happen in the future.

396. Idem, at P. 250

397. Idem

398. Supra PP. 28-29

399. Supra, footnote 3


401. Conflicts experienced by children during this process have been cited as being partially responsible for emotional disturbances in later life. Watson, supra, footnote 212, at P. 55. Also see generally Westman and Cline, supra, footnote 102.

402. Ellsworth and Levy, supra, footnote 7, at PP. 209-210. Also see Devine, supra, footnote 158, at P. 312 footnote 47.

403. Irving and Schlesinger, supra, footnote 18
404. N.B., the suggested process has been in use in parts of the United States for some time now. See generally Irving and Schlesinger, ibid.

405. Ibid at P. 81

406. Idem at P. 83

407. If the parties are unable to agree on one of these alternatives, then the court must be resorted to.

408. Irving and Schlesinger, supra, footnote 18, at P. 88

409. Irving and Schlesinger express it in this fashion (ibid, at P. 83):

Voluntary settlements, which are worked out by both spouses on an emotional level as well as an intellectual one are not only more humane than those forced by litigation, but also more practical. Mutual agreement means that neither party is the 'loser' or has been taken advantage of, so there is less likelihood of revenge erupting later and leading to new and prolonged legal battles."

Also see Mnookin, supra, footnote 33, at P. 288.

410. Ibid

411. Irving and Schlesinger attach great weight to the concept that their conciliator acts as the child's advocate throughout the conciliation process (ibid at P. 86).

412. See the Law Reform Commission of Canada's Report on Family Law (1976), at P. 54. It is also interesting to note that Irving and Schlesinger (ibid, at P. 83) see a need for conciliation even if the parties have previously resolved all the relevant issues involving the child. But c.f. Mnookin, supra, footnote 33, at P. 288, where he suggests that parental agreements should not be second-guessed.


414. S.B.C., 1978, c. 22

415. See Leiff, "Pre-trial of Family Law in the Supreme Court: Simplify and Expedite" (1976), 10 Law Society Gazette 300.
416. Statutory Rules No. 210, 1975

417. Irving and Schlesinger propose, supra, footnote 18, at P. 91, that their conciliation procedure be mandatory in all cases involving a child.


419. Supra, footnote 33, at P. 289

420. Irving and Schlesinger, supra, footnote 18, at PP. 87-88

421. Gosse and Payne, supra, footnote 213, at P. 181, argue, that the courts are the most appropriate tribunal to decide the issue of custody placement once conciliation has failed, but provided the judges receive assistance from social services.


423. For a critical analysis of the proposal see Note, "Committee Decision of Child Custody Disputes and the Judicial Test of 'Best Interests'", (1964), 73 Yale L.J. 1200.

424. This was a concern of the August 1978 meeting of The American Bar Association in New York City. It was felt that the problem with taking custody outside the court system was that no-one would know what information the other experts would use in the decision. See (1978), 4 Fam. L. Reporter 2680.

425. Mnookin, supra, footnote 33, at P. 289, also considered this alternative, and concluded that a system involving such an intimate form of adjudication could hardly be implemented on a broad scale.

426. In the words of Foster, supra, footnote 89, at P. 58: "Non-lawyers who ... would favour the substitution of a panel of experts or some other process, often do not reckon with constitutional questions or with the dangers inherent in suggested alternatives. As the history of juvenile courts amply illustrates, the judicial process gets into difficulties when it becomes a social service agency rather than a court"
427. Foster, supra, footnote 89

428. Ibid at P. 56

429. Idem at P. 59


431. Supra, footnote 89, at P. 64. Also see Ellsworth and Levy, supra, footnote 7

432. Supra, footnote 3, at P. 67

433. Mnookin, supra, footnote 33, and Chisholm, supra, footnote 48, at P. 2

434. Commentators have astutely observed that, "(i)t is not the standard - the best interests of the child - that produces inadequate results; it is the application of the standard without allowing the child counsel". Inker and Perretta, "A Child's Right to Counsel in Custody Cases" (1971), 5 Fam. L.Q. 108, at P. 112).
Child placement is an issue that has exercised the minds of all and sundry. However, I suggest that too much energy has been expended in searching for an elusive alternative to the present system. It is my submission that what is needed is an increased emphasis on the child himself and that this can readily be achieved within the existing scheme of things.

However, this is not to say that changes are not required. Indeed they are, but I suggest they are primarily attitudinal. For example, there needs to be an appreciation by all involved that a custody dispute is a very special conflict, having tremendous repercussions for the future development of the child concerned. The court must break away from the parent versus parent theme and be receptive to independent evidence concerning the child. This input will then balance the partisan advocacy which is a hallmark of custody disputes. The detailed examination in this paper of how the best interests principle is employed by the courts should well illustrate this point. It is incomprehensible to expect a judge to effectively employ that well-worn test without an adequate information base. The prime ingredient that is lacking is input from the child, and here I have suggested four avenues through which that ingredient can be
supplied. The key though, is independent counsel. His involvement is critical, and he will be expected to orchestrate the other procedures.

However, one vital problem still remains, and that is the decided lack of knowledge concerning the psychological welfare of a child embroiled in a custody dispute. Of course, there have been many and varied studies relating to a child's development, but unfortunately only a small amount of this research has any relevance to custody adjudication. What is required is specific data dealing with the differential effects of childhood living arrangements. Without this, much of the evidence given by behavioural scientists is nothing less than speculative, and the courts will continue to approach the same with extreme caution.

Thus, although I suggest that the key to the future development of the law relating to child custody lies in the provision of independent counsel, his effect will be stultified somewhat without access to affirmative evidence concerning the likely psychological and psychiatric effects of alternative placements. The court can only go so far armed with knowledge of the child, his personality and his existing affection-relationships. Predictive ability then becomes all-important.
However, it is crucial not to lose sight of the fact that a trial over custody should only be considered as a last resort in determining child placement. Settlement must be uppermost in everybody's mind. Prior to any proceedings being issued there should be extensive use of counsellors. Similarly, if proceedings are in fact issued, independent counsel should have settlement as his immediate purpose. Yet, even here, it can be seen that there must be input from the child. A mediated resolution provides no more comfort for the child than a court decision, if he or she has no voice in the same. Unfortunately, it cannot be assumed that the parents will subordinate their own self-interests to the welfare of the child.

Other warnings should also be heeded. For example, it is easy to forget that the relationship between a child and its parents is a mutual and reciprocal matter. It is as impossible to make one parent no longer a parent, as it is to cut a child in half. Thus, although child input is essential, such input can not be considered in vacuo.

The law is criticised as being incapable of handling the complex and delicate relationship that exists between parent and child. However, in my submission this should be taken in context. It may be applicable where there is no separate representation of children, where there is no
appreciation of the psychological influences at play, and particularly where adult priorities loom largest in the eyes of the law. But it is ill-founded where the law comprises a system in which children are heard, in which their interests are always important and at times dominant, and one in which children do not serve as bargaining counters or as objects to be kept and used. Such a system is achieved, I suggest, by turning to devices such as separate representation, and mitigating the rigours of the traditional adversary process.
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