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Whose Best Interests? Custody and Access Law and Procedure

By Noel Semple¹

Custody and access disputes arise when separated parents cannot agree about how to divide the ongoing rights and responsibilities of parenting.² “Custody” usually means the right to make decisions on behalf of a child, and the right to have care and control of a child.³ “Access” refers to the right to be with or communicate with a child, and may also include the right to obtain information about a child.⁴ While most parents resolve custody and access disputes privately, a substantial number also pass through our courts.⁵ In 1998, proposals to amend the *Divorce Act* triggered a heated debate about joint custody and allocation of parenting time.⁶ An apparent stalemate was reached 2004,⁷ although

¹ Ph.D Candidate, Osgoode Hall Law School. I am grateful to Professor Trevor Farrow and to the OHLJ reviewers for their helpful suggestions.

² This paper focuses on disputes between individuals after relationship breakdown, as opposed to adoption or child protection proceedings.

³ James G. McLeod, *Child Custody Law and Practice* (Scarborough, Ont.: Carswell, 1992 to present) at s. 1(1). These two meanings are sometimes distinguished as “legal custody” and “physical custody,” but usually an individual who has the right to one of these two types of custody at a given point in time will also have the right to the other.

⁴ E.g., in Ontario, *Children's Law Reform Act*, R.S.O. 1990, c. C.12 establishes the access parent’s right to information at s. 20(5). The rights of custody and access are bundled with concomitant responsibilities for the child’s welfare.

⁵ In the year ending April 2009 there were 75,108 new family proceedings filed in Ontario’s courts, excluding child protection matters. Ministry of the Attorney General (Ontario), *Court Services Division Annual Report 2008/2009*. (Toronto: Ministry of the Attorney General, 2009) at 32. Statistics do not appear to be available about the proportion of these which involved child-related issues, as opposed to those which were exclusively financial in nature. However the author asked judges and lawyers about this issue during a series of interviews. One family lawyer told me that 90% of her cases involved a custody or access issue, and a judge at the Ontario Court of Justice said that in two years on the bench she had only heard two cases in which there was no parenting issue. In the Superior Court of Justice, child-related issues appear to be somewhat less ubiquitous, with one judge indicating that “easily half if not more” of the cases have them. Ethics approval was granted for the interviews by the York University Human Participants Review Sub-Committee. (Certificate Number 2009-161, granted on November 25, 2009.)

⁶ Landon Pearson and Roger Gallaway, *For the sake of the children : report of the Special Joint Committee on Child Custody and Access* (Ottawa: Senate and House of Commons, 1998); Marie Laing, "For the Sake of the Children: Preventing Reckless New Laws" (1999) 16 Can. J. Fam. L. 229; Nicholas Bala, "Report from Canada's Gender War Zone: Reforming the Child-Related Provisions of the Divorce Act" (1999) 16 Can. J. Fam. L. 163; Susan Boyd, "Can Child Custody Law Move beyond the Politics of Gender?" (2000) 49 U.N.B.L.J. 157; Linda C. Neilson, "Putting Revisions to the Divorce Act through a Family Violence Research Filter: The Good, the Bad and the Ugly", (2003) 20 Can. J. Fam. L. 11.

⁷ Janice Tibbetts, "Martin government shelves plan to overhaul divorce, child-custody law" *The Ottawa Citizen* (Feb 6, 2004) A1.

occasional skirmishes continue.⁸ Other disputes also now swirl around custody and access, with the issue of parental alienation surfacing most recently in the media.⁹

This article proposes to take a step back from these controversies and make a more general claim. There is a fundamental contradiction in the system that the state uses to resolve custody and access disputes. The *law* focuses on the interests of the *children* involved to the exclusion of all else. However the *procedure* by which the disputes are resolved primarily empowers the *adult parties* to the dispute. I will argue that this contradiction is worth resolving, and will suggest how this might be done.

Part I focuses on the legal doctrine, and will seem to demonstrate the near-universality of the “best interests of the child” principle in statutes, case law, and normative scholarship. Part II turns to the procedure, examining who decides whether the procedure occurs, who controls the evidence, and who decides when the procedure ends. Part III will suggest two alternatives to resolve this inconsistency between doctrine and procedure. We might acknowledge the legitimacy of parents’ interests in custody and access disputes, as the American Law Institute proposed to do in 2002.¹⁰ Alternatively, there may be ways to reform the custody and access dispute resolution procedure to better serve the best interests of the children involved.

Part I: Law: The Best Interests of the Child

The “best interests of the child” (BIC) is the golden thread running through the Canadian law of custody and access. As this Part will demonstrate, statute and case law have repeatedly and forcefully stated that the interests or rights claims of the adults involved in the dispute are not relevant. The golden thread of BIC is also woven into almost all of the normative scholarship about private parenting disputes. This Part will trace the thread to show the remarkable degree of consensus supporting BIC, before identifying the distinctiveness of this legal standard.

A preliminary question arises. What is the meaning of “best interests of the child” in the context of a custody or access dispute? At the level of case-by-case decision-making, judges often have great difficulty applying this standard.¹¹ Determining what outcomes

⁸ A number of private members’ bills from Conservative MPs have sought to create an “equal parenting” presumption in the *Divorce Act* (e.g. Maurice Vellacott’s Bill C-422, *An Act to amend the Divorce Act (equal parenting) and to make consequential amendments to other Acts*, 2nd Sess., 40th Parl., 2009). However, the government has never introduced or endorsed any of these, and the Minister of Justice recently announced his opposition to the proposed change (Cristin Schmitz, “Federal AG nixes equal parenting presumption” *The Lawyers Weekly* (August 28, 2009).

⁹ E.g. Susan Pigg, “Family subterfuge leaves lasting scars” *Toronto Star* (Mar 31, 2009) E1; Kirk Makin, “Parental alienation cases draining court resources” *The Globe and Mail* (May 13, 2009) A8.

¹⁰ American Law Institute, *Principles Of The Law Of Family Dissolution : Analysis And Recommendations* (Newark, NJ: M. Bender, 2002), s. 2.08 (“Allocation of Custodial Responsibility”). See section III(1)(b) below for an account of this proposal.

¹¹ Martin Guggenheim, *What’s Wrong with Children’s Rights* (Cambridge: Harvard University Press, 2005) at 153. See also the judgment of Justice L’Heureux-Dubé in *Young v. Young*, [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117

would be “best” for a given child, as Robert Mnookin aptly put it, “poses a question no less ultimate than the purposes and values of life itself.”¹² Even a judge who is certain about what outcomes are best in general may be no closer to being able to predict which among the available decisions is most likely to produce those outcomes. Some scholars have claimed that BIC is essentially indeterminate or unknowable by law.¹³

However, there are two points of consensus regarding what is in children’s best interests after their parents’ relationship ends. First, all else being equal, children typically benefit from the preservation of meaningful relationships with both of their parents.¹⁴ Second, inter-parental conflict is not in the interests of children, especially if the children are aware of or observe that conflict.¹⁵ Much of the live controversy in the literature is about how to reconcile these two principles. Specifically, scholars debate whether reforms designed to strengthen children’s relationships with both parents post-separation would increase conflict to the extent that they would do more harm than good.¹⁶

at para 161: “A determination of the best interests of the child encompasses a myriad of considerations, as child custody and access decisions have been described as ‘ones of human relations in their most intense and complex forms.’ ... Courts are required to predict the happening of future events rather than to assess the legal import of past acts and judge the effect of various relationships on the best interests of the child, all the while weighing innumerable variables without the benefit of a simple formula.”

¹² Robert H. Mnookin, “Child-custody adjudication: Judicial Functions in the Face of Indeterminacy” (1975) 39 L.C.P. 226 at 260.

¹³ John Dewar, “The Normal Chaos of Family Law” (1998) 61 Mod. L. Rev. 467 at 479; Jon Elster, “Solomonic Judgments: Against the Best Interest of the Child” (1987) 54 U. Chi. L. Rev. 1. Robert Leckey describes it as “an open-textured concept ... a vessel into which judges in individual cases must pour content.” (Robert Leckey, “Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past” (2009) 15 IRPP Choices No. 8 at 20.

¹⁴ E.g. Jennifer E. McIntosh, “Legislating For Shared Parenting: Exploring Some Underlying Assumptions” (2009) 47 Fam. Ct. Rev. 389 at 391; Seth J. Schwartz and Gordon E. Finley, “Mothering, Fathering, And Divorce: The Influence Of Divorce On Reports Of And Desires For Maternal And Paternal Involvement” (2009) 47 Fam. Ct. Rev. 506 at 506; Nicholas Bala and Nicole Bailey, “Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses” (2004) 23 C.F.L.Q. 1. This idea is reflected in the *United Nations Convention on the Rights of the Child* (UNCRC), Art 9(3): “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.” The UNCRC been ratified but not enacted in Canada.

¹⁵ Andrew Schepard, “Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective” (1998) 32 Fam. L.Q. at 95 and 105; David Doolittle *et al.*, *The Scientific Basis of Child Custody Decisions* (New York: Wiley, 1999) at 426 and 430; Joan Kelly and Robert E. Emery, “Children’s Adjustment Following Divorce: Risk and Resilience Perspectives” (2003) 52 Family Relations 352 at 353.

¹⁶ E.g. Martha Shaffer, “Joint Custody, Parental Conflict and Children’s Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us” (2007) 26 C.F.L.Q. 285 at 314; Richard A. Warshak, “Punching The Parenting Time Clock: the Approximation Rule, Social Science, and the Baseball Bat Kids” (2007) 45 Fam. Ct. Rev. 600; Michael Saini and Rachel Birnbaum, “Linking Judicial Decision-making in Joint Custody Awards with Evidence-based Practice: It Is Possible” (2005) 24 C.F.L.Q. 139. However a few advocates for a joint custody presumption actually claim that this reform would reduce interparental conflict. (e.g. Edward Kruk, *Child Custody, Access and Parental Responsibility The Search for a Just and Equitable Standard*, 2008) online:

Also incontrovertible is the absence of the word “parents” from the phrase “best interests of the child.” The law’s instruction to resolve disputes according to the best interests of the child therefore precludes consideration of parental interests as ends in of themselves. It may well be that solicitude for the emotional and/or financial well-being of a child’s parents is an effective means to the end which is BIC.¹⁷ Children’s interests are served by positive relationships with parents, which in turn may well require legal attention to the needs of those parents.¹⁸ However, unless they are instrumental to the interests of the child, parents’ claims regarding what they need or are entitled to are irrelevant according to BIC doctrine.

1. Statutes

Custody and access law is governed by the federal *Divorce Act* when the applicant is or seeks to be divorced, and by provincial legislation otherwise. These statutes all instruct decision-makers in custody and access cases to choose the available outcome which is most consonant with the best interests of the child.¹⁹ The *Divorce Act* states that “the court shall take into consideration only the best interests of the child” in making or varying an order about the custody of or access to a child.²⁰

Two other subsections in the *Divorce Act* elaborate on the BIC principle, without compromising it. Section 16(9) states that the past conduct of a person is to be considered only if it is “relevant to the ability of that person to act as a parent of a child.” No evidence or consideration relevant to BIC would be excluded by this provision.²¹ Section 16(10) of the *Divorce Act* may appear at first glance to compromise the BIC principle. It provides that

the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that

Father Involvement Research Alliance <http://www.fira.ca/cms/documents/181/April7_Kruk.pdf>; Pearson and Gallaway, *supra* note 6 at vi).

¹⁷ Juliet Behrens, “The form and substance of Australian legislation on parenting orders: a case for the principles of care and diversity and presumptions based on them” (2002) 24 *Journal of Social Welfare and Family Law* 401 at 414; Maria Coley, “Children’s Voices in Access and Custody Decisions: The Need to Reconceptualize Rights and Effect Transformative Change” (2007) 12 *Appeal, A Review of Current Law and Law Reform* 48; Solangel Maldonado, “Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce” (2008) 43 *Wake Forest L.Rev.* 441.

¹⁸ Elizabeth S. Scott and Robert E. Scott, “Parents As Fiduciaries” (1995) 81 *Va. L. Rev.* 2403 at 2415; Behrens.

¹⁹ Alberta’s *Family Law Act*, S.A. 2003, c. F-4.5, has replaced the terms “custody” and “access” with “parenting order,” “contact order,” and “time with the child.” (ss. 32 to 45.) However, this difference in language does not appear to reflect or to have created a difference in the law.

²⁰ R.S.C. 1985,(2d Supp.), c. 3, at ss. 16(8) and 17(5).

²¹ The same may be said of Manitoba’s *Family Maintenance Act*, C.C.S.M. c. F20, s. 39(3): “In considering an application under this section, a court shall only receive evidence of the conduct of either parent if the court is satisfied that the evidence bears directly on the parent’s ability to care properly for the child.”

purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.²²

The same language appears in Saskatchewan's *Children's Law Act*.²³ This is Canada's version of the "friendly parent" rule, versions of which appear in custody and access statutory provisions in many Western jurisdictions.²⁴ It has generated some controversy, and has been read as favouring the interests of fathers over mothers.²⁵ In the *Divorce Act* (although not in Saskatchewan's *Children's Act*), the section bears the marginal note "Maximum Contact."

The "friendly parent rule" does not, on its face, detract from or compromise the BIC principle. It merely states that the amount of contact with the spouses which the court orders should be the amount which reflects the child's best interests. The legislative text itself takes no position regarding what amount of contact this would be in any given case. The phrase 'Maximum Contact' is a "marginal note," and the *Interpretation Act* states that marginal notes "form no part of the enactment, but are inserted for convenience of reference only."²⁶ If one accordingly disregards the phrase, the text of s. 16(10) might just as easily be relied upon to favour a custodial parent who has taken steps to ensure that a violent access parent is kept away from the child. A court might reason that the amount of contact which is consistent with the child's best interest is none at all, and take into account the custodial spouse's willingness to facilitate that level of contact. Even if the marginal note is given effect, the friendly parent rule still means only that, if two possible outcomes are exactly equal with regard to BIC, the court should choose the one which involves more equal time. It does not, therefore, reflect any form of deviation from the BIC principle.²⁷

²² *Divorce Act*, R.S.C. 1985, (2d Supp.), c. 3.

²³ *Children's Law Act*, 1997, S.S. 1997, c. C-8.2, at s. 6(5).

²⁴ Brenda Cossman and Roxanne Mykitiuk, "Reforming Child Custody and Access Law in Canada: A Discussion Paper" (1998) 15 Can. J. Fam. L. 13 at 51; Linda Elrod, "Counsel for the Child in Custody Disputes: The Time is Now" (1992) 26 Fam. L.Q. 53.

²⁵ e.g. Anne Marie Delorey, "Joint Legal Custody: A Reversion to Patriarchal Power" (1989) 3 Can.J.Women & L. 33 at 40 and Jonathan Cohen and Nikki Gershbnain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" (2001) 19 C.F.L.Q. 121.

²⁶ *Interpretation Act*, R.S., 1985, c. I-21 at s. 14.

²⁷ Recent decisions have exhibited some reluctance to order sole custody (e.g. *Breakey v. Block*, 2009 SKQB 203, 2009 CarswellSask 335 at para. 27 and *Blank v. Micallef*, 2009 CarswellOnt 5753 at para. 63). An increasing number avoid using the word "custody" at all, preferring to establish a detailed calendar and division of responsibilities. However, courts have reiterated that there is no presumption in Canadian law for the maximization of contact. In *Cavanaugh v. Balkaron*, 2008 CarswellAlta 1963, 2008 ABCA 423, 60 R.F.L. (6th) 64, 446 A.R. 302 (C.A.), the Alberta Court of Appeal overturned a trial judgment (53 R.F.L. (6th) 295, 2008 CarswellAlta 308, 2008 ABQB 151, Alta. Q.B.) which seemed to adopt shared parenting as a starting point. The higher court held at para. 12 that "there are no ... presumptions or default positions that regulate decisions as to custody and access. The sole determinant is the best interests of the child." An Ontario court found likewise in *Foster v. Foster*, 2009 CarswellOnt 2099 (Ont. S.C.J.), additional reasons at (2009), 2009 CarswellOnt 3958 (Ont. S.C.J.) at para. 35. The judgment of McLachlin J. in *Young v. Young*, *supra* note 11 at

The same is true of provincial and territorial family law statutes, which have jurisdiction over custody and access when the parties are not divorced. Each of these 12 statutes includes the phrase “welfare of the child,”²⁸ or “interest of the child,”²⁹ or “best interests of the child,”³⁰ in its provisions pertaining to custody and access.³¹ No Canadian statute confers rights on adults in custody and access disputes or indicates that their interests should be considered.³²

It is true that there is substantial heterogeneity in the factors which the provincial and territorial statutes identify as relevant to a child’s best interests. However, the variety in enumerated factors does not reflect disagreement about BIC itself. No statute states that the enumerated factors are exhaustive or provides any priority among them. Indeed it is not clear whether the factors have any impact whatsoever on outcomes. Professor Jay McLeod observed that differences between the lists of factors in the various applicable Canadian statutes have not resulted in substantive differences in the jurisprudence.³³ Jeffery Wilson concluded that the enumerated factors “add nothing” to BIC as an “operative legal concept.”³⁴

para. 18 reconciles the friendly parent rule with the primacy of BIC in the following way: “by mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized ... to the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent.”

²⁸ *Maintenance and Custody Act (Nova Scotia)*, R.S., c. 160, s. 1; 2000, c. 29, s. 2 at 18(5)

²⁹ *Civil Code of Québec*, S.Q., 1991, c. 64 at ss. 604 and 606.

³⁰ All the other provincial statutes use this phrase.

³¹ Prince Edward Island is somewhat less explicit in endorsing the BIC principle. Section 2(a) of the Custody Jurisdiction And Enforcement Act states four purposes of the Act, the first mentioned of which is “to ensure that applications to the court in respect of custody of, incidents of custody of and access to, children will be determined on the basis of the best interests of the children.” The Act does not specifically state that the decision-maker is to resolve disputes on this basis. However, the other three purposes listed in section 2 are interjurisdictional in nature – they seek the correct balance between the jurisdiction of P.E.I. and foreign courts. The P.E.I. statute does not contemplate parental interests or conduct being relevant goals in custody and access decision-making.

³² The first section of the Yukon Territory’s *Children’s Act* explicitly subordinates them to BIC, stating that “if the rights or wishes of a parent or other person and the child conflict the best interests of the child shall prevail.” (*Children’s Act (Yukon Territory)*, R.S.Y. 2002, c. 31).

³³ McLeod, *supra* note 3 at s. 1(1).

³⁴ Jeffery Wilson, Priscilla Darrell and Mary Tomlinson, *Wilson on Children and the Law*, 2nd (looseleaf) ed. (Toronto: Butterworths, 1986 to present) at 2§2.

2. Case Law

The Supreme Court of Canada (S.C.C.) has repeatedly emphasized the primacy of the best interests principle in custody and access cases.³⁵ With regard to access, *Young v. Young*, established that BIC is the only applicable test when a court considers proposed restrictions on the rights of an access parent.³⁶ As the point was put by the judgment of McLachlin J. in that case, “the express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and ‘rights’ play no role.”³⁷

Gordon v. Goertz concerned the variation of custody in cases in which the custodial parent proposes to move with the child.³⁸ An S.C.C. majority found that “the amendments to the *Divorce Act* in 1986 ... elevated the best interests of the child from a ‘paramount’ consideration to the ‘only’ relevant issue.” A central doctrinal issue in *Gordon* was whether there should be a presumption in favour of the custodial parent’s right to move with the child in such cases. The majority reasons of McLachlin J. for rejecting any such presumption emphasize the absence of any place for parental rights. The “most important” reason identified by the judgment for avoiding such a presumption is that it “tends to shift the focus from the best interests of the child to the interests of the parents.”³⁹ The conclusion emphasizes again that “the focus is on the best interests of the child, not the interests and rights of the parents.”⁴⁰

The most recent S.C.C. judgment about custody or access was 2001’s *Van de Perre v. Edwards*.⁴¹ Whereas *Young* dealt with access and *Gordon* with variation of custody, *Van de Perre* was an appeal of a first instance custody determination. In this unanimous judgment, the court held at para. 9 that “the principal determination to be made in cases involving custody is the best interests of the child.”

Given the statutory authority of BIC, lower courts today have no leeway to depart from it.⁴² However, even before BIC became the universal statutory standard, it was treated as such by courts. The words “best interests of the child” were added to Ontario

³⁵ E.g. *Gordon v. Goertz*, 2 S.C.R. 27, 19 R.F.L. (4th) 177 at para 20 refers to “Parliament’s view that the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake.” See also *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 19 R.F.L. (5th) 396.

³⁶ *Young v. Young*, *supra* note 27.

³⁷ *Ibid.*

³⁸ *Gordon v. Goertz*, *supra* note 35.

³⁹ *Ibid.* at para 46.

⁴⁰ *Ibid.* at para. 49.

⁴¹ *Van de Perre v. Edwards*, *supra* note 35.

⁴² Examples can be found of language which suggests an inchoate conception of parental rights or interests, e.g. *Nash v. Nash*, 2009 SKQB 126, [2009] S.J. No. 195 at para 17 and *Lutz v. Lutz*, 2009 SKQB 29, 329 Sask. R. 310 at para 7. However, these cases do not justify the outcome on any basis other than BIC.

statutes with the 1978 *Family Law Reform Act* and they appeared in the federal *Divorce Act* in 1985.⁴³ However by the late 1970s courts were rarely acknowledging any basis other than BIC for a custody or access order.⁴⁴

Before that time, the case law was characterized by gender and fault-based *presumptions* which judges relied upon in custody and access disputes. The “tender years” doctrine, which was prevalent between 1930 and the early 1970s, held that a child below a certain age was better off in the custody of his or her mother, all else being equal.⁴⁵ During roughly the same period, it was also sometimes presumed that the “innocent party” in a divorce should be entitled to custody.⁴⁶ Decisions were therefore made on the basis of findings of fact about adultery, cruelty, and other marital “faults.”

The important point is that these presumptions were not alternatives to the BIC principle, but rather theories about what would be in the best interests of a child in certain factual scenarios. For example, the 1948 judgment of the Ontario Court of Appeal in *Youngs v. Youngs* has been cited as an example of the innocent party presumption.⁴⁷ In refusing the adulterous father’s application for custody, the court stated that “it would be positively against [the children’s] interest and detrimental to their welfare to permit him to associate or visit with them.”⁴⁸ Similarly, the same court explained the tender years presumption in 1933 as follows: “the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture ... the time during which it needs the care of the mother more than that of the father.”⁴⁹

One must turn to 19th century case law to find judges making custody awards without justifying them on the basis of BIC. Before roughly 1900, there existed a presumption that fathers were entitled to custody of their children. This was based, at

⁴³ *Family Law Reform Act*, S.O. 1978, c. 2, s.35; *Divorce Act*, S.C. 1967-8, c. 24.

⁴⁴ Nicholas Bala, "Developments in Family Law: the 1993-1994 Term: The Best Interests of the Child" (1995) 6 Sup.Ct.L.Rev. 453; Ann Ehrcke, "Limiting Judicial Discretion in Custody Proceedings on Divorce" (1987) 6 Can. J. Fam. L. 211 at 213-214.

⁴⁵ Karina Winton, "The Spoilt Darling of the Law: Women and Canadian Child Custody Law in the Postwar Period (1945-1960)" (2002) 19 Can. J. Fam. L. 194; Susan B. Boyd, *Child custody, law, and women's work* (Don Mills, Ont.: Oxford University Press Canada, 2003).

⁴⁶ Edward D. Bayda, "Procedure in Child Custody Adjudication: A Study in the Importance of Adjective Law" (1980) 3 Can. J. Fam. L. 57 at 65.

⁴⁷ *Youngs v. Youngs*, [1948] O.J. No. 343, 1948 CarswellOnt 360, cited in Rachel Birnbaum, Barbara Jo Fidler and Katherine Kavassalis, *Child custody assessments : a resource guide for legal and mental health professionals* (Toronto: Thomson Carswell, 2008).

⁴⁸ *Youngs v. Youngs*, *ibid.* at para 4.

⁴⁹ *Re Orr*, [1933] O.R. 212, [1933] 2 D.L.R. 77 (C.A.) at 80-81 in the D.L.R. version. According to McLeod, *supra* note 33, at s. 5(1), the tender years presumption “was justified on pragmatic grounds and the welfare of the child was often the cited reason for the presumption.”

least in part, on a conception of the rights of the father.⁵⁰ However, since the demise of this “paternal presumption,” the law has consistently told judges to make decisions on the basis of BIC. Only the presumptions about where the child’s interests would lie have shifted.

3. Scholarship: Majority Support for BIC

The legislative consensus supporting the BIC principle is mostly echoed in the scholarship, despite a few significant dissenters who will be reviewed in Section III(1) below. For the majority, what Martha Fineman wrote in 1989 remains true today: “asserting that a ... position conforms to, or is advanced in a manner designed to advance, the best interests of the child has become the rhetorical price of entry into the debate over custody policy.”⁵¹ BIC as a general principle is so firmly ensconced in the law that most scholars do not bother advocating or defending it. Instead, the custody and access literature hosts debates over whether certain parenting arrangements should be presumed to be in the best interests of the child.

The general argument for a presumption is that it would enhance determinacy and reduce litigation.⁵² Advocates for a statutory presumption about BIC will make this argument and then claim that a certain parenting arrangement is usually consonant with BIC or that it is ordered less often than would be consonant with BIC. For example, a number of scholars have endorsed a “primary caretaker presumption,” which would award sole custody to the parent who spent more time caring for the child during the relationship unless the best interests of the child require otherwise.⁵³ The primary caretaker presumption evolved from the tender years presumption. It is gender neutral, but given prevailing childcare patterns within intact families it would in most cases produce the same result.

The “approximation standard,” in turn, evolved from the primary caretaker presumption. It holds that “the court should allocate custodial responsibility so that the

⁵⁰ Danaya C. Wright, “*De Manneville v. De Manneville*: Rethinking the Birth of Custody Law under Patriarchy” (1999) 12 *Law and History Review* 247; Christopher Allan Jeffreys, “The Role of Mental Health Professionals in Child Custody Resolution” (1986) 15 *Hofstra L. Rev.* 115 at 118.

⁵¹ Martha Fineman, “The Politics of Custody and Gender: Child Advocacy and the Transformation of Custody Decision Making” in Carol Smart & Selma Sevenhuijsen eds., *Child Custody and the Politics of Gender* (New York: Taylor & Francis, 1989) at 27 at 36.

⁵² Guggenheim, *supra* note 11 at 171; Katharine T. Bartlett, “Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute’s Family Dissolution Project” (2002) 36 *Fam. L.Q.* 11 at 16.

⁵³ Elster, *supra* note 13 at 37; David L. Chambers, “Rethinking the Substantive Rules for Custody Disputes in Divorce” (1984) 83 *Mich.L.Rev* 477 at 478; Fineman, *supra* note 53; Nora Holtrust, Selma Sevenhuijsen and Annick Verbraken, “Rights for fathers and the state: Recent developments in custody politics in the Netherlands” in Carol Smart & Selma Sevenhuijsen eds., *Child Custody and the Politics of Gender* (New York: Routledge, 1989) at 51; Laura B. Dupaix, “Comment, Best Interests Revisited: In Search of Guidelines” (1987) *Utah L. Rev.* 651 at 661-666. For Canadian perspectives on the primary caretaker presumption, see Bruce Ziff, “The Primary Caretaker Rule: Canadian Perspectives on an American Development” (1990) 4 *Int’l J.L. & Fam.* 186 and Susan Boyd, “Potentialities and Perils of the Primary Caregiver Presumption” (1991) 7 *C.F.L.Q.* 1.

proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action."⁵⁴ It too looks to parenting arrangements prior to the breakdown in order to structure arrangements afterwards, but it does not have the "all or nothing" quality of the primary caretaker presumption.⁵⁵ Another group of scholars argues for a joint custody or shared parenting presumption.⁵⁶ Today, those in this group are more likely to advocate presumptions about the amount of time the child should spend with the two parents, as opposed to the allocation of rights involved in custody.⁵⁷ Joint custody presumptions have been introduced in several American states; they have had less success in Canada.

What unites these scholarly arguments for presumptions is their claim to be salutary for the children involved.⁵⁸ For example, a number of joint custody presumption advocates have cited this conclusion from Robert Bauserman's meta-analysis: "children in joint custody are better adjusted, across multiple types of measures, than children in sole (primarily maternal) custody."⁵⁹ However those who support a primary caretaker presumption or approximation standard, and those who advocate a simple BIC standard without presumptions, have identified other research results which seem to reflect children's interests just as clearly. Martha Shaffer, for example, reviewed a number of studies and concluded "the research to date indicates that children do not fare better post-divorce in joint custody arrangements than they do in sole custody, and some children -- including those in high conflict families -- may fare worse."⁶⁰

Helen Reece observes that even those few authors who may appear to be arguing against BIC are actually arguing only against the broad and unelaborated form in which BIC appears in our law. She claims that the true position of this group is not that adults' rights should be given effect, but rather that that "a more determinate principle would serve the

⁵⁴ American Law Institute, *supra* note 10.

⁵⁵ Guggenheim, *supra* note 11, at 150.

⁵⁶ Kruk, *supra* note 8; Shannon Dean Sexton, "A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System" (2000) 88; Brian J. Melton, "Solomons Wisdom or Solomons Wisdom Lost: Child Custody in North Dakota - A Presumption That Joint Custody Is in the Best Interests of the Child in Custody Disputes notes" (1997) 73 N.D. L. Rev. 263.

⁵⁷ Schwartz and Finley, at 519.

⁵⁸ Bartlett, *supra* note 52 at 16.

⁵⁹ Robert Bauserman, "Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements" (2002) 16 Journal of Family Psychology 91 at 99. Bauserman was cited, for example, by Kruk, *supra* note 8.

⁶⁰ Shaffer, *supra* note 16. See also the judgment of L'Heureux-Dubé J. in *Young v. Young*, *supra* note 27 at para 169, paraphrasing the argument made by Susan Boyd for the primary caretaker presumption in "Potentialities and Perils of the Primary Caregiver Presumption" (1991) 7 C.F.L.Q. 1: "one of the principal rationales for endorsing this presumption is not to supplant the best interests of the child as the ultimate objective but to ensure that those interests are protected."

child's interests, since it would lead to decisions which would be both arrived at more quickly and more acceptable to the parents.”⁶¹ Reece’s conclusion regarding the literature as a whole is simply that “everybody agrees that children's welfare should be paramount.”⁶²

4. The Distinctiveness of BIC

The primacy of BIC makes custody and access a unique area of our law, insofar as the litigants in a custody or access dispute have no legitimate rights or interests in the outcome. Professor Reece points out that “there is no other area of the law in which only one participant is valued.”⁶³ Reece seems to be correct that the law is distinctive in its focus on a single individual. However, as the subsequent Part of this article will point out, the individual in question is very often not a “participant” in the process at all.

There is thus a sharp distinction between custody and access on one hand and financial family law disputes on the other. A dispute over spousal support or matrimonial property division is in a fundamental way akin to a contract or tort dispute. It involves litigants asserting their own legal rights against each other. Child support was created by our law, at least in part, for the benefit of children.⁶⁴ However, child support is almost always money which the law requires one parent to pay to another.⁶⁵ The law does not require the recipient parent to spend the money received on the child, nor does it require the payor parent to pay child support to the child if the recipient does not seek it. Despite its name, child support law is a balancing of the rights of the two adult litigants. It is therefore fundamentally akin to spousal support and matrimonial property division, and fundamentally different from custody and access law.

Nor does child protection law share the distinctive nature of custody and access. The purpose of child protection law, like custody and access law, is to uphold the best interests of children.⁶⁶ The state intervenes in families in order to protect children, which is consonant with the BIC principle. However, for constitutional and policy reasons, parents are allowed to assert their own rights of family autonomy and privacy in the process.⁶⁷ Child protection law is a contest between these parental rights and the state’s

⁶¹ Helen Reece, “The Paramountcy Principle, Consensus or Construct?” (1996) 49 C.L.P. 267 at 274.

⁶² *Ibid.* at 271.

⁶³ *Ibid.* at 275.

⁶⁴ *Federal Child Support Guidelines*, P.C. 1997-469 at s. 1: “the objectives of these Guidelines are ... a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation...”

⁶⁵ In rare cases involving adult children, child support may be ordered payable to the child directly.

⁶⁶ For example, *Child and Family Services Act (Ontario)*, R.S.O. 1990, c. C.11 at s. 1(1): “the paramount purpose of this Act is to promote the best interests, protection and well being of children.”

⁶⁷ E.g. *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47, 177 D.L.R. (4th) 124, 50 R.F.L. (4th) 63.

right to protect endangered children. Insofar as parental rights are a key feature of the child protection law, it is unlike custody and access law.

Indeed, there does not seem to be any part of the law which shares the distinctive feature of custody and access law – the irrelevance of the interests and rights claims of the parties to the dispute. This distinctiveness leads logically to questions about the procedure whereby custody and access claims are adjudicated. Does the procedure, like the law, disregard the interests of the parties in favour of those of the child? Part II takes up this question.

Part II. Procedure: The Rights of the Parents

The word “procedure” is not used in this Part to refer to the voluntary efforts which the parties may make to resolve their dispute, such as mediation, collaborative family law, or traditional negotiation.⁶⁸ These do not result in a binding outcome unless the parties agree. Rather, the focus here is on the procedure by which the state imposes a solution to the dispute if the parties do not agree, and initiate litigation.

Part II will ask (i) who decides if the procedure occurs, (ii) whose evidence predominates during the procedure if and when it does occur, and (iii) who decides when the procedure ends. I will suggest that there is a single answer to all three of these questions: “the adult parties.” Thus, while custody and access law is focused entirely on the best interests of children, in custody and access procedure it is the rights of parents which predominate. While the law is distinctive in its exclusive valorisation of a non-party’s interests, custody and access litigation procedure is fundamentally akin to other civil litigation – the parties are in control.⁶⁹ Some elements of the procedure endow one parent at the expense of the other and others endow them collectively, but very few are designed to place the child’s interests first.

This reality is tellingly revealed by Ontario’s *Family Law Rules* (FLR), which apply to custody and access as well as other family disputes.⁷⁰ Rule 2 of the FLR states that their “primary objective [is] to enable the court to deal with cases justly.”⁷¹ Dealing with a case justly is then defined to include “ensuring that the procedure is fair to all parties.”⁷²

⁶⁸ Such efforts may or may not be “court-connected,” and participation may or may not be mandatory before litigation can be conducted. Some ADR processes used to resolve family disputes are consciously designed to protect the interests of children involved in custody and access disputes. E.g. Sharlene A. Wolchik *et al.*, “The New Beginnings Program For Divorcing And Separating Families: Moving From Efficacy To Effectiveness” (2009) 47 *Fam. Ct. Rev.* 416 and American Bar Association, “Model Standards of Practice for Family and Divorce Mediation” ((2001-2002)) 35 *Fam. L.Q.* 32.

⁶⁹ Gerald W. Hardcastle, “Adversarialism and the Family Court: A Family Court Judge’s Perspective” (2005) 9 *UC Davis J. Juv. L. & Pol’y* 57 at 65-66.

⁷⁰ *Courts of Justice Act*, O. Reg. 114/99 (Family Law Rules) (“FLR”).

⁷¹ *Ibid.* at s. 2(2).

⁷² *Ibid.* at s. 3(a).

Because children are never or almost never parties to the custody and access disputes which concern them,⁷³ the FLR do not include children's interests as part of their definition of justice. While the drafters of Rule 2 probably did not consciously intend to put parents ahead of children, my argument is that this provision's exclusion of children's interests is generally representative of custody and access procedure.⁷⁴

1. Parents decide if the procedure occurs

After separating, parents have two powerful procedural rights. First, each parent has the right to *initiate* the custody and access decision-making procedure at least once. Second, subject to a narrow set of exceptions, each parent has the right to *avoid* the decision-making procedure.⁷⁵

The adult right to initiate the procedure is based in two statutes. Section 21 of the *Children's Law Reform Act* states that "a parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child."⁷⁶ This provides a broad entitlement to bring an application, which the CLRA limits in only two ways. Section 22 allows an Ontario court to decline jurisdiction if another province would be a more appropriate venue for the litigation.⁷⁷ Section 27 automatically stays the application if a *Divorce Act* action is brought and the court hearing the CLRA application does not grant leave to continue it.⁷⁸

The *Divorce Act* requires that a "breakdown of [the] marriage" be established before a divorce can be granted. A final custody and/or access order is considered corollary relief to a divorce, and can only be obtained after a breakdown of the marriage.⁷⁹ However, evidence that the spouses have lived separate and apart for a period of one year is sufficient to establish a breakdown.⁸⁰ The cumulative effect of the CLRA's lack of any

⁷³ It is not clear whether statutes even permit a minor child to have party status in a custody or access dispute anywhere in Canada, according to Wilson, Darrell and Tomlinson, *supra* note 34 at §6.4. The author reviewed 181 reported custody and access decisions from 2009 and did not find children with party status in any of them: Noel Semple, "The Silent Child: A Quantitative Analysis of Children's Evidence in Canadian Custody and Access Cases" (2010) 29 C.F.L.Q. 1.

⁷⁴ It is interesting to note that the FLR justify procedural variations on the basis of the child's best interests with regard to child protection (at section 3(5)) but not with regard to custody or access cases.

⁷⁵ Parent X may avoid the procedure provided that Parent Y is willing to assume custody. In the rare event that neither X nor Y wants custody, the parents might have to be involved in arranging other parenting for the child, or else risk prosecution for neglect.

⁷⁶ *Children's Law Reform Act*, *supra* note 4, s. 21.

⁷⁷ *Ibid.* at s. 22.

⁷⁸ *Ibid.* at s. 27.

⁷⁹ An interim custody or access order can be obtained pending the determination of a divorce action: *ibid.* at s. 16(2).

⁸⁰ *Divorce Act*, *supra* note 22, at ss. 8(1) and 8(2).

threshold and the *Divorce Act's* low threshold is that parents can almost invariably initiate the state's custody and access decision-making procedure with regard to their children at least once.

Conversely, in the absence of child protection concerns, the state's custody and access decision-making procedure is undertaken *only if* one or both separated parents triggers it. Separating parents who wish to avoid the procedure are allowed to do so, as long as they pass the relatively low standard of parenting required by the child protection system. This is most obviously true when married or unmarried parents separate without a divorce. There is no legal obligation for them to involve a neutral decision-maker in any way.⁸¹

A divorce can only be granted by a judge, even if the divorcing parties have reached an agreement about parenting arrangements. Section 11(1)(b) of the *Divorce Act* provides that "in a divorce proceeding, it is the duty of the court ... to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines." The word "support" could conceivably be read to refer to parenting arrangements. However the reference to the *Child Support Guidelines* makes it clear that judges need only scrutinize the financial arrangements,⁸² and the reality is that most judges in Ontario today do not override consensual parenting arrangements.⁸³

The most obvious reason why the parties might choose to avoid the procedure is that they are in agreement about what is best for their child(ren). However, it is misleading to assume that parents who have avoided the procedure have "settled," in the sense of negotiating an agreement which they both understand and accept. Litigation has very substantial costs for parents in time, money, and stress, and parents may simply abandon the effort to obtain a court order or oppose one sought by another party.

2. Parents control most of the evidence

While the legal focus of custody and access litigation is the best interests of the child or children involved, in a very substantial portion of the litigated cases the evidence is entirely controlled by the adult litigants. There are two types of evidence in custody and access litigation. *Children's evidence* includes evidence coming either directly from the child, from a lawyer representing the child, or from another professional with child-related

⁸¹ To obtain an order for custody or access under Ontario's *Children's Law Reform Act*, *supra* note 4, one must convince a judge of its merits. However, the law does not require one to obtain such an order before acting as a parent to a child.

⁸² The jurisprudence confirms this reading of s. 11(1)(b). The author was able to find only one reported case in which s. 11(1)(b) was used to decline the parties' request for a divorce order incorporating their consensual custody arrangement. This was *Hayes v. Hayes*, (1987) 6 R.F.L. (3d) 138 (Sask. Q.B.) a trial level decision issued early in the life of the 1985 *Divorce Act*. Given that judges have no power to secure compliance in the absence of litigation being commenced by one of the parties, they are unlikely to use the power to withhold divorce in order to compel the parties to formally adopt custody arrangements other than those which they prefer.

⁸³ Interviews and personal communications with family lawyers and judges, *supra* note 5.

expertise. *Parents' evidence* includes everything else, such as the statements of the parents and the friends and relatives whom they choose to call.⁸⁴

Although civil procedure generally allows only the parties to bring forward evidence, in custody and access cases children's evidence is welcomed by the law. For example, Ontario's CLRA states that "in considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them."⁸⁵ The Supreme Court of Canada has called for attention to the views of the child, at least in the context of variation applications.⁸⁶

However, children do not in any part of the country have an enforceable right to be involved in custody and access litigation which concerns them. To determine how often they actually do participate, the author undertook a quantitative survey of all 181 custody and access decisions which were reported in either of Canada's two commercial case law databases during a 5 month period in 2009.⁸⁷ The purpose of this study was to determine how many judgments included any reference to children's evidence, as defined above.

The results of this study are published elsewhere,⁸⁸ and only the central findings need be reproduced here. In 55% of the judgments, no children's evidence was mentioned. In these cases, the case report refers only to evidence which came from the adult litigants themselves, and/or from the witnesses which they chose to call. Among the 45% in which there was some sort of children's evidence mentioned, it was usually a custody assessment.⁸⁹ Children were represented by their own lawyers in only 7% of the cases, and children's voices were heard directly in only 3%.⁹⁰ In none of the 181 cases was a child

⁸⁴ Note however that Ontario's legislation was recently amended to *require* adults to submit certain evidence when applying to court for a custody or access order (*Children's Law Reform Act, supra* note 4, s. 21). The required evidence includes a "plan for the child's care and upbringing" and information about the applicant's past involvement in family, child protection, or criminal proceedings.

⁸⁵ *Ibid.*, s. 64(1). See also British Columbia's *Family Relations Act*, R.S.B.C. 1996, c. 128 at s. 24(1)(b) and Quebec's *Civil Code*, Art. 34.

⁸⁶ *Gordon v. Goertz, supra* note 35. Judgment of McLachlin J. at para. 49(7)(d); dissenting judgment of L'Heureux-Dubé J. at para. 65.

⁸⁷ Westlaw Canada (<http://home.westlawecarswell.com/>) and Quicklaw Canada (<http://www.lexisnexis.ca/en/quicklaw/>). Both of these databases use the phrase "custody and access" in the keywords if a case is about a private parenting dispute. The author reviewed all 302 cases with these keywords from the sample period, and excluded from the sample those in which the outcome was not based on a judicial decision about the best interests of the child.

⁸⁸ Semple, *supra* note 73.

⁸⁹ The recommendations made in these assessments are not necessarily determinative, if the adults' evidence points in a different direction. An earlier empirical study focused on reported custody and access decisions in which recommendations were made by neutral social worker assessors employed by Ontario's Office of the Children's Lawyer. Judges accepted only approximately half of the 151 assessor recommendations about what outcome would be in the best interest of the child. (Noel Semple, *The Eye Of The Beholder: Professional Opinions About The Best Interests Of A Child* (Master of Laws, Osgoode Hall Law School, York University 2009) [unpublished] Online: <http://www.noelsemple.ca/?p=47>).

⁹⁰ *Ibid.* at 13.

an actual party to the litigation. This research suggests that, in the majority of custody and access cases, the adult litigants control all of the evidence.

In an earlier quantitative analysis of Quebec cases (both settled and adjudicated), Joyal and Queniart found even less children's evidence. Assessments were found in 12% of their cases, testimony by children in 6%, and child legal representation in 3%.⁹¹ One author goes so far as to conclude that children "are, for the most part, rendered invisible and voiceless in legal proceedings."⁹² It can at least be said that parents very often control most or all of the evidence which comes before the decision-maker in a custody and access case.

3. Parents decide when the procedure ends

If the procedure does begin, parents can also usually decide when it ends. While they may and hopefully do consider their children's welfare in making these decisions, their discretion is not constrained by the children's preferences or interests. A custody or access dispute can be settled by the parties mutually at any time, and either party can end the litigation by abandoning his or her claim.⁹³ Ontario's *Family Law Rules* provide at R. 12(1) that "a party who does not want to continue with all or part of a case may withdraw all or part of the application, answer, or reply by serving a notice of withdrawal on every other party and filing it."⁹⁴ However, a parent may bring the process to a halt by simply failing to appear or pursue the litigation. Failure to file a notice of withdrawal will, at worst, produce an order for costs if the other party seeks one.

Conversely, a parent has wide latitude to *continue* the procedure if he or she chooses to do so, even in the face of a "final" ruling. Most parents resolve their disputes without any, or with very limited recourse to the courts. However a small but persistent minority relitigate continuously about the custody and access arrangements for their children. The parenting arrangement which is in the best interests of a child depends on facts which can easily change, because children and their needs evolve over time. Their parents' respective abilities to meet those needs can also easily shift. Statute and case law have therefore established a relatively low threshold for a party subject to an existing custody or access order who wishes to continue litigating.⁹⁵ This section will review the three primary

⁹¹ Renée Joyal and Anne Queniart, "Enhancing the Child's Point of View in Custody and Access Cases in Quebec: Preliminary Results of a Study Conducted in Quebec" (2002) 19 Can. J. Fam. L. 173.

⁹² Coley, *supra* note 17 at 53.

⁹³ Settlement is actively encouraged by the FLR. Rule 2(5)(c) requires the court to engage in "active management of cases, which includes ... helping the parties to settle all or part of the case." Examples of this policy in the FLR include Rules 17 (4), (5), and (6), which provide for case conferences, settlement conferences, and trial management conferences respectively. For each of these, the first purpose listed is "exploring the chances of settling the case." See also Rule 18 subsections 14 to 16, which make settlement offers relevant to costs orders.

⁹⁴ FLR, *supra* note 70, R. 12(1).

⁹⁵ Esther L. Lenkinski, Barbara Orser and Alana Schwartz, "Legal Bullying: Abusive Litigation within Family Law Proceedings" (2003) 22 C.F.L.Q. 337; Sandra A. Goundry, National Association of Women and the Law,

procedural impediments to relitigation of custody and access disputes. I will argue that, despite these provisions, the only guaranteed end to custody and access litigation comes when the child in question becomes an adult in the eyes of the law. In the words of Justice Brownstone, “family court orders involving children are never truly final.”⁹⁶

a) The Material Change Threshold

Once a custody or access order has been made by a court, a party seeking to vary it must demonstrate a “material change in [the] circumstances” of the child. The CLRA uses these words at s. 29(1).⁹⁷ The *Divorce Act* refers at s. 17(5) to a “change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the [previous] custody order,” but the Supreme Court of Canada confirmed in *Gordon v. Goertz* that the change must have been “material.”⁹⁸ The S.C.C. went on to explain the threshold as follows:

The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. ... Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way... the question is whether the previous order might have been different had the circumstances now existing prevailed earlier ... moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.⁹⁹

The material change threshold was imposed to prevent unnecessary litigation, and courts do apply it to give effect to this intent. The Saskatchewan Court of Appeal, for example, recently confirmed that the mere passage of time (and increasing maturity of the child) can not in of itself constitute a material change in circumstances.¹⁰⁰ Given the substantial number of variation applications which are rejected on the material change threshold, it is probably an effective deterrent to litigation of this nature.

However, the material change threshold does not by any means deprive parents of their right to decide when the litigation will end. It can only be applied by a judge. Thus, while it deters variation applications, if the application is commenced litigation and its

and Vancouver Association of Women and the Law, Final report on court-related harassment and family law justice : a review of the literature & analysis of case law (Ottawa: NAWL, 1998) at 38.

⁹⁶ Harvey Brownstone, *Tug Of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009) at 19.

⁹⁷ *Children's Law Reform Act*, *supra* note 4.

⁹⁸ *Gordon v. Goertz*, *supra* note 35.

⁹⁹ *Ibid.* at paras 11-12.

¹⁰⁰ *Wieggers v. Gray*, 2008 CarswellSask 10, 2008 SKCA 7, 47 R.F.L. (6th) 1, overturning 2007 CarswellSask 30.

attendant costs will be required merely in order to determine that there has been no material change.

More importantly, the material change threshold only applies to variation applications, and parents who wish to continue litigating about their children have various other avenues open to them. Like all court orders, custody and access judgments are subject to appeal.¹⁰¹ Contrary to some earlier suggestions of an especially deferential standard of appellate review for custody and access cases due to the child's interests in finality,¹⁰² the Supreme Court of Canada held in *Van de Perre* that "the scope of appellate review does not change because of the type of case on appeal."¹⁰³ Rollie Thompson found that, among appellate custody decisions involving a parental mobility element and issued between 1996-2006, in 45% the trial outcome was overturned.¹⁰⁴ This suggests that appellate deference in parenting decisions may be more of a "talk" than a "walk."

In addition to appealing a previous order, a party wishing to continue litigation may allege that the other is in contempt of it. Given the complexity of many court-ordered parenting schedules, breaches are common and any such breach can be seized upon by a committed litigant looking to bring a contempt motion.¹⁰⁵ Motions may also be brought with regard to the admissibility of evidence, costs, and various other procedural issues.

The saga of *Geremia v. Harb* offers an extreme example of how long parenting litigation can continue in the absence of any finding of a material change. Frank Geremia and Lily Marie-Thérèse Harb were married in 1999, and their daughter was born in the following year. They separated in 2001, and were divorced in 2002. From 2001 until May 1st, 2008, they litigated about the parenting arrangements for their daughter. At least 25 court orders were produced by this dispute, including five lengthy judgments by J.W. Quinn J. of the Superior Court of Justice in St. Catherines.¹⁰⁶ At least 8 different judges were involved, and the continuing record eventually occupied 13 volumes and 2000 pages.¹⁰⁷ The trial that occurred in the summer and fall of October 2006 involved 57 days of oral

¹⁰¹ FLR, *supra* note 70, R. 38.

¹⁰² E.g. *de Verteuil v. de Verteuil* (1986), 5 R.F.L. (3d) 294 (B.C. C.A.).

¹⁰³ *Van de Perre v. Edwards*, *supra* note 35 at para. 14.

¹⁰⁴ D. A. Rollie Thompson, "Ten Years After Gordon: No Law, Nowhere " 35 R.F.L. (6th) 307.

¹⁰⁵ FLR, *supra* note 70, R. 31.

¹⁰⁶ Quinn J.'s five sets of written and reported reasons in the matter of *Geremia v. Harb* were delivered on August 25, 2006 (2006 CarswellOnt 5237, 32 R.F.L. (6th) 218, [2006] O.J. No. 3464); November 14, 2006 (2006 CarswellOnt 7096, [2006] O.J. No. 4547); January 24, 2007 (2007 CarswellOnt 446, [2007] O.J. No. 305); August 2, 2007 (2007 CarswellOnt 4956, [2007] O.J. No. 3019, 40 R.F.L. (6th) 362), and May 1, 2008 (2008 CarswellOnt 2483, [2008] O.J. No. 1716, 54 R.F.L. (6th) 274, 90 O.R. (3d) 185). Reference is made in these reasons to eight other unreported judgments (May 2, 2002; September 15, 2002; July 31, 2003; November 15, 2004; May 2007; September 2007; November 2007; and December 2007.) In the May 1st 2008 judgment, Quinn J. states that there were 25 orders in all.

¹⁰⁷ *Geremia v. Harb*, 2008 CarswellOnt 2483, [2008] O.J. No. 1716, 54 R.F.L. (6th) 274, 90 O.R. (3d) 185.

evidence.¹⁰⁸ The Office of the Children’s Lawyer prepared three assessments about this parenting dispute.

Although custody is generally perceived to be a more significant issue than access, in this extreme example of repetitive litigation custody was not at issue. Geremia had consented to Harb having sole custody in 2002, with Geremia exercising access. Motions to vary the terms of access were repeatedly brought by both parties. Another central dispute was about Harb’s obligation, pursuant to one of the early court orders, to share medical and educational information about the child with Geremia. Her failure to do so gave rise to three contempt motions, which in turn led to litigation about costs and a motion for leave to appeal.

The most recent – and perhaps final – judgment came on May 1st, 2008. Geremia had moved for increased access; Harb moved to dismiss Geremia’s case due to his failure to pay child support. Both parties sought costs with regard to the foregoing litigation. Access was increased somewhat, and the cost claims of both parties were dismissed due to their conduct. The most distinctive passage in this judgment of Quinn J. came in the final three paragraphs:

94 Finally, neither party shall be permitted to commence or continue any proceeding in the Superior Court of Justice, directly or indirectly related to their child, without first having obtained leave of the court. I make this order pursuant to subsection 140(1) of the *Courts of Justice Act*... the parties have gorged on court resources as if the legal system were their private banquet table. It must not happen again.

...

96 By requiring leave, I do not think that I am impermissibly fettering access to the courts by either party. If they have a case with merit, I expect that leave will be granted and justice will be done.¹⁰⁹

b) The Vexatious Proceedings Threshold

The mechanism by which Quinn J. brought *Geremia v. Harb* to an apparent end was s. 140(a) of Ontario’s *Courts of Justice Act*, “Vexatious Proceedings.”¹¹⁰ This provision states that a litigant who has “persistently and without reasonable grounds ... instituted vexatious proceedings in any court” may be forbidden to institute further proceedings without the leave of the court. The Ontario Court of Appeal has held that the purpose of this provision is to “codify the inherent jurisdiction of the Superior Court to control its own process and to prevent abuses of that process by authorizing the judicial restriction, in

¹⁰⁸ *Geremia v. Harb*, 2007 CarswellOnt 446, [2007] O.J. No. 305, at paras 13-14 and 17.

¹⁰⁹ *Geremia v. Harb*, 2008 CarswellOnt 2483, [2008] O.J. No. 1716, 54 R.F.L. (6th) 274, 90 O.R. (3d) 185.

¹¹⁰ There are analogous provisions in other provinces.

defined circumstances, of a litigant's right to access the courts.”¹¹¹ That court has also confirmed that s. 140(a) can be used to prevent custody or access variation proceedings undertaken without leave, before applying the “material change” test.¹¹²

However, it is very rare for even the most protracted custody and access litigation to be found vexatious.¹¹³ *M. (J.M.) v. M. (K.A.A.)* was a 2009 Newfoundland decision interpreting that province’s version of the vexatious proceedings rule.¹¹⁴ Like in *Geremia*, access was the primary issue. The Court summarized the procedural history of the case:

The duration and extent of this litigation between the parents demonstrates their almost complete inability to resolve, without Court intervention, issues touching on [the child]'s care and upbringing. There have already been 20 Court applications in this matter addressing a myriad of issues. Examples include: child access, custody, asset disclosure, discovery, document production, stay, contempt, judicial bias, alienation, counselling, expert assessments, child support, directions, interrogatories and more. The hearing on custody and access alone occupied 31 days in Court. The costs to date exceed \$600,000.¹¹⁵

The child was almost 17 years old at the time of this decision.¹¹⁶ The father’s outstanding applications were for a professional assessment and for access to information about the child.¹¹⁷ He was also seeking enforcement of a previous access order, although he had acknowledged that the adolescent child should not be forcibly compelled to visit

¹¹¹ *Kallaba v. Bylykbashi*, [2006] O.J. No. 545, 265 D.L.R. (4th) 320, 23 R.F.L. (6th) 235, 2006 CarswellOnt 749.

¹¹² *Ballentine v. Ballentine*, 65 O.R. (3d) 481, [2003] O.J. No. 2589 (Ont. C.A.), at para. 39: “It allows the court to make an order prohibiting a person who has persistently and unreasonably instituted vexatious litigation from instituting further legal proceedings without leave of the court. This is particularly important in family law matters, given the availability of variation orders for support and custody. ... Without some mechanism to prevent abuse, a party could bring an endless stream of variation applications, with a new one launched as soon as the last one has been denied. ... Accordingly, initiating new court proceedings could become a form of harassment of one’s former spouse. Section 140 of the CJA is a mechanism to prevent such abuse [citations omitted].”

¹¹³ Commenting on *Geremia v. Harb*, experienced lawyers Phil Epstein and Lene Madsen said: “we have not seen this kind of order before” (Philip Epstein and Lene Madsen, “Case Comment: *Geremia v. Harb*” (2008) Epstein and Madsen’s This Week in Family Law, Issue #27).

¹¹⁴ *M. (J.M.) v. M. (K.A.A.)*, 2009 CarswellNfld 11, considering R. 14.24 *Rules of the Supreme Court (Newfoundland)*, 1986, S.N.L. 1986, c. 42, Sch. D.

¹¹⁵ *M. (J.M.) v. M. (K.A.A.)*, at para. 7.

¹¹⁶ *Ibid.* at para. 20.

¹¹⁷ *Ibid.* at para. 4.

him.¹¹⁸ The mother moved for the case to be stayed or dismissed. This position was supported by the intervenor, a *guardian ad litem* lawyer representing the child.

The court found at para. 18 that although the litigation was “a very poor example for the Court model of dispute resolution,” nonetheless “it is not frivolous or vexatious for a parent to seek access to his child and to seek information about his child's health, education and welfare.” At para. 19, the judge added “it would only be in the most exceptional case that a Court would restrict in any way the free access of any person to the Courts to assert his or her civil rights and remedies.” The reference to *rights* in this dictum is a telling indication of the procedural power which courts allow to parents. While finding that the child's “best interests would be well served if his parents were to agree to a cooling off period, say six months,” this was not ordered. The motion for stay or dismissal was denied.

As the reasoning and result in *M. (J.M.) v. M. (K.A.A.)* suggest, the vexatious proceedings threshold is not designed to curtail custody or access litigation at the point when its continuance is more likely to harm than to help the child. It was drafted and continues to be applied to protect the court -- not the child. When and if these provisions are used in this context, a great deal of water has already passed under the bridge. For example, in *Roscoe v. Roscoe*, CJA s. 140(a) was successfully invoked against a litigant who by his own account had appeared in family court on 70 occasions with regard to his divorce.¹¹⁹ Cases such as *Geremia, K.A.A.M.*, and *Roscoe* are certainly extreme examples.¹²⁰ As noted above, the majority of parents resolve their disputes with little or no judicial intervention. However, these cases demonstrate that the right of a parent to choose when litigation over a minor child ends is little constrained by the law.

c) Child Age Threshold

While some courts are reluctant to make custody or access orders about older teenagers,¹²¹ the only guaranteed end to custody and access litigation comes when the child who is the subject of the litigation ceases to be governed by the applicable statute. Under Ontario's *Children's Law Reform Act*, custody and access orders may be sought with

¹¹⁸ *Ibid.* at para 18.

¹¹⁹ [2005] O.J. No. 5117, 24 R.F.L. (6th) 331. The Court of Appeal upheld the s. 140 order but removed the requirement that Mr. Roscoe post \$5,000 in security for costs if he were ever to seek leave to continue: [2007] O.J. No. 2640, 2007 ONCA 516. See also *Warren v. Pollitt*, (1999), 1999 CarswellOnt 24, [1999] O.J. No. 31 (Ont. Gen. Div.); additional reasons at (1999), 1999 CarswellOnt 678, [1999] O.J. No. 740 (Ont. Gen. Div.), and *A.A. v. S.N.A.*, [2009] B.C.J. No. 427, 2009 BCSC 303, further reasons at [2009] B.C.J. No. 558, 2009 BCSC 387, 66 R.F.L. (6th) 294.

¹²⁰ Others could certainly be found. A recent newspaper article described (without providing the name of) an Ontario access dispute which produced 54 court hearings and cost \$200,000 in legal fees. (Susan Pigg, "1 divorce, 54 hearings, 5 judges, \$200,000" *Toronto Star* (May 8, 2009) L1).

¹²¹ *Ladisa v. Ladisa*, 2005 CarswellOnt 268, 11 R.F.L. (6th) 50 (Ont. C.A.) *Clayton v. Clayton*, (1998), 38 R.F.L. (4th) 320, 40 O.R. (3d) 24 (Ont. Gen. Div.); *House v. Tunney*, (1991), 35 R.F.L. (3d) 68 (Sask. Q.B.). In the words of Professor Christine Davies, "older children who hold strong views with respect to their custody or access ... are likely 'to decide with their feet' as the courts well know" (Christine D. Davies, "Access to Justice for Children: The Voice of the Child in Custody and Access Disputes" (2004) 22 C.F.L.Q. 153 at s. 2(a).)

regard to any child who is a minor.¹²² Under the *Divorce Act*, custody and access orders may be made for “any or all children of the marriage.”¹²³ Minors who have withdrawn from parental charge are not “children of the marriage.”¹²⁴ However, a child who has attained the age of majority remains a “child of the marriage,” and therefore subject to parenting litigation, if he or she is “unable, by reason of illness, disability or other cause, to withdraw from [the parents’] charge or to obtain the necessities of life.”¹²⁵ Until the child ceases to be subject to the *CLRA* or the *Divorce Act*, no judicial decision about custody or access is necessarily final. Ontario family court judge Harvey Brownstone stated that an outcome which he has “seen ... far too many times” is that in which “the parents keep litigating for so long that the child in question grows up and becomes an adult.”¹²⁶

Part III. Resolving the Inconsistency

Part I of this article showed that the “best interests of the child” is a golden thread running through the law governing custody and access disputes. Statute and case law unequivocally instruct judges to choose the available outcome which is best for the child or children involved. The majority of the normative scholarship accepts this premise, and debates what if any legal reforms would be in the interests of children. Part I concluded by identifying the feature which makes custody and access law unique, namely that the parties to the dispute have no legally-recognized rights or interests in the outcome.¹²⁷

Part II examined the *procedure* by which the state resolves custody and access disputes when the parties do not settle. Here, the parents are in charge. Parents decide if the decision-making process occurs. If it does occur, they usually control most of the evidence which comes before the decision-maker. Finally, despite the law’s attempt to restrain relitigation through the material change and vexatious proceedings provisions, adults retain a great deal of latitude to continue litigating about custody and access until their children are no longer minors.

This inconsistency is a problem worth resolving. If we intend for adults to have the rights and interests in parenting outcomes which their control of the procedure implies, then we should make these rights and interests explicit in our law. If on the other hand we really do mean to put children first, then we must design a procedure which reflects this intention. This Part begins by considering the case for law reform to valorize parents’ interests, an agenda for which some scholarly support can be found and one which the American Law Institute openly endorsed. It then turns to procedural reform for children.

¹²² *Children's Law Reform Act*, *supra* note 4 at s. 18(2).

¹²³ *Divorce Act*, *supra* note 22, at s. 16(1).

¹²⁴ *Ibid.*, at s. 2(1), definition of “child of the marriage,” subsection (a).

¹²⁵ *Ibid.*, subsection (b).

¹²⁶ Brownstone, *supra* note 96 at 14.

¹²⁷ As observed above, children are never or almost never parties to custody and access disputes about them (Semple, *supra*, note 73).

After considering the costs and benefits to children of parenting litigation, the article will sketch three avenues for reform which might help ensure that the benefits exceed the costs.

1. Law Reform For Parents

a) Scholarship: Minority Support for Parents' Rights or Interests

One way to resolve the inconsistency is to change the law to recognize parents' interests or rights in parenting outcomes. This position is not entirely without precedent in the literature, despite the preponderance of support which the BIC principle has attracted in scholarly debate.¹²⁸ The protection of parental interests or rights has sometimes been defended as instrumental in securing children's interests.¹²⁹ However the authors reviewed below go further, arguing that parents are worthy of the law's consideration in their own right.¹³⁰

In the 1980s, David Chambers and Jon Elster both accepted the primacy of children's interests, but argued against the total exclusion of parents from the law's purview.¹³¹ As Elster put the case, children deserve special protection but "that protection should not ... extend to small gains in the child's welfare achieved at the expense of large losses in parental welfare."¹³² Elster and Chambers differed about what type of consideration parents should receive. The former argues that the law should focus on parental rights rather than needs, because needs can be misrepresented whereas rights are based on facts.¹³³ Chambers by contrast would have focused more on parents' emotional *need* for relationships with their children. He argued for a primary caregiver presumption for children under 6 years of age in part because the secondary caregiver would probably

¹²⁸ See Section I. (3), *supra*.

¹²⁹ See e.g. Andrew S. Watson, "The Children of Armageddon: Problems of Custody Following Divorce" (1969) 21 Syracuse L. Rev. 55 at 78; Scott and Scott, *supra* note 18 at 2439-2440; Carol Smart and Bren Neale, *Family fragments?* (Malden, Mass.: Blackwell, 1999) at 198-199.

¹³⁰ According to one recent paper from researchers at Arizona State University, this position has some support in public opinion. Respondents were read vignettes and then asked how parenting time should be allocated. Their responses led the authors to conclude that their "respondents [we]re at least as concerned with making decisions that are fair to the parents as they are with ensuring that custody decisions reflect what is best for the children." (Sanford L. Braver, Ira Mark Ellman, William V. Fabricius, and Ashley Votruba, "Public Opinion about Child Custody" (2009) [unpublished]. Online: Social Science Research Network, <http://ssrn.com/abstract=1435043>.)

¹³¹ Chambers, *supra* note 53; Elster, *supra* note 13. In a similar vein, Scott Altman concluded that "child custody rules can consider fairness to adults and still give child welfare due consideration ... sometimes children either have little to lose, or we have insufficient information as a practical matter to know which of two decisions will best serve the child's interests." (Scott Altman, "Should Child Custody Rules Be Fair?" (1996) 35 U. Louisville J. Fam. L. 326 at 352-353).

¹³² Elster, *supra* note 13 at 20.

¹³³ "It seems best ... to use rights as a proxy for needs, even if on first- best principles one would want to discount rights not backed by needs." (*ibid.* at 19)

experience less emotional devastation from being deprived of custody than the primary caregiver would in these cases.¹³⁴

An attack on BIC from a different angle came in the 1996 article by English law professor Helen Reece mentioned above.¹³⁵ The statutory and scholarly paramountcy of the BIC principle in English law is perhaps even more pronounced than in Canadian or American law. Reece argued that children's interests should not have this privileged status. The central defect that Reece finds in BIC is that its indeterminacy allows it to function as a "smokescreen," an empty bit of rhetoric facilitating courts' imposition of orthodox sexual morality.¹³⁶ Professor Reece convincingly makes this case with regard to custody and access cases involving one homosexual and one heterosexual parent. However, she does not develop this critique with regard to the overwhelming majority of parenting disputes, which are not of this nature.¹³⁷

A final example of dissent from the BIC consensus comes from an article published by Nicholas Bala and Nicole Bailey in 2004 entitled "Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses." They observed that "for the high-conflict cases where the parties are most likely to seek the involvement of the justice system, there is social science evidence that [access] can have a negative influence on children's emotional well-being."¹³⁸ This is because access in these cases causes parental conflict which is harmful to the child, and this harm outweighs any benefit to the child brought about by the contact itself. However, despite this fact, Bala and Bailey proceed to list a number of "powerful arguments for recognizing and enforcing access rights in most high-conflict cases" even when that access would not be in the interests of the child involved.¹³⁹

Some of these statements are arguments that the best interests of children *generally* require enforcement of access in a particular case even if it's contrary to the interests of the specific child involved. For example, they suggest that access enforcement litigation has a general deterrent effect, reducing the likelihood that other custodial parents will deny access and also deterring litigation about parenting generally.¹⁴⁰ However the following

¹³⁴ Chambers, *supra* note 53.

¹³⁵ Reece, *supra* note 61.

¹³⁶ *Ibid.*

¹³⁷ In the author's survey of all 181 Canadian custody and access judgments reported during 5 months of 2009, no cases were found in which a parent was identified as other than heterosexual. Nor did any of the cases apparently involve two parents of the same gender (Semple, *supra* note 73).

¹³⁸ Bala and Bailey, "Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses," *supra* note 14 at 20.

¹³⁹ *Ibid.* at 20.

¹⁴⁰ *Ibid.* Similarly, Elster, *supra* note 13 paraphrases without endorsing the following argument that adultery should be punished by denying custody to the wrongdoer: "although the welfare of a given child may be best promoted if custody is given to an adulterous parent, the welfare of children in general may require a presumption, which may be more or less strong, against this practice."

passage suggests that Bala and Bailey also believe that access should be enforced because failure to do so would be unfair to the non-custodial parent:

Canadian law imposes and enforces child support obligations on all parents. It would be grossly unfair and deeply undermining of respect for the justice system if non-custodial parents were legally obliged to pay child support, but could not look to the legal system to enforce access.¹⁴¹

Like much of the scholarship, the dominant thrust of Bala and Bailey's article is upholding the best interests of children but a subtle undercurrent of concern for adults' rights and interests can also be detected.¹⁴²

b) The ALI's *Principles of the Law of Family Dissolution*

An explicit proposal to recognize parental interests in custody and access law is found in the *Principles of the Law of Family Dissolution* released by the American Legal Institute (ALI) in 2002.¹⁴³ The *Principles* are apparently unique in that they explicitly give a place to parents' rights in custody and access law. Chapter 2 deals with custody and access *inter alia*, and section 2.02(1) enshrines the BIC principle -- "the primary objective of Chapter 2 is to serve the child's best interests."¹⁴⁴

However, section 2.02(2) then states that "a secondary objective of Chapter 2 is to achieve fairness between the parents." The commentary states that fairness to parents is "a valid objective in itself" as well as being "intertwined with the child's interests."¹⁴⁵ This sentence makes it clear that consideration of parental interests is not, for the *Principles*, merely instrumental in serving children. It is an independent, although subordinate, goal. The commentary states that parental fairness can be used as a tie-breaker when two alternatives are equal with regard to BIC.¹⁴⁶ However it is also clear that parents' interests could be a reason to choose the outcome which would be worse for the child(ren).¹⁴⁷ The

¹⁴¹ Bala and Bailey, "Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses" at 20-21.

¹⁴² Similarly, see Gene C. Colman, "Procedural Fairness and Case Conferences" (2004) 20 Can. J. Fam. L. 379 at 387: "can any judge therefore truly justify to himself or herself taking custody or access away from a parent absent adequate notice and admissible evidence?" While the idea that custody or access is an entitlement or right belonging to a parent (as opposed to the child) is never explicitly argued, it appears to be the unspoken premise underlying comments like this one.

¹⁴³ American Law Institute, *supra* note 54.

¹⁴⁴ *Ibid.* at s. 2.01(1).

¹⁴⁵ *Ibid.* at s. 2.02, Comment (b).

¹⁴⁶ "When more than one rule could be expected to serve the interests of children equally well, or when the impact of the alternative rules upon children is uncertain, Chapter 2 adopts the rule most likely to produce results that achieve the greatest fairness between parents" (*ibid.*).

¹⁴⁷ Fairness to parents is less important than BIC under the *Principles*. Presumably, therefore, an outcome not in the child(ren)'s interest would have to produce a relatively large fairness benefit for parents at the expense

centrepiece of the *Principles* is the approximation standard described above.¹⁴⁸ One of the arguments given for this standard reflects the parental fairness objective: “the reliance on past caretaking is also designed to correspond reasonably well to the parties' actual expectations.”¹⁴⁹ While the approximation standard has not been widely adopted, it does provide an example of how parental interests in custody and access outcomes might be given legal weight.¹⁵⁰

2. Procedural Reform For Children

If the unanimity of our legislators and judges reflects a social consensus that the best interests of the children involved should be the only relevant factor in custody and access disputes, then procedural reform is urgently needed. The *status quo* empowers adult litigants in ways which often work to the detriment of their children. This section will support this claim, before suggesting reforms which might improve the cost-benefit balance for children. These are premised on awareness of the benefits and costs of custody and access litigation for the children involved, grounded in social science evidence.¹⁵¹

Custody and access litigation can be analogized to diagnostic surgery on a child patient. Suppose that you are responsible for making medical decisions on behalf of a child, who suffers from a medical condition. There are two possible ways to treat this condition, and it is clear that one or the other must be utilized. The child's doctors ask your permission to undertake diagnostic surgery, which will provide information about which of the two treatment options would be better for the child. What do you say?

of a relatively small detriment to the child(ren), compared to its BIC-maximizing alternative. In this, the *Principles* appear to be accepting Jon Elster's argument about the weights which should be placed on children's and parent's interests (Elster, *supra* note 13, at page 20).

¹⁴⁸ *Supra*, note 54.

¹⁴⁹ American Law Institute, *ibid.*, at s. 2.08, Comment (b).

¹⁵⁰ Michael R. Clisham and Robin Fretwell Wilson, "American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?" (2008) 42 Fam. L.Q. 573 state that West Virginia is the only state to have adopted the approximation standard.

¹⁵¹ Cost-benefit analysis has some support in Ontario's Family Law Rules (FLR), *supra* note 70 at Rule 2(5)(e). That subsection requires judges, in discharging their duty to actively manage cases, to consider “whether the likely benefits of a taking a step justify the cost.” A passage from a recent judgment of S.B. Sherr J. suggests that Rule 2 might be used with the welfare of the family in mind: “Rule 2 provides courts with considerable flexibility in managing cases. The days of having the right to endlessly litigate a case without regard to time and expense are over. There is a recognition in the rules that such litigation is damaging to families, creates undue expense, wastes time and does not achieve justice.” (*Figurado v. Figurado*, 2009 ONCJ 134, [2009] O.J. No. 1443 at para. 9) However, Rule 2(5)(e) does not state whether benefits to the child are the relevant. Given that case management is meant to promote the “primary objective” of the FLR and given that the primary objective does not include the interests of the child (Rule 2(3) and Part II, *supra*), the more harmonious reading of this section would be that it is benefits to the parties and benefits to the court which are relevant. In any case, the Rules do not in any other place specify benefits to the child as a criterion in making procedural decisions.

You shouldn't answer before asking two further questions. First, how substantial are the benefits of the diagnostic surgery for the child? You have been told already that it will help indicate which of the two treatment options is best for the child. However you don't know whether the diagnostic procedure is certain to answer this question. Is it possible that the results will be ambiguous? Nor do you yet know how important it is for the child's health to pick the better of the two treatment options. Perhaps, regardless of the diagnostic result, the less-appropriate treatment would be almost as good as the more-appropriate treatment.

Second, what are the costs of the diagnostic surgery for the child? Is there a high probability that it will create moderate short-term pain? Is there a small probability that the procedure itself will also do long-term damage? These questions about benefits and costs for children must also be asked about custody and access litigation, if we are to make procedural choices that actually put them first.

a) Benefits for Children of Parenting Litigation

The primary benefit of custody and access litigation for children is that it may lead to the parenting arrangement that is in the child's best interest being put into effect, when this would not otherwise occur. There are three important reasons not to overestimate this benefit. First, the ability of litigation or any other procedure to determine with certainty what would be best for a child is highly questionable. As noted above,¹⁵² some scholars argue that it is simply beyond the power of the law (even with mental health science as an ally) to predict what would be best for a child given the uncertainty of the future.¹⁵³ In the words of one recent article, "particularly in those cases where angry, hurt, but 'good enough' parents are contesting custody or the allocation of time sharing, there is generally no basis in psychology or law for choosing between parents."¹⁵⁴

Second, even if the procedure does identify the best parenting arrangement, the best arrangement might not be *very much better* for the child than the alternative. A judge seeking to craft the perfect parenting arrangement has limited resources at his or her disposal, namely the time and effort which the litigants are willing to dedicate to the child. If a parent's conduct is bad enough to pose a clear risk to the child, it is the task of the child protection system, and not that of the judge hearing the private family law matter, to keep him or her away from the child. In most custody and access disputes, both parents are 'good enough' to avoid this form of intervention. Within these constraints, the alternatives may represent only small gradations of benefit to the child.

Third, if the best parenting arrangement is identified and put into place, it may not last long. As observed above, variation and appeal provide legal avenues whereby orders may be changed. More commonly, if a party does not comply with a parenting order, and

¹⁵² Part I, *supra*.

¹⁵³ Michael King, "Future Uncertainty as a Challenge to Law's Programmes: The Dilemma of Parental Disputes" (2000) 63 Mod. L. Rev. 523.

¹⁵⁴ Joan B. Kelly and Janet R. Johnston, "Commentary on Tippins and Wittman's 'Empirical and Ethical Problems with Custody Recommendations'" (2005) 43 Fam. Ct. Rev. 233.

no other party seeks to enforce it, that order becomes a dead letter. Parents with access rights are allowed simply to disappear from a child's life, with or without the consent of the other parties and the child. A number of authors have noted the mutability of parenting arrangements after litigation.¹⁵⁵ Empirical evidence suggests that shared parenting and joint custody arrangements are especially likely to shift over time.¹⁵⁶ The mutability of post-litigation parenting arrangements often reflects a responsible and pragmatic response on the part of the parents to the changing needs of their child. However, mutability also reduces the expected benefit to a child from a court's parenting order, and therefore increases the chance that the cost of the procedure will exceed the benefit for that child.

b) Costs to Children of Parenting Litigation

While the benefits of the process for the child are less significant than one might assume, the costs can be substantial.¹⁵⁷ Occasionally, children participate directly in custody and access litigation by testifying or being interviewed by a judge. They may also contribute evidence in the form of an affidavit or other written communication to the decision-maker. Direct children's participation of this nature occurs rarely in Canada – the author's empirical research described above found it in only 3% of the sample of reported cases.¹⁵⁸ While there is a live debate about the potential benefits to children of direct participation in the process, it is also clear that this can be highly traumatic.¹⁵⁹ This is especially true if a child is asked directly to choose between his or her parents.¹⁶⁰ It is much more common for children to participate via assessments conducted by psychologists or social workers.¹⁶¹ While these assessments are designed to gather

¹⁵⁵ e.g. Cornelia Brentano and Alison Clarke-Stewart, *Divorce: Causes and Consequences* (New Haven, CT: Yale University Press, 2006) at 206 *et seq.*; Smart and Neale, *supra* note 129 at 36 and 43; Amanda Barratt and Sandra Burman, "Deciding the Best Interests of the Child: An International Perspective on Custody Decision-Making" (2001) 118 S. African L.J. 556 at 559.

¹⁵⁶ McIntosh, *supra* note 14; Sharon Moyer, *Child Custody Arrangements: Their Characteristics and Outcomes*, (Report No. 2004-FCY-3E). online: Department of Justice (Canada) <http://www.justicecanada.ca/eng/pi/pad-rpad/rep-rap/2004_3/2004_3.html>; Saini and Birnbaum, *supra* note 16, but see Lawrence M. Berger et al., "The stability of child physical placements following divorce: Descriptive evidence from Wisconsin." (2008) 70 J. Marriage & Fam. 273.

¹⁵⁷ Wilson, Darrell and Tomlinson, *supra* note 34 at §2.8, citing Nelson Weisman, "On Access After Parental Separation" (1992) 36 R.F.L. (3d) 35: "so dissonant is the courtroom forum from the milieu of the family that the process, in and of itself, results in greater harm than help to those who suffer through it."

¹⁵⁸ Semple, *supra* note 73 at 13.

¹⁵⁹ Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings*. Department of Justice, Canada, 2002-FCY-1E (Ottawa, 2002) <dsp-psd.communication.gc.ca/Collection/J3-1-2002-1E.pdf>. at 56; Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43 Alta. L. Rev. 845; Pearson and Gallaway, *supra* note 6 at Chapter 2, Section B.

¹⁶⁰ Bala, "Child Representation in Alberta," *ibid.*

¹⁶¹ Semple, *supra* note 73.

information about the child without causing harm, some scholars have suggested that assessments can also be emotionally difficult for a child.¹⁶²

Children's well-being is affected by their parents' financial security, and custody and access litigation can easily become expensive enough to threaten this security.¹⁶³ The median after-tax income for an unattached individual Canadian was \$24,200 in 2007,¹⁶⁴ and a recent report found that the median income of applicants in Ontario's unified family courts was \$25,200.¹⁶⁵ Examining some of the costs associated with parenting litigation against this comparator suggests how substantial the financial impact can be. According to a 2009 survey by *Canadian Lawyer* magazine, the average legal fee for a contested divorce in Ontario is \$12,602.¹⁶⁶ However a "contested" divorce might not include much if any courtroom advocacy, and the average legal cost for a case culminating in a two-day civil trial was \$45,477.¹⁶⁷ Retaining other private sector professionals, such as mediators or assessors, naturally adds to the cost. A 2007 article suggested typical costs of \$1500-\$6000 for a social worker assessment, and \$3,000 to \$20,000 or more for a psychologist assessment.¹⁶⁸

A recent Ontario Bar Association report stated that 40% of civil litigants lack lawyers, and that the rate among family litigants is even higher than this average.¹⁶⁹ This is, in part, a symptom of the strain which legal fees put on separating parents.¹⁷⁰ Parents

¹⁶² Nicholas Bala, *Mohan, Assessments & Expert Evidence: Understanding the Family Law Context*. (Queen's Faculty of Law Legal Studies Research Paper Series, Working Paper No. 2007-02). online: Social Science Research Network, <<http://ssrn.com/abstract=989761>> at 36.

¹⁶³ Schepard, *supra* note 15 at 105.

¹⁶⁴ Statistics Canada, "The Daily: Income of Canadians." Online: Statistics Canada, <<http://www.statcan.gc.ca/daily-quotidien/090603/dq090603a-eng.htm>>

¹⁶⁵ Alfred A. Mamo, Peter G. Jaffe and Debbie G. Chiodo, *Recapturing and Renewing the Vision of the Family Court*. (Toronto: Ministry of the Attorney General (Ontario), 2007), online: Centre for Research & Education on Violence against Women and Children <http://www.crvawc.ca/documents/Family%20Court%20Study%202007.pdf>.

¹⁶⁶ Kelly Harris, "The Going Rate" *Canadian Lawyer* 33:6 (June, 2009) 32 at 36.

¹⁶⁷ *Ibid.*

¹⁶⁸ Bala, "Mohan," *supra* note 162 at 25.

¹⁶⁹ Ontario Bar Association, *Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit*. Ontario Bar Association, (Toronto, 2008). online: Ontario Bar Association, <http://www.oba.org/en/pdf/Justice_Summit_sml.pdf> at 8.

¹⁷⁰ According to one survey conducted in the Kingston area, 83% of litigants without lawyers stated that they were unable to afford the fees. (Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30 *Queen's L.J.* 825 at 832.) The rate of self-representation also reflects the small supply of publicly-funded legal aid certificates for private family law disputes. See, e.g. Michael Trebilcock, *Report of the Legal Aid Review*, (Toronto: Ministry of the Attorney General (Ontario), 2008), online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf> at 109.

without lawyers save money but pay the price in their own time and aggravation. Whether or not the parties have lawyers, litigation is time-consuming to the extent that it can interrupt parenting time.¹⁷¹ The financial and time stresses of litigation come at a time when the average separating parent is likely to be experiencing various other transitional costs and stresses associated with relationship breakdown.

The financial and time costs of parenting litigation, although paid directly by parents, are also paid indirectly by their children in two ways. First, time and money spent on custody and access litigation is time and money which cannot be spent on parenting. Second, given the stress which is likely to accompany any relationship breakdown, the costs of custody and access litigation create additional strain and financial insecurity which may undermine the ability of parents to act competently as such. Clarke-Stewart and Brentano reviewed a number of studies and concluded that the scarcity of resources which often accompanies divorce may account for as much as half of the negative impacts on children which have been associated with it.¹⁷²

Finally, custody and litigation costs children because it increases the likelihood that they will be exposed to parental conflict, which the literature unequivocally establishes to be bad for them. While some parents may expect catharsis from litigation, the reality is that it intensifies hostility. According to Justice Brownstone,

most couples who bring their disputes to family court do not enjoy, or ultimately benefit from, the experience ... in many cases, the parties' ability to communicate and co-operate with each other as co-parents became worse, not better, as a result of family court litigation.¹⁷³

This point has often been made in the literature.¹⁷⁴ Strong empirical evidence for it came from Pruett and Jackson, who conducted interviews with 41 Connecticut parents who had recently divorced.¹⁷⁵ A remarkable 71% of the respondents stated that the legal process had made their feelings of anger and hostility more extreme.¹⁷⁶ Furthermore, 75% of them "indicated that the process intensified their negative perceptions of the other

¹⁷¹ Schepard, *supra* note 15 at 105.

¹⁷² Brentano and Clarke-Stewart, *supra* note 155 at 135.

¹⁷³ Brownstone, *supra* note 96 at 12 (emphasis original).

¹⁷⁴ e.g. Robert E. Emery, David Sbarra and Tara Grover, "Divorce Mediation: Research and Reflections" (2005) 43 Fam. Ct. Rev. 22 at 35; Rhonda Freeman, "Parenting after Divorce: Using Research to Inform Decision-Making about Children" (1998) 15 Can. J. Fam. L. 79 at 104; Hardcastle, *supra* note 69 at 66; Janet Weinstein, "And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System" (1997) 52 U.Miami L.Rev. 79.

¹⁷⁵ Marsha Kline Pruett and Tamara D. Jackson, "The Lawyer's Role during the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys" (1999) 33 Fam. L.Q. 288.

¹⁷⁶ *Ibid.* at 298.

parent by pitting them against each other and replacing direct communication."¹⁷⁷ In a subsequent article, Pruett and her colleagues argued that

parents' opposing positions are exacerbated through the adversarial process because the lack of clear facts or standards on which to make judgments serves to augment the family struggles. Conflict spreads and feeds on itself, escalating the destructive family dynamics that the divorce was intended to dissipate... The legal system thus operates as a powerful vehicle for sustaining or increasing parental conflict.¹⁷⁸

Andrew Schepard concurs that litigation increases interparental hostility, but offers a somewhat different explanation for the phenomenon. He suggests that it

puts a premium on parents finding fault with each other ... parents who participate in adversary procedures focus on the weaknesses of the other parent, rather than focusing on how to reconstruct their post- divorce or separation relationship for their children's benefit.¹⁷⁹

Whatever the reason, there appears to be general agreement that litigation increases conflict. As noted above, there is an equally strong consensus that interparental conflict is bad for children.¹⁸⁰ One of the costs of custody and access litigation to children, therefore, is its tendency to increase interparental conflict.¹⁸¹

c) Why Litigating Parents may be Unreliable Balancers of Cost and Benefit

Sometimes, a parent's litigation decisions reflect that parent's accurate perception of the costs and benefits thereof for the child. Parents can be presumed to be aware of their children's interests and they often make altruistic decisions, which put those needs ahead of their own. Like the responsible and conscientious decision-maker in the operating room analogy, parents may weigh the costs and benefits before deciding whether and how to initiate or continue the diagnostic surgery which is custody and access litigation.

However, in the context of an acrimonious relationship breakdown, scholars have identified many reasons why a parent's choices about custody and access litigation may not

¹⁷⁷ *Ibid.* at 298-299.

¹⁷⁸ Marsha Kline Pruett, Glendessa M. Insabella and Katherine Gustafson, "A Court-Based Intervention for Separating Parents with Young Children" (2005) 43 *Fam. Ct. Rev.* 38. Brownstone offers a similar explanation for "why litigation [is] such a damaging and destructive way to resolve parental disputes ... the court system is based on an adversarial process in which 'winning' is the object of the exercise." (Brownstone, *supra* note 96 at 12).

¹⁷⁹ Schepard, *supra* note 15 at 105.

¹⁸⁰ *supra*, note 15.

¹⁸¹ Schepard, *supra* note 15 at 95 and 105; Watson, *supra* note 129 at 58; Robert E. Emery, "Interparental Conflict and Social Policy" in John H. Grych & Frank D. Fincham eds., *Interparental conflict and child development: theory, research, and applications* (New York: Cambridge University Press, 2001) at 421.

be based on an accurate perception of BIC. First, the costs and benefits of litigation are mysterious, especially to someone who has never been involved in it before. While explaining these costs and benefits is part of a lawyer's job, as noted above at least 40% of family court litigants have no lawyers.¹⁸²

Second, there are numerous factors which may cloud the judgment of parents making decisions about custody and access litigation. Parenting litigation may be initiated or prolonged in order to control or punish the other parent, or to prolong cohabitation.¹⁸³ Given the context, there are often powerful emotional issues at play. In the words of Robert Emery,

co-parents are not just parents, but they may be each other's friend (or enemy) lover (or estranged mate), protector (or abuser), economic partner (or competitor), family member (or cast-off) ... interparental conflict may be a result of, or an expression of, an ongoing dispute about altogether different aspects of the co-parents' relationship. It has been suggested, for example, that many child custody disputes may really be attempts to block divorce or to maintain contact with a former spouse...¹⁸⁴

Carol Smart and Vanessa May suggest that parents interpret the BIC standard as a judgment regarding who is the better parent. Yielding custody therefore means accepting a characterization of oneself as the less-adequate parent, which is very difficult for many people to do.¹⁸⁵

Third, a number of scholars have suggested that custody and access litigation can be seized upon by parents who need, but lack any other opportunity to be publicly vindicated or to vent.¹⁸⁶ In Canada, as in many other Western jurisdictions, opportunities to discuss "fault" and "conduct" in the context of relationship breakdown have been gradually eliminated from our law.¹⁸⁷ Although courts and legislatures have also tried to eliminate

¹⁸² *supra*, note 169.

¹⁸³ Elizabeth Scott and Andre Derdeyn, "Rethinking Joint Custody" (1984) 45 Ohio St. L.J. 455 at 493; Maldonado, *supra* note 17; Emery, Sbarra and Grover, "Divorce Mediation: Research and Reflections," *supra* note 174 at 34; Goundry, *supra* note 95 at 19.

¹⁸⁴ Emery, *supra* note 181 at 417.

¹⁸⁵ Carol Smart *et al.*, *Residence and Contact Disputes in Court: Volume 2* (London: Department of Constitutional Affairs (UK), 2005) at p. 56.

¹⁸⁶ Carol Smart and Vanessa May, "Why Can't They Agree? The Underlying Complexity of Contact and Residence Disputes" (2004) 26 Journal of Social Welfare and Family Law 347; Francis J. Catania, Jr., "Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes, 71 Neb. L. Rav. 1228, 1233 (1992)" at 1256; Maldonado, *supra* note 17; Carol Smart *et al.*, *Residence and Contact Disputes in Court: Volume 1 (Research Report No 6/03)*. Research Unit Department for Constitutional Affairs (UK), 2003) at 100.

them from custody and access law, evidence about past conduct is legally relevant if it bears on parenting ability.¹⁸⁸

Finally, financial disputes arising from relationship breakdown are likely to be live at the same time as parenting disputes. Parents may make unreasonable parenting claims in order to gain a bargaining chip which can subsequently be cashed in for financial advantage.¹⁸⁹ Because child support entitlements can depend on parenting arrangements, parents may have financial incentives to push for custody or for more parenting time in a joint custody arrangement.¹⁹⁰

Justice Brownstone offers compelling examples of parenting litigation for which the costs to the children involved must exceed the benefits, because the benefits are nonexistent:

I regularly see parents starting court motions at the slightest infraction or provocation by the other parent ... a child was not delivered for an access visit with enough clothing; an item of clothing was not returned after an access visit (or was returned unwashed); a child's toy has gone missing; a parent was a few minutes late for an access exchange; a child missed a nap during an access visit ... I have even seen parents litigate over the length and style of their child's hair, or the brand of toothpaste a child should use.¹⁹¹

d) Improving the Cost-Benefit Balance for Children

Part II above described three ways in which the procedure serves the adults involved. They decide if the procedure occurs, they control most of the evidence, and they decide when the procedure ends. Not all of these characteristics of the status quo are

¹⁸⁷ The overwhelming majority of Canadian divorces are granted on the basis that the spouses "have lived separate and apart for at least one year," (*Divorce Act, supra* note 22, s. 8(2)(a)), and not on the basis of adultery or cruelty (s. 8(2)(b)). Conduct is also almost always irrelevant to the financial corollary remedies under the *Divorce Act* and provincial legislation.

¹⁸⁸ *Divorce Act, supra* note 22, s. 16(9): "In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child." *Children's Law Reform Act, supra* note 4 at s. 24 (3): "A person's past conduct shall be considered only (a) in accordance with subsection (4)" [re domestic violence] ... or (b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent."

¹⁸⁹ Goundry, *supra* note 183 at 11; Patricia Geraldine Tobin, *Clinical recommendations for sole custody in child custody disputes: an analysis of sex-related factors in the decision-making and assessment process*, (Ph D, Ontario Institute for Studies in Education (University of Toronto), 1989) at 14 and 33.

¹⁹⁰ *Federal Child Support Guidelines, supra* note 64; *Contino v. Leonelli-Contino*, 2005 SCC 63, 2005 3 S.C.R. 217.

¹⁹¹ Brownstone, *supra* note 96 at 14. Brownstone later adds at page 73: "all too often, parents are so filled with hatred and vindictiveness that they keep the litigation going as a means of torturing each other without the slightest concern for the effect of their immature behaviour on their children."

contrary to children's interests, and good procedural reform for children would not likely involve abandoning them all. This is true for two reasons.

First, some of the procedural power which parents hold is consonant with the interests of their children. For example, for the state to examine all consensual arrangements between separated parents would be very invasive, and probably create more costs than benefits for children. The procedural empowerment of parents may also lead them to regard the outcomes as more legitimate, which in turn increases the likelihood of compliance, which is in the interests of children.¹⁹²

Second, while custody and access disputes are fundamentally unlike financial family law issues, they do come "bundled with" those financial issues in the sense that people experience them together when intimate relationships break down. A procedure calibrated to protect the child's interests above all would be patently inappropriate for the determination of issues like spousal support and property division, in which children's interests are only tangentially relevant. It would therefore have to be a parallel system, and putting families through multiple procedures has much to be said against it.

However, there are certain practical procedural reforms which could help reconcile custody and access procedure with the best interests of the child. Procedural reform for children would begin by explicitly recognizing their interests in the *Family Law Rules*. An excellent model in this regard is Australia's *Family Law Act*. In any proceeding involving a child in that country, "the first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings."¹⁹³ The primary objective of Ontario's FLR is "dealing with cases justly," and the definition of "dealing with cases justly" provided by R. 2(3) should be amended to include "producing net benefits for any child or children involved in the proceeding."¹⁹⁴ To give effect to this aspiration, it might be wise for the legislature to re-examine the rules about (1) *whether* custody and access litigation occurs, (2) *how* it occurs when it does occur, and (3) *whether and how* children's evidence is heard within it.

1. Whether Litigation Occurs

Whether a procedural step occurs is a question which judges should answer in light of the probable costs and benefits thereof to the child. The status quo allows litigation to occur or continue even when its likely benefits for children do not exceed its likely costs. This is certainly true with regard to the most extreme cases such as those described

¹⁹² Colman, *supra* note 142 at para. 6; Hardcastle, *supra* note 69 at 71-74.

¹⁹³ *Family Law Act 1975* (Cth), at s. 69ZN(3). This statute has two other child-focused procedural principles which have no analogue in Ontario's FLR. Section 69ZN(5a) provides that "the proceedings are to be conducted in a way that will safeguard ... the child concerned against family violence, child abuse and child neglect." Section 69(ZN)(6) states that "the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties."

¹⁹⁴ FLR, *supra* note 70, R. 2.

above.¹⁹⁵ Apart from the endless sagas of the high-conflict repeat litigators, this may also be true with regard to the more trivial variation motions. For example, consider a motion to vary access. Assuming that the access arrangement sought by the moving party is better for the child, and assuming that the court reaches this conclusion, and assuming that the new order is obeyed, it is still entirely possible that the deleterious impact on the child's financial security brought about by the parents' expenditures on lawyers (and, perhaps, expert witnesses) to argue the motion will outweigh the benefit of the change. Considering the non-financial costs to children outlined above makes it even less likely that a motion to vary access will have a *net* benefit for the child.

The mechanisms currently available for curtailing litigation might be strengthened to prevent litigation of this nature. Rule 2(5)(e) obliges the court to consider the benefits and costs of a procedural step before allowing it to occur. This should also be amended to explicitly require consideration of the benefits and costs of a proposed step *to any children involved*. Second, "vexatious proceedings" should have a special definition in the context of custody and access litigation – proceedings whose expected benefits for the child or children involved do not exceed their costs. Such proceedings could be made subject to the remedy available in s. 140 of the *Courts of Justice Act*.¹⁹⁶ Judges might be given the power which they possess in Australia, to make such an order on the court's initiative even if no party has sought it.¹⁹⁷

As observed above, courts are reluctant to make parenting orders about older adolescents due to the likelihood that they will simply "vote with their feet."¹⁹⁸ The CLRA affirms "the right of a child of sixteen or more years of age to withdraw from parental control."¹⁹⁹ However, the applicable legislation continues to allow custody and access orders to be sought for these children.²⁰⁰ Given that orders of this nature are less likely to be granted, and perhaps legally unenforceable if they are granted, does allowing parents to seek them create net benefits for the children involved? Or should the legislature close the door on parenting orders for older adolescents in order to save them from the procedural costs of litigation which is unlikely to do them much good?

2. How the Litigation is Conducted

Once it is determined that a step in the procedure should occur, ideally the way in which that step proceeds should be determined in light of the cost-benefit calculus for the child. Reforms to parenting litigation procedure may demonstrably reduce its costs to the children involved, without equivalent reductions in its benefits. Here too, Australia is a

¹⁹⁵ *Supra*, section II(3).

¹⁹⁶ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 140.

¹⁹⁷ *Family Law Act 1975*, *supra* note 193, s. 69ZP .

¹⁹⁸ Davies, *supra*, note 121.

¹⁹⁹ *Children's Law Reform Act*, *supra* note 4 at s. 65.

²⁰⁰ *Divorce Act*, *supra* note 22 at s. 2(1); *Children's Law Reform Act*, *supra* note 4 at s. 18(2).

leader. A pilot Children's Cases Program was launched in 2004 in Sydney area family courts.²⁰¹ In addition to substantial efforts to encourage voluntary settlement, this initiative also modified trial procedure itself. For example, the judge was given substantial power to limit the evidence put forward by the parties.²⁰² A subsequent evaluation, which compared this pilot project to the mainstream court system, found that those involved in the pilot program reported "better management of conflict, less damage to the co-parental relationship, greater satisfaction of parents and children with their living arrangements, and, in association with these, improved children's adjustment."²⁰³

Imposing higher procedural costs on children may be justified in some parenting cases but not in others, depending on what benefits the child stands to gain from the procedure. For example, suppose Pat and Cameron are seeking a divorce. They are more or less evenly matched in terms of their ability to parent their child Jane. Suppose further that joint custody is not an option in this case, due to the level of hostility between Pat and Cameron.²⁰⁴ The available options with regard to the custody decision are therefore either sole custody to Pat, or sole custody to Cameron. The non-custodial parent will have liberal access rights.

Legally, the correct decision between these options is that which is most consonant with Jane's best interests. However, the benefits to Jane from reaching the correct decision are modest. The correct decision does not mean permanently placing Jane with a fantastic parent and saving her from the custody of an awful parent. It means only that the slightly better parent will have custody, whereas the other will have generous access. In this case, the procedure most consonant with BIC will be a brief and summary one which involves relatively little cost to the parties and relatively little procedural trauma for Jane, even if this procedure runs a higher chance of reaching the wrong conclusion.

Conversely, a procedure with higher costs would be appropriate when the stakes are higher for Jane. For example, suppose Pat and Cameron are seeking a divorce on consent, incorporating minutes of settlement whereby Pat is to have sole custody of Jane. However, the court has reason to believe that Cameron would be a far superior parent, and only reluctantly agreed to the custody arrangement. Cameron is in a weaker financial position than Pat, and is afraid of being bankrupted by legal fees if the case proceeds to litigation. The settlement offer whereby Pat receives sole custody also includes a spousal

²⁰¹ Stephen O'Ryan, "A Significantly Less Adversarial Approach: The Family Court Of Australia's Children's Cases Program." Presentation to the 22nd Australian Institute of Judicial Administration Conference. Wellington, New Zealand, September 18, 2004. [unpublished] online: <http://www.aija.org.au/ac04/papers/ORyan.pdf>>. It was subsequently renamed the "Less Adversarial Trial" program. (Jennifer E. McIntosh, Diana Bryant and Kristen Murray, "Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia" (2008) 46 Fam. Ct. Rev. 125 at 126.

²⁰² The Hon. Alastair Nicholson, "Practice Direction No. 2 Of 2004: The Children's Cases Program." Effective date: March 1, 2004. (Sydney: Family Court of Australia, 2004); O'Ryan, *supra* note 201, at 21.

²⁰³ McIntosh et al. *supra* note 201 at 130.

²⁰⁴ *Kaplanis v. Kaplanis*, 249 D.L.R. (4th) 620, (2005), 10 R.F.L. (6th) 373, (2005) 194 O.A.C. 106 (ON C.A.).

support term which Cameron desperately needs. In this case, the procedure most consonant with BIC will be more lengthy and costly for the child Jane. Despite its costs to her, litigation might be most consonant with BIC in this case insofar as it will prevent Jane from ending up in Pat's custody. However, what would actually happen in this case would be no procedure whatsoever, insofar as the parties have reached a consensual arrangement.

Amending the procedure depending on the cost-benefit calculus in a given case is not so simple as merely deciding to curtail litigation. However, precedents exist in Ontario civil procedure, which for example directs cases to Small Claims Court, simplified procedure, or regular procedure depending on the monetary value of the claim. This reflects the general policy of *proportionality* – that the nature of the proceeding should befit the significance of the claim. Proportionality is now an explicit interpretive principle in Ontario's general *Rules of Procedure*, which provide that “the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”²⁰⁵

The proportionality principle is more difficult to apply to custody and access litigation because it is difficult to evaluate the significance of a proceeding to a given child, especially before it is adjudicated. Monetary value is not available as a ready proxy for significance. Further research might develop rules of thumb about what types of custody and access claims are most likely to produce more or less substantial benefits for the children involved, and techniques to tailor the procedure depending on the type of claim.²⁰⁶

3. Whether Children's Evidence is Heard

It is natural and inevitable that parents' evidence should be prominent in a procedure focused on the interests of their child. They usually know the child better than anyone else does, and their personal inclinations and characteristics are also important given that they will be the agents of whatever order is ultimately made. However, this does not justify the apparent absence of children's evidence from most custody and access cases. I will suggest here that including it would do more good than harm for the children involved, and that training and encouraging judges to interview children appears to be the most practical means of doing so given resource constraints.

Above, this paper reviewed empirical findings about the types of evidence which are usually available in custody and access litigation.²⁰⁷ The available data suggest that the majority of judicial custody and access decisions are made without any form of children's evidence, if that term is defined to include evidence which comes directly from the child or

²⁰⁵ *Courts of Justice Act*, R.R.O. 1990, Reg. 194 (“Rules of Civil Procedure”), s. 1.04(1.1).

²⁰⁶ Efforts are being made to develop *differentiated case management* (or “triage”) protocols, whereby cases are streamed to different services and dispute-resolution approaches depending on their characteristics. See Nancy Ver Steegh, “Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process” (2009) 42 Fam. L.Q. 659 and Peter Salem, “The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?” (2009) 47 Fam. Ct. Rev. 371 .

²⁰⁷ *supra*, at section II(2).

from a neutral professional with child-related expertise. Direct evidence from children may easily have more costs than benefits for them.

However most scholars agree that there are ways to involve children which provide net benefits, both by improving the quality of the outcome and by giving children the psychologically beneficial sense that they have been consulted in these decisions which intimately involve them.²⁰⁸ The *United Nations Convention on the Rights of the Child* also speaks to this point, at Article 12:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.²⁰⁹

The “gold standard” for children’s evidence may well be the assessment or interview of the child conducted by an independent lawyer, social worker, or mental health professional with specific expertise and training. However, resource constraints usually make this impossible. Most parents cannot afford to retain psychologists or social workers to conduct assessments. Many of them turn to the Office of the Children’s Lawyer (OCL), which provides child legal representation and social worker investigations akin to assessments without charge. At one time, the OCL’s predecessor was notified of all Ontario divorces involving minor children,²¹⁰ and OCL investigations were mandatory in every divorce case before 1987.²¹¹ However, funding did not keep pace with the increasing prevalence of custody and access litigation over the second half of the 20th century.²¹²

²⁰⁸ E.g. Rachel Birnbaum & Nicholas Bala, “The Child’s Perspective On Representation: Young Adults Report On Their Experiences With Child Lawyers” (2009) 25 Can. J. Fam. L. 11 at 40 (“Child’s Perspective”); Coley, *supra* note 17; Bessner, *supra* note 159.

²⁰⁹ UNCRC, *supra* note 14, Art. 12.

²¹⁰ Rachel Birnbaum and Dena Moyal, “How social workers and lawyers collaborate” (2003) 21 C.F.L.Q. 379 at 383.

²¹¹ Kevin Marron, “Child rule changed: checks on divorces no longer required” *The Globe and Mail* (Feb 11, 1987) A11.

²¹² The same seems to be true further west. Regarding Alberta, see Davies, *supra* note 121 at section 2(d), Dale Hensley, “Role and Responsibilities of Counsel for the Child in Alberta: A Response to Professor Bala” (2006) 43 Alta. L. Rev. 871 at 875-6, and Bala, “Child Representation in Alberta,” *supra* note 159 at 847. Regarding British Columbia, see Ministry of Attorney General (British Columbia) Justice Services Branch -- Civil and Family Law Policy Office, *Family Relations Act Review Discussion Paper Chapter 8: Children’s Participation*, (2007) at 9-10. Regarding Manitoba, see the recent case of *Poste v. Mitchell-Poste*, 2009 CarswellMan 368, at para 51, where the judge ordered an assessment but stated that he was “mindful of the delay which will ensue given the backlog of outstanding assessments at Family Conciliation Services.”

Today, the OCL declines approximately half of the requests for its involvement in custody and access cases. A 2007 study found that the OCL was involved in only 9% of those cases in Ontario's unified family courts in which the applicant and/or respondent had children.²¹³

There are and will continue to be a large group of cases in which it would not be in the child's interest to be heard directly, and resources do not permit a neutral child expert to speak to and for the child. In such cases, the judicial interview is an obvious mechanism by which children's evidence can be heard. Such interviews are authorized by s. 64(2) of Ontario's CLRA,²¹⁴ by statutes in four other provinces, and by case law in the rest of the country.²¹⁵ However, they are very rare in practice. The author's empirical research did not find a single reference to a judicial interview of a child in a sample of 181 reported custody and access cases.²¹⁶ Bala and Birnbaum recently interviewed Ontario judges and found widespread reluctance to interview children.²¹⁷

In other jurisdictions, such as Ohio, judicial interviews of children in custody and access litigation are common.²¹⁸ It is possible that their scarcity in Canada reflects not a conclusion on the part of judges that interviews invariably do more harm than good to the children, but rather a discomfort or unfamiliarity with this function. Interviewing is a form of active evidence-gathering and as such a departure from the traditional judicial role. However, it is difficult to believe that, in a dispute which is focused entirely on a child and his or her future, the child should have no involvement whatsoever when resources do not allow for a dedicated neutral professional to assist. If further research supports the conclusion that judicial interviews are under-utilized in custody and access cases, then judges should be trained and encouraged to deploy this tool more often.²¹⁹

Judicial interviews are certainly not always appropriate, most obviously if the child is too young to provide meaningful information. They may also pose some of the same risks for the child as *viva voce* courtroom testimony. The OCL's Dan Goldberg draws a distinction between a judicial "preference interview" (in which the child is asked more or less directly which outcome he or she would choose) and a judicial "conversation" with a

²¹³ Mamo et al., *supra* note 165 at 82.

²¹⁴ *Children's Law Reform Act*, s. 64(2).

²¹⁵ Birnbaum and Bala, "Child's Perspective," *supra* note 208.

²¹⁶ Semple, *supra* note 73.

²¹⁷ Rachel Birnbaum and Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24 *International Journal of Law, Policy, and the Family* [forthcoming] ("Judicial Interviews").

²¹⁸ Denise Herman McColley, remarks at *Family Law: The Voice of the Child* (Law Society of Upper Canada Continuing Legal Education seminar, March 5th 2009); Birnbaum and Bala, "Judicial Interviews," *supra* note 217.

²¹⁹ In *G. (L.E.) v. G. (A.)*, 2002 CarswellBC 2643, 2002 BCSC 1455 (B.C.S.C.), Martinson J. concluded that judges have the authority to interview children, and that in some circumstances doing so may be in their interests.

child.²²⁰ He argues that the latter, which may focus more on getting to know the child or explaining the process, is substantially less dangerous. This type of interview may skirt the pitfalls while capturing most of the therapeutic and evidentiary advantages of including children's voices which have been identified in the literature.²²¹

Conclusion

There is a fundamental contradiction in our approach to custody and access disputes. The statutes, case law, and scholarship all clearly proclaim that the best interests of the child is the only relevant consideration. This distinctive legal standard renders the parties' claims and needs irrelevant as ends in of themselves. However the procedure by which we resolve disputes about parenting embodies the opposite philosophy. As in all civil litigation, the parties have a great deal of control over the process. While children's evidence is a component of our system and while the material change threshold does effectively prevent some litigation which is not in children's interests, these are exceptions to the general rule: a procedure which empowers the adult parties. One obvious way to reconcile the inconsistency would be legal reform to recognize parents' interests in the outcome.

The more challenging, but to the author the more just resolution to the contradiction is to reform the procedure to give children's interests the same priority which they have in the law. This is a task which the present article has only begun to sketch. The task calls, first, for an accounting of the costs and benefits of different types of custody and access litigation for different types of children. Then, we must find ways to ensure that every custody and access dispute is resolved with the maximum possible *net benefits* for the child or children involved. Only after this endeavour is complete can we as a society pledge our allegiance, without hypocrisy, to the best interests of the children involved in custody and access disputes.

²²⁰ Dan Goldberg, "Judicial Interviews Of Children In Custody And Access Cases: Time To Pause And Reflect" in *Family Law: The Voice of the Child*. March 10, 2010 (Toronto: Law Society of Upper Canada, 2010).

²²¹ E.g. Birnbaum and Bala, "Child's Perspective," *supra* note 208; Coley, *supra* note 17; Birnbaum and Bala, "Judicial Interviews," *supra* note 217.