WIFE BATTERY AND DETERMINATIONS OF CUSTODY AND ACCESS: A COMPARISON OF U.S. AND CANADIAN FINDINGS*

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The author of this article examines the effect of wife battery on custody determinations in Canada. In doing so she looks at how courts and academics in the United States have dealt with this issue. In particular, she discusses the joint custody presumption that is applied by many courts in the United States. She then looks, by way of comparison, at how this arrangement is dealt with in Canada and canvasses the relevant legislation in various provinces. She discusses the pitfalls of this presumption, especially when dealing with an abusive relationship.

The author discusses the effect on battered women of provisions with the "best interests" or "welfare" of the child and

L'auteure de cet article examine l'impact de la violence faite aux femmes sur les décisions rendues en matière de garde d'enfants au Canada. Dans le cadre de son examen, elle analyse comment les tribunaux et les universitaires ont abordé cette question aux États-Unis. En particulier, elle discute de la présomption de garde commune qui est appliquée par de nombreux tribunaux aux États-Unis. Pour comparer, elle étudie ensuite comment cet arrangement est mis en oeuvre au Canada et examine de façon approfondie les lois pertinentes de différentes provinces. Elle discute des difficultés que pose cette présomption, particulièrement dans les cas de violence conjugale.

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the "friendly parent" tests. She also discusses the fact that some legislation does not permit conduct to be a consideration in determining custody. She states, though, that, for the most part, Canadian courts have looked at the existence of abuse in making their determinations. The author then looks at the Canadian case law both where abuse has been used to deny custody to a batterer and where it has not.

In concluding the author looks at various statutory reforms that have been suggested in the United States. She then looks at possible reforms to Canadian law. In particular, she discusses the possibility of a legislated primary care-giver presumption and mediation. These reforms are reviewed with the battered woman in mind.

L'auteure traite aussi des effets sur les femmes victimes de violence conjugale des dispositions qui prévoient un test pour déterminer « l'intérêt » ou le « bien-être » de l'enfant et quel est « le parent amical ». Elle discute du fait que certaines lois ne permettent pas de tenir compte de la conduite d'une personne pour rendre un décision en matière de garde d'enfants. Elle affirme toutefois que, pour prendre leur décision, la plupart des tribunaux canadiens ont pris en considération l'existence de la violence. L'auteure examine ensuite la jurisprudence canadienne en analysant à la fois les affaires où la violence a été invoquée pour refuser la garde d'enfants à un homme violent envers sa conjointe et les affaires où la violence n'a pas été invoquée.

En conclusion, l'auteure étudie différentes réformes législatives qui ont été proposées aux États-Unis. Elle examine aussi les réformes du droit canadien qui pourrait être adoptées. En particulier, elle discute de la possibilité de prévoir dans une loi une présomption en faveur de la principale personne dispensatrice de soins ainsi qu'une médiation. Ces réformes sont discutées en tenant compte des femmes victimes de violence conjugale.

I. INTRODUCTION

So far, the role wife battery does or should play in determinations of custody and access has not attracted much academic discussion in Canada.[1] It has recently become the subject of considerable attention in the United States, however. An analysis of recent Canadian case law surrounding this issue indicates that Canadian judicial decisions involving this issue do not seem to be characterized by the same problems as those which have been identified in the United States, though they do raise some questions about background assumptions which have also been identified as problematic in the American context. This is by no means to say either that wife battering is not a problem in Canada[2] or that women in abusive relationships do not have problems

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[1] I would like to take this opportunity to thank Dawn Jordan, a law student now in her third year at Dalhousie Law School, for having acted as my research assistant in relation to the preparation of this paper. She did the literature search and the survey of recent Canadian case law which provided the background data on which the paper is based. Her work was invaluable. In the course of her searches, she did not locate a single Canadian book or periodical article dealing specifically with the issue of the relevance of wife battery to custody and access determinations, though several articles touch on this issue within the framework of discussing current trends in custody awards and/or problems concerning awards of joint custody. Researching the case law as far back as the beginning of the FAMILY LAW REPORT series, and the NOVA SCOTIA REPORTS for the years 1980 and forward, she located only fourteen cases indexed according to spousal violence and/or a custody or access dispute. Three more very recent and as yet unreported cases were added to the data base in the preparation of the final draft of the paper. The implications of these findings will be discussed further in the body of the paper.

I would also like to thank Michael Crystal, also a law student now in his third year at Dalhousie Law School, who was my research assistant in relation to preparation of the final version of this article for publication. He specifically researched the issue of presumptions of joint custody in Canadian family law statutes. His work has also been invaluable.

[2] There has been considerable research on the extent, nature, and consequences of wife battery in Canada and there is no dearth of literature on the more general topic of violence against women and children and its effects on its survivors. But problems encountered in relation to the legal system have focused on the way in which these problems have been reacted to by the criminal justice system rather than by family law regimes.

A review of the Canadian literature on the incidence of wife battery and its effects on its victims, both adult and children, indicates that the problem has the same dimensions in Canada as in the United States. There seems to be general agreement in both jurisdictions that, at the very least, one woman in ten is the victim of spousal assault and/or other forms of spousal abuse. *See* L. MacLeod, BATTERED BUT NOT BEATEN: PREVENTING WIFE BATTERING IN CANADA (Ottawa: Canadian Advisory Council on the Status of Women, 1987); M. Kara, *Domestic Violence and Custody: To Ensure Domestic Tranquility* (1984) 14 GOLDEN GATE L. REV. 623, at 633; and L.R. Keenan, *Domestic Violence and Custody Litigation: The Need for Statutory Reform* (1985) 13 HOFSTRA L. REV. 407 at 407-08 & n. 7 citing other references in support.

in relation to separation and divorce, and the corollary issues arising from dissolution of an abusive relationship.[3] What it may indicate, however, is that their biggest problems lie outside the traditional scope of family law and divorce, and/or that their problems with custody and access are being dealt with primarily by means of settlements negotiated by their legal representatives or through other processes such as mediation. Judging from the small number of Canadian cases, located in the background research for this paper, raising issues as to the way in which wife battery is being dealt with in relation to custody and access, if large numbers of contested cases involving these issues are being dealt with in the courts, they are not being reported. This appears to suggest, at least, that large numbers of them are not being appealed beyond the trial level. It may well be wrong to infer from this that all, or even most, battered wives are satisfied with the results obtained at this level,[4] but it does mean that we have to look elsewhere for information as to what problems there may be and why they are not reflected in the reported case law.

In order fully to understand whether or not battered women are suffering at the hands of our family law/divorce regimes, and, if they are, what the specific problems are that they are encountering, research needs to be carried out surveying family law practitioners, particularly female practitioners and those involved in legal aid service delivery, as to the problems they identify in relation to these issues in the course of their practice. Research analyzing trial decisions rendered in family courts, and consent orders and separation agreements registered with family courts, should also be undertaken in order to ascertain trends and obtain basic data respecting the ways in which evidence of wife battery impacts on decisions respecting these issues.

The remainder of the paper will explore the problems identified in the American literature on this topic. These include the extent to which, and reasons why, these problems do or do not characterize Canadian statutory and judicial approaches to the problem of wife battery in relation to determinations of custody and access, the reforms suggested by American commentators and their applicability in the Canadian context, and the kind of reforms needed in Canada to deal with the problems Canadian women identify in this area.

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[3] *See* L.M.G. Clark, *Feminist Perspectives on Violence Against Women and Children: Psychological, Social Service, and Criminal Justice Concerns* (1989-90) 3 C.J.W.L. 420.

[4] Keenan, *supra*, note 2 at 422-23. This author points out that many battered wives are unable to afford legal fees and that the threat of a custody battle is therefore a "particularly effective weapon" a battering husband can use to keep the battered woman in the home, or to induce her to make economic concessions in order to retain custody. For the same reason, many battered wives would be unable to afford the cost of appealing trial decisions with which they were not in agreement.

II. The American Experience

Part of the reason why Canadian jurisprudence in this area has not developed the way it has in the United States is almost certainly due to the fact that most Canadian jurisdictions have not put in place the kinds of statutory provisions regulating custody and access which were the trend in the United States and which have sharply focused the issue of the relevancy of evidence of wife battery in custody and access determinations. With respect to U.S. trends, Linda Keenan comments as follows:

> The modern trend in statutory standards for custody determinations is clearly towards joint custody. Where a court awards joint physical custody, the parties share both legal responsibility for the child and physical custody. In an award of joint legal custody, on the other hand, the parents share equally the rights and responsibilities of making decisions regarding the health, education and welfare of the child, but one of the parents is granted physical custody. While some states merely provide for joint custody as an option when the parties agree, other states allow awards of joint custody over the objection of one parent, or create a presumption of joint custody. Under these statutory schemes, joint custody can be imposed on unwilling parties.[5]

The historical development of this trend is discussed by M. Kara:

> The concept of joint custody gained acceptance by legislatures and courts in the wake of significant social and political turmoil regarding women, marriage, sex roles, and parenting. At common law, both wife and children were the property of the husband and, in the rare event of divorce, custody was awarded to the father. This system gave way to legal recognition of the mother as primary caretaker of children. The courts protected the children's need for the continued nurturing by the mother by awarding custody to her, especially when children were "of tender age." Custody to the mother and reasonable visitation rights to the father have been the norm in the United States for the greater part of this century. In fact, legal joint custody awards have done little to change this pattern on a practical day-to-day basis. Joint legal custody often co-exists with sole or primary physical custody, usually by the mother. Many judges, especially males, have a tendency to award custody based on traditional perceptions of gender roles: "A man with a full-time job who provides *any* assistance in child rearing. . .looks like a dedicated father, while the woman with a full-time job who still does primary but not all caretaking looks like half a mother. . ."
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> Consequently, in 90% of cases today, mothers have *de facto* physical custody and children spend certain limited time with their fathers. Nevertheless, joint custody legislation by a majority of states and increasing awards of sole custody to the father indicate a philosophical shift away from the traditional resolution of child custody.[6]

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[5] *Ibid.* at 426.

[6] *Supra*, note 2 at 626-27 [emphasis in text].

However, as will be discussed in the concluding section of the paper, there is now some evidence suggesting that the U.S. trend may be moving away from presumptions of joint custody, and that this is due at least in part to problems identified in relation to abusive relationships.

So far, neither preferences for, nor presumptions in favour of, joint custody are characteristic of Canadian custody and access statutes.[7] The Yukon Territory is the only jurisdiction in Canada which has a presumption of joint custody in its governing statute. The relevant section reads as follows:

> In any proceedings in respect of custody of a child between the mother and the father of that child, there shall be a rebuttable presumption that the court ought to award the care of the child to one parent or the other and that all other parental rights associated with custody of that child ought to be shared by the mother and the father jointly.[8]

As will be noted, this provision creates not merely a presumption of *joint* custody, albeit a rebuttable one, but a presumption of what the American jurisprudence refers to as joint *legal*, as opposed to joint *physical*, custody. As will be discussed further, awards of joint legal custody, while not unknown in Canada, have so far been rare.[9] Where Canadian courts have approved or ordered joint custody, the case law appears to support the proposition that they have until now usually meant by joint custody what American commentators refer to as joint physical custody in which the parents each share equally in *both* day-to-day care and control of the child or children of the marriage and the other rights incident to custody such as the right to equal decision-making respecting the child's education, religion, and general health and welfare.[10]

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[7] S. Swift, Research Officer, Legislative Research Service, Current Issue Paper #89: *Joint Custody: An Overview of the Debate, Research, and the Law* (February 1989) Government of Ontario [unpublished, available from the Ontario Legislative Library] who notes at 18 that "there is no federal or provincial statute that expresses either a preference or creates a presumption in favour of joint custody."

[8] *Children's Act*, R.S.Y.T. 1986, c. 22, s. 30(4) [hereinafter *Children's Act*].

[9] *Re Nicholson and Nicholson* (1979), 24 O.R. (2d) 530, 99 D.L.R. (3d) 725 (Prov. Ct Fam. Div.) is one such case. However, it is somewhat unusual. Following court-initiated conciliation, the conciliation report recommended joint custody and both parents were in agreement with this. They agreed that decisions concerning the children were to be a joint responsibility, that each parent was to have an equal voice in the children's upbringing, education, and general welfare. Joint custody was awarded with care and control of the daughter to the mother and care and control of the son to the father. Thus, this is an example of joint legal custody and split physical custody.

[10] However, *see* S.M. Holmes, *Imposed Joint Legal Custody: Children's Interests or Parental Rights?* (1987) 45 U.T. FAC. L. REV. 300 at 300. She suggests that the concept of joint legal custody "is becoming a popular phrase among lawyers, social work professionals, the judiciary, the media, and politicians. It is receiving much attention as the direction for legal reform". While she does not explicitly say so, I presume she is referring to the Canadian context.

That Canada has not been so quick to get on the joint custody bandwagon is supported by Susan Swift who comments that "Canada has been more tempered in its response to this legislative surge and to the forces behind it. It is only recently that the *Divorce Act* was amended to allow the awarding of custody 'to one or more persons' (s. 16(4))."[11] She points out that at the time of writing, only four of the ten provinces have made similar statutory provisions for joint custody dispositions. Including the statutory provisions previously discussed with reference to the Yukon Territory, the number of Canadian jurisdictions having some specific provision respecting joint custody is increased to five; the other Provinces having provisions similar to those found in the *Divorce Act, 1985*[12] are Manitoba,[13] Ontario,[14] New Brunswick,[15] and Prince Edward Island.[16]

However, the relevant statutes of several Canadian jurisdictions contain provisions similar to that found in the Nova Scotia *Family Maintenance Act*, section 18(4), which states that "the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise (a) provided by the *Guardianship Act*; or (b) ordered by a court of competent jurisdiction."[17] While the effect of such provisions would seem to be merely declaratory of the fact that, during the course of a legal marriage (or,

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[11] *Supra*, note 7 at 1.

[12] S.C. 1986, c. 4, s. 16(4) [hereinafter *Divorce Act, 1985*].

[13] *The Family Maintenance Act*, R.S.M. 1987, c. F-20, s. 39(2), C.C.S.M. F20 [hereinafter *Family Maintenance Act*].

[14] *Children's Law Reform Act*, R.S.O. 1980, c. 68, *as am.* S.O. 1982, c. 20, s. 28(a) [hereinafter *Children's Law Reform Act*].

[15] *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, s. 129(2) [hereinafter *Child Services and Family Relations Act*].

[16] *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-31, s. 5(1)(a) [hereinafter *Custody Jurisdiction and Enforcement Act*].

[17] *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 18(4) [hereinafter Nova Scotia *Family Maintenance Act*]. *See also* the Newfoundland governing statute, *The Children's Act*, S.N. 1988, c. 61, s. 26(1) [hereinafter *The Children's Law Act*], which states that "[e]xcept as otherwise provided in this Part, the father and the mother of a child are equally entitled to custody of the child"; the Manitoba *Family Maintenance Act*, s. 39(1), which states that, subject to ss (2) which provides that either parent may make an application for custody of, or access to a child, "rights of parents in the custody and control of their children are joint" but states that the person with whom a child resides has sole custody in the case where the parents have never cohabited after the birth of the child; the Ontario *Children's Law Reform Act*, s. 20(1), which provides that "[e]xcept as otherwise provided in this Part, the father and the mother of a child are equally entitled to custody of the child"; and the Prince Edward Island *Custody Jurisdiction and Enforcement Act*, s. 3(1), which provides that "[e]xcept as otherwise ordered by the court, the father and the mother of a child are joint guardians of a child and are equally entitled to custody of the child". The Manitoba and Prince Edward Island statutes cited in *supra*, notes 13 and 16 respectively do not stipulate a "best interests" or "welfare" of the child standard of paramount consideration, while the Newfoundland, Ontario, Nova Scotia, and New Brunswick statutes do.

in the case of Nova Scotia, of a relationship between unmarried parties who have cohabited for one year), each parent is an equal guardian of the child and is therefore equally entitled to the care and custody of the child in the absence of any order to the contrary, at least one judge of the Family Court for the Province of Nova Scotia has interpreted the Nova Scotia provision as a presumption of joint custody.[18] This seems to confuse a description of the equal entitlement of both parents to custody in an ongoing relationship with a disposition utilized only on divorce or separation. As Sheila Holmes has commented:

> The term *custody* denotes legal and physical custody. In an ongoing marriage, parents are co-custodians of their children, with equal legal and physical rights. *Joint custody* is a term used after divorce or separation.[19]

Perhaps even more significantly, this interpretation is in conformity with the American concept of joint *legal* custody. The case in which this was decided is *Murray*.[20] The husband and wife separated in 1988 after fifteen years of marriage and the wife sought sole custody of their seven-and-one-half-year-old son. The husband sought joint custody. The Family Court awarded "joint custody, with physical care and control to the wife",[21] commenting that "joint custody" should not be confused with joint physical care and control. The Court stated that:

> Joint custody deals with decision making not physical control. When making a joint custody order physical care and control is allocated to one parent, with access to the other. Day-to-day decision making is made by the parent having control of the child at the time. Long-range decision making is made by both parents.[22]

The relevant law is stated to be subsections 18(4) and (5) of the Nova Scotia *Family Maintenance Act*, subsection 18(5) providing that the principle that the court shall apply in determining an issue of custody is that the welfare of the child is the paramount consideration. Without any discussion whatsoever, immediately after citing subsections 18(4) and (5), the trial judge concludes that "[t]he general law of this Province, therefore, is to recognize joint custody. But the welfare of the child is the major governing factor when a court decides whether or not to continue the pre-established legal condition."[23] This seems in

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[18] *Murray* v. *Murray* (1989), 93 N.S.R. (2d) 66, 242 A.P.R. 66 (Fam. Ct) [hereinafter *Murray*].

[19] *Supra*, note 10 at 301 [emphasis in text].

[20] *Supra*, note 18.

[21] *Ibid.* at 66.

[22] *Ibid.* at 71.

[23] *Ibid.* at 68.

fact to establish a presumption in favour of the pre-divorce/separation legal *status quo*, placing an onus on the party applying for sole custody to justify any change. Thus, it is not merely a presumption that custody *disputes* should be decided in favour of joint (legal) custody unless there are compelling reasons for not doing so, but a presumption that the pre-divorce/separation co-custodial rights of each parent should persist *despite* a divorce or separation, unless doing so is contrary to the welfare of the child. Since the "welfare" of the child is the overriding principle, one could construe the presumption here created to be a rebuttable one. Indeed, the decision holds that the parent opposing joint custody has to prove that joint custody is not in the best interests of the child. This case does, however, fit a trend to be discussed, namely that where joint custody is ordered against the wishes of one of the parties, it is usually in situations in which the court is satisfied that the parents can continue to co-operate in relation to the welfare of the child even if one or both of them are opposed to joint custody.

It should also be pointed out, however, that the court was mindful that the interpretation it placed on subsections 18(4) and (5) of the Nova Scotia *Family Maintenance Act* means that this *Act* is "[u]nlike the *Divorce Act, 1985* or its predecessor" in that it "clearly mandates that joint custody shall be the rule, unless the welfare of the child dictates otherwise."[24] This would entail, of course, that where sole custody is sought by either or both parents pursuant to a divorce, the provisions of the *Divorce Act, 1985*, and not those of the Nova Scotia *Family Maintenance Act*, would prevail, thus creating a conflict of laws and some confusion for parties seeking an order of sole custody from Family Court pursuant to a divorce proceeding.

In materials prepared for a presentation,[25] the trial judge in the *Murray* case argues that when faced with a custody dispute, the court should first "determine what type of order is in the best interests of the child and then rule on its workability."[26] He argues strenuously that varying types of joint custody orders should be utilized in this process and he cites many of the alleged benefits of such dispositions as well as some of the "negatives". But his overriding view is that considerations of what is in the best interests of the child should take precedence over other considerations, such as the fact that one party is opposed to a joint custody arrangement.

This should alert us to at least one potential but serious source of conflict between a "best interests", or "welfare" of the child test and the kinds of considerations which have militated against court-ordered joint custody against the wishes of one of the parties. Nowhere

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[24] *Ibid.* at 72.

[25] P. S. Niedermayer J., *An Overview of Joint Custody and a Discussion of Mobility Rights* (Address to Continuing Legal Education, 26 May 1990) [unpublished].

[26] *Ibid.* at 14.

in either the *Murray* decision itself, or Judge Niedermayer's paper referred to above, is there any discussion of the kinds of issues which have been raised in the United States in relation to this issue. In the list of "negatives" he discusses in relation to awards of joint custody, no mention is made of the fact that such awards are at least problematic, if not outright contraindicated, in relationships characterized by wife battery. This is particularly significant in that Judge Niedermayer contemplates the granting of such orders over the objections of one of the parties. At minimum, one would surely want to insist that an award of joint custody of any kind should not be granted over the objections of a battered wife.

In my view, Judge Niedermayer's position fails to take adequate account of the problems which have been identified in the United States arising from presumptions of joint custody. However, it would appear that while some courts are making decisions similar to the *Murray* decision, other jurisdictions with statutory provisions similiar to those in section 18 of the Nova Scotia *Family Maintenance Act* are not (yet) interpreting these provisions as presumptions of joint custody or as legislative preferences for continuation of the marital *status quo*. It is noteworthy as well that the Ontario *Children's Law Reform Act*, which contains a provision similar to that of section 18 of the Nova Scotia *Family Maintenance Act*,[27] also contains a provision which appears to make it clear that the equal co-custodial status of parents prior to separation or divorce does not give rise to any presumption of joint custody in a custody dispute following separation or divorce. This is contained in subsection 20(7) which reads as follows:

> Any entitlement to custody or access or incidents of custody under this section is subject to alteration by an order of the court or by separation agreement.

That this is the correct interpretation to be placed on subsection 20(1) of the Ontario statute is further supported by the fact that subsection 20(4) of that *Act* contemplates a change of the marital legal *status quo* respecting joint parental custodial rights even prior to the bringing of application for sole custody or the conclusion of a separation agreement. This section reads as follows:

> Where the parents of a child live separate and apart and the child lives with one of them with the consent, implied consent or acquiescence of the other of them, the right of the other to exercise the entitlement to custody and the incidents of custody, but not the entitlement to access, is *suspended* until a separation agreement or order otherwise provides.[28]

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[27] S. 20(1) which reads as follows:
Except as otherwise provided in this Part, the father and the mother of a child are equally entitled to custody of the child.

[28] R.S.O. 1980, c. 68, s. 20(4).

Until recently, the trend in Canada has been not to award joint custody over the objections of one of the parties. This is almost certainly a consequence of the fact that, as Susan Swift points out, "[t]he judicial history of joint custody in Canada has been marked by a reticence to award joint custody in all but 'exceptional cases'".[29] This flows from two Ontario Court of Appeal cases both decided in 1979, *Baker* v. *Baker*[30] and *Kruger* v. *Kruger*.[31] Susan Swift has suggested that these two early decisions "which have been followed by courts in the other provinces, have effectively precluded joint custody in all cases of contested custody."[32] *Baker* held that there is no presumption in favour of joint custody and that it was an "exceptional" disposition appropriate only for separated parents who could work together co-operatively in the interests of their children and who were stable, mature, and amicable. The Court held that it was an appropriate disposition only in situations which were "rarely, if ever, present in cases of disputed custody."[33] In *Kruger* the parties had established and maintained a joint custody arrangement before the trial on an application brought by the mother for sole custody. The trial judge ordered custody to the mother and the father appealed seeking an order for joint custody, with which the mother was not in agreement. The Court of Appeal denied the father's appeal stating:

> The fact remains that in this case, there is no agreement between the parties on the issue of joint custody. That fact, in my opinion, makes all the difference to the approach which should be taken by this Court to the question whether it should now seek to impose an order for joint custody. . .[34]

Susan Swift suggests that "the Court inferred an unwillingness or inability to cooperate from the contesting of proceedings".[35] I am in agreement with her contention that these two cases have continued to influence judicial decisions in Canada ever since, with the result that the ability of parents to co-operate in relation to their children is still, in Swift's words, "a prerequisite to an award of joint custody"[36] in Canada.

However, as evidence of a "softening" of the position that joint custody should be awarded only if one or both parties request it, and should not be awarded where one of the parents is opposed to it, albeit

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[29] *Supra*, note 7 at 19.

[30] 23 O.R. (2d) 391, 8 R.F.L. (2d) 236 [hereinafter *Baker* cited to O.R.].

[31] 25 O.R. (2d) 673, 11 R.F.L. (2d) 52 [hereinafter *Kruger* cited to O.R.].

[32] *Supra*, note 7 at 19.

[33] *Supra*, note 30 at 396.

[34] *Supra*, note 31 at 679. *See also Zwicker* v. *Morine* (1980), 38 N.S.R. (2d) 236, 69 A.P.R. *236 (S.C.A.D.)*.

[35] *Supra*, note 7 at 20.

[36] *Ibid.*

only if the court is satisfied that the parties are capable of co-operating, she cites *Faunt* v. *Faunt*.[37] *Parsons* v. *Parsons*[38] is also illustrative of this trend. In this case, a decision of the Newfoundland Supreme Court, pursuant to the terms of a separation agreement, the parties shared joint custody for three years following their separation. Both parties sought sole custody at the hearing of the divorce because of frustrations caused by the joint custody agreement. The Court ordered joint custody, holding that the arrangement had been reasonably successful despite the irritations and that the children were in favour of its continuation. This result was justified on the basis that it was in the best interests of the children. This case is also illustrative of a trend to see the prior existence of such an agreement as evidence of the ability of parents to co-operate even in the face of their objections at trial, which is now characteristic of cases in which joint custody is awarded over the objections of either or both parties.[39] Swift sums this up as follows:

> This element of parental cooperation is still crucial to the award of joint custody in Canada. It is fair to say that the Canadian judiciary has moved, but only slightly, from the very constrained circumstances in which joint custody could be awarded under *Baker* and *Kruger*. The Courts will now overlook the superficial objections of the parties if convinced that they are capable of cooperating.[40]

Many Canadian authors (and American authors published in Canada) have been extremely critical of presumptions of joint (legal) custody and of court-ordered joint custody, physical and/or legal, against the wishes of one of the parties and have argued strenuously against the introduction of such regimes in Canada.[41] Nor, as we have seen, has a judicial trend developed drawing a distinction analogous to the American distinction between joint physical custody, as opposed to joint legal custody, though there have been some notable exceptions to this as has already been discussed.

The prevalence of such statutory regimes in the U.S. has played a significant role in raising the issue of the impact wife battery should have in custody determinations:

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[37] (1988), 12 R.F.L. 331 (Alta C.A.).

[38] (1985), 55 NFLD & P.E.I.R. 226, 162 A.P.R. 226 (Nfld Unif. Fam. Ct).

[39] *See also Kamimura* v. *Squibb* (1988), 13 R.F.L. 31 (B.C.S.C.), and Swift, *supra*, note 7 at 20, with respect to this issue.

[40] *Supra*, note 7 at 20.

[41] An entire volume of the C.J.W.L. was devoted to the issue of women and custody. *See* A.M. Delorey, *Joint Legal Custody: A Reversion to Patriarchal Power* (1989) 3 C.J.W.L. 33, and M.L. Fineman, *Custody Determination at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality* (1989) 3 C.J.W.L. 88, for articles particularly critical of presumptions of joint custody and the way in which these have operated in the United States. *See also* Holmes, *supra*, note 10 and Swift, *supra*, note 7.

> The trend towards automatic awards of joint custody, along with greater reluctance to evaluate the relative fitness or fault of the parties, bodes ill for battered women. While no-fault divorce and custody standards are ostensibly motivated by the desire to minimize acrimony in family dispute settlement, these statutory trends are unrealistic to the extent that they fail to take into account the high incidence of domestic violence involved in marital breakdown.[42]

Myra Sun and Elizabeth Thomas comment as follows respecting the problems besetting the American battered woman as a result of these provisions:

> This tendency [to award joint custody even when one of the parties is opposed to it], especially when coupled with judicial reluctance to acknowledge the relevance of domestic violence evidence, creates a particular challenge for counsel who is faced with a batterer's joint custody claim.[43]

It has been for just this reason that the widespread adoption in the U.S. of statutory presumptions of joint custody has brought the issue of relevance of evidence of wife battery in custody determinations to the forefront. Indeed, the problems surrounding wife battery in the context of such provisions has challenged the desirability of the provisions themselves. M. Kara concludes that the institution of such regimes should be approached cautiously and must take account of evidence of a history of wife abuse:

> Joint custody is a new and largely unproven experiment in structuring family relations. Studies of its effects on children are inconclusive, premature, or non-existent. The logistics of joint custody are often cumbersome for parents and can be dislocating for children. In making a custody determination, the judge to a great extent shapes the child's future. In order to meet this responsibility, the panelists emphasized the need for very careful case-by-case evaluation of families seeking joint custody and agreed that a history of domestic violence within a family called for particular attention.[44]

This writer goes on to provide a detailed outline of the factors indicating a need to re-evaluate statutory presumptions of joint custody:

> The aggregate of the panel's opinions and reservations suggests a conservative approach to joint custody. Judge Galvin provided a possible model for such an approach. Her state, she said, was a late arrival in the field of joint custody and perhaps had had a chance to profit by the pioneering efforts of others. In Ohio, joint custody may be awarded only if both parents agree to it. Parents must submit their own joint custody

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[42] Keenan, *supra*, note 2 at 427.

[43] M. Sun & E. Thomas, *Custody Litigation on Behalf of Battered Women* (1987) 21 CLEARINGHOUSE REV. 562 at 575.

[44] Kara, *supra*, note 2 at 629.

> plan to the court. This plan must be evaluated by a court social worker. The court must then review the plan in light of the best interests of the child. There is no presumption that joint custody is preferable to any other form of custody or that it is necessarily in the children's best interest. The plan must be in effect for ninety days before the court can give it final approval. "The immediate role of the court," said Judge Galvin, "is to encourage and facilitate the new concept of joint custody. . .*where appropriate*".[45]

In light of the foregoing one must applaud the reluctance of most Canadian legislatures to adopt such provisions and add one's voice to the body of opinion which opposes their introduction. It is certainly to be pointed out that Canadian and American authorities are in agreement that joint custody can be a most satisfactory resolution of this issue.[46] However, as we have seen, Canadian authorities and the judiciary have taken the view that this is only appropriate where both parties freely consent to it, without duress or intimidation by their spouses, and is only workable when the parties can communicate openly and without marked hostility or conflict. Since this is rarely the case in relation to families characterized by wife assault perpetrated by the husband, there has been no tendency to see such cases as appropriate candidates for this form of disposition, unless arrived at by mutual consent following negotiation.[47]

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[45] *Ibid.* at 630 [emphasis in text].

[46] *Ibid.* 627-29; *see also* C. Davies, FAMILY LAW IN CANADA, 4th ed. (Toronto: Carswell Legal Publications, 1984) at 547-49.

[47] *See Smith* v. *Smith* (1989), 92 N.S.R.(2d) 204, 237 A.P.R. 204 (S.C.T.D.) as an example of a recent Canadian case illustrating that judges are often favourably disposed towards joint custody and see themselves as having the authority under the *Divorce Act, 1985* to make such an award even if it is not sought by the parties, but believe that it is only appropriate in some circumstances. This was a case involving wife battery and is one of those included within the cases located in relation to the preparation of this paper. The trial judge commented as follows at 207:

> I think it must be acknowledged from the psychological assessments that were done, and the other evidence, that Mr. Smith is indeed a very strong person and he is a very determined person. He acknowledged himself that he is subject to temper outbursts which have got him into difficulty, as he said, in the past. Although I favour joint custody generally, and I thought that that might be the solution here, I have concluded after considering all of the evidence, and in particular the opinions expressed by the psychologists and the great concern expressed by Mrs. Smith, that it is not a satisfactory alternative in this instance. It seems to me that in light of the antipathy that is currently existing between the parties that it would just be inviting more conflict and more unpleasant confrontations.

III. THE CANADIAN EXPERIENCE

Current Canadian statutory regimes governing custody and access determinations have already been discussed at some length but it remains to be said that in those Canadian jurisdictions which are governed by regimes in which either the "best interests" or "welfare" of the child is said to be the paramount consideration in the making of such orders,[48] they are in much the same position as those U.S. states which have not enacted statutory presumptions of joint custody:

> States that do not require joint custody by statute generally adhere to the "best interests of the child" standard in making custody determinations. This formula for determining custody gives broad discretion to the court in choosing the factors to be considered and how a particular factor will be weighed.[49]

However, one major and important Canadian legal regime governing custody and access awards also includes a "friendly parent" provision. Such provisions have been the second biggest factor pointed to in the U.S. as problematic in the context of wife battery. Since constitutionally divorce is a matter solely and exclusively within the jurisdiction of the Federal Government of Canada,[50] the provisions of the *Divorce Act, 1985* apply across Canada in all Canadian provinces and territories. This statute is therefore of major significance in determining how custody disputes will be resolved in the Canadian context. It is the only Canadian jurisdiction which adopts a "friendly parent" provision. The provision reads as follows:

> In making an order under this section, 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

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[48] *See, e.g., Divorce Act, 1985*, s. 16(8); the British Columbia *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 24(1) [hereinafter *Family Relations Act*]; the New Brunswick *Child Services and Family Relations Law Act*, s. 129(2); Saskatchewan's *The Infants Act*, R.S.S. 1978, c. 38, s. 3(3) [hereinafter *the Infants Act*]; Newfoundland's *The Children's Law Act*, s. 25(a); the Ontario *Children's Law Reform Act*, s. 24(1); and the Nova Scotia *Family Maintenance Act*, s. 18(5).

[49] Keenan, *supra*, note 2 at 427.

[50] *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(26) under which the Federal Government of Canada has sole and exclusive jurisdiction over marriage and divorce.

> that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.[51]

In addition, this statute includes a direction that,

> [i]n 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.[52]

No further specification is given as to what is, may be, or is not "relevant" to assessing the ability of a person to act as the parent of a child.

As noted above, some Canadian statutes such as the *Divorce Act, 1985*, subsection 16(9), contain provisions either prohibiting parental conduct from being taken into account unless it is relevant to the ability of the person to act as a parent, or otherwise specifying and/or limiting the ways in which such evidence may be used in making determinations respecting custody and access.[53] Other jurisdictions provide that parental conduct shall be taken into account,[54] and others simply do not mention conduct one way or the other.[55] Where the

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[51] S.C. 1986, c. 4, s. 16(10). With regard to questions of variation, rescission, or suspension of existing custody and access provisions granted pursuant to a divorce, s. 17(9) also imports a "friendly parent" provision into proceedings for variation of an existing custody arrangement. It is precisely the type of provision to which American commentators have pointed as particularly problematic for battered wives who have been awarded sole custody on divorce but who subsequently find themselves threatened by an application for sole custody brought by their abusive ex-husbands. As is not surprising, they frequently remain hostile to the husband and are virtually certain to be opposed to changes in custody and access arrangements which will have the effect of making their contact with the children subject to his discretion and control. The provision reads as follows:

> In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[52] S.C. 1986, c. 4, s. 16(9).

[53] Under the British Columbia *Family Relations Act*, for example, s. 24(1) lists the factors which shall be considered, which includes the "capacity" of a person to whom custody rights may be granted to exercise the rights and duties adequately, s. 24(3) states that conduct which does not substantially affect a factor listed in s. 24(1) shall not be considered, and s. 24(4) provides that where the court does consider conduct under s. 24(3), it shall do so only to the extent that the conduct affects a factor set out under s. 24(1). Like B.C., Saskatchewan's *The Infants Act*, s. 3(3)(c) provides that one of the factors to be taken into consideration shall be the "capacity to be a parent" but is silent with respect to conduct.

[54] The Alberta *Domestic Relations Act*, R.S.A. 1980, c. D-37, s. 54(1) and (2), and s. 56(2)(b).

[55] *See, e.g.*, the Nova Scotia *Family Maintenance Act*.

latter is the case, parental conduct can be brought in under the "best interests" or "welfare" tests utilized in arriving at a determination.

With respect both to "friendly parent", and to provisions prohibiting consideration of parental "conduct" in reaching a custody determination, American commentators consistently point out that they create great difficulty in relation to cases involving wife battery. Linda Keenan makes the following comments:

> A mother may be deemed "uncooperative" about visitation when she attempts to avoid exposure to continued threats or beatings from the father. Ironically, if the woman has remained in the violent situation or attempted to leave and returned, this may be cited as further evidence of emotional instability. . . When courts fail to consider evidence of spouse abuse as relevant to fitness for custody, the battered woman may lose custody as a result of problems caused by the abuse itself. Even where the victim's charges of abuse are admissible, she may be prejudiced in certain situations by the fact that she made the allegations. For example, California includes a "friendly parent" provision in its joint custody statute, giving preference in a sole custody award to the parent most likely to encourage contact between the children and the other parent. Because of the "friendly parent" provision, the California statute places the burden of proof on the party opposing joint custody. Michigan's custody statute creates a presumption favoring joint custody that can only be overcome by "clear and convincing evidence". A battered woman risks losing custody altogether if she fails to meet this stringent burden of proof. If the woman was previously reluctant to seek help or if the police failed to respond, this burden can be insurmountable.[56]

In discussing how these matters are dealt with under a "best interests of the child" standard, she comments as follows:

> In applying the standard, courts appear increasingly reluctant to scrutinize a parent's character. In addition, only four states have statutes that allow a court to consider the causes for marital breakdown in determining custody, and several states have adopted language from the Uniform Marriage and Divorce Act that precludes judicial consideration of parental conduct that "does not affect his relationship to the child". This language can be construed to exclude evidence of spouse abuse where courts fail to recognize its effect on children.[57]

Even though Alaska's custody statute requires the court to consider marital violence in determining whether to award joint custody, it is unclear whether this requires consideration of wife battering in all custody disputes, or only in those in which joint custody is an issue, and the statute "does not require consideration of domestic violence in *structuring visitation*".[58]

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[56] Keenan, *supra*, note 2 at 424-25.
[57] *Ibid.* at 427.
[58] *Ibid.* at 429 [emphasis added].

Problems surrounding access or visitation in relation to families characterized by histories of wife battery are also discussed by Myra Sun and Elizabeth Thomas:

> A growing number of states penalize parents who deny visitation, either by weighing this conduct against them in an initial custody decision, or by making it a basis for custody modification. These "friendly parent" provisions place the burden on the battered woman to explain her reluctance to allow visitation. . . Visitation orders with provisions that ensure the client's safety and that of the children may make compliance easier. While the victim may legitimately wish to prevent all contact between the batterer and the children, she should understand and accept that visitation is likely to be awarded. . . However, the court should order that visitation be arranged to protect the victim's safety. Protective arrangements should be drafted to meet a client's individual needs.[59]

As is readily apparent, the weight of U.S. opinion is that presumptions of joint custody, friendly parent provisions, and provisions excluding evidence of parental conduct unless such conduct can be clearly demonstrated to be contrary to the best interests of the child, or to render the parent "unfit", all conspire to further disadvantage the already disadvantaged battered woman.

However, an analysis of recent Canadian case law involving these issues does not demonstrate that the Canadian judiciary is interpreting the "friendly parent" and "conduct" provisions of the *Divorce Act, 1985*, or the provisions regulating custody and access determinations in any of the provincial or territorial custody regimes, in a way which appears to be prejudicial to protection of the interests of the battered wife. They routinely allow evidence of wife abuse to be admitted in custody and access matters,[60] solicit expert opinion in the form of

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[59] Sun & Thomas, *supra*, note 43 at 575-76.

[60] *Jeans* v. *Jeans* (1980), 44 N.S.R. (2d) 716, 83 A.P.R. 475 (T.D.) [hereinafter *Jeans*]. In this case Hallet, J. found that the respondent had a serious drinking problem and, when drinking, had a tendency toward violence and had on several occasions struck the wife. He granted sole custody to the wife with access to the husband on conditions suggested by the wife that the husband be required to refrain from being under the influence of alcohol and drugs while exercising access and himself imposed the further condition that the wife should have a sole discretion to refuse access if the husband violated these terms or showed signs of alcohol or drug use when he picked the children up.

home-study reports and oral testimony,[61] appear to have no difficulty seeing wife battery as an issue relevant to considerations of the welfare and best interests of children,[62] and give it the weight that it deserves in the sense that they most often award sole custody to the wife in such situations, frequently with access structured to protect the safety of the wife and/or children.[63] In making such awards, they typically stress the primary care-giver role of the wife and appear to recognize that abusive husbands frequently exhibit low impulse control and a tendency to commit acts of violence which also constitute a threat to the safety of children and does not fit them for the role of custodial parent.[64] They grant *ex parte* interim orders in the form of peace bonds restraining the husband from further contact with the wife and children, and for sole custody to the wife, with either no, or only supervised,

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[61] *Grills* v. *Grills* (1982), 38 A.R. 475, 30 R.F.L. (2d) 390 (Fam. Ct) [hereinafter *Grills* cited to R.F.L.]. In this case, the Court ordered a custody investigation following the granting of an interim order of sole custody to the wife and interim access to the husband. Both parties were seeking sole custody of the five-year-old child of the marriage. On the final hearing of the matter, Bowker J. rejected the recommendation of the custody report which would have given custody to the father and found that on considering the whole of the evidence, the wife was preferable to the husband as the custodial parent on the grounds that she had always been the primary care-giver and that her plan for the case of the child while she worked was much more realistic than that of the husband. He found that "[t]he proposal presented by the father indicates little comprehension on his part as to the basic needs of a young child" (at 397). He also reduced the husband's acess in order to facilitate the fact that the wife was also working and he structured the access in such a way as to prevent what he found to be "harassment" of the wife by the husband and warned that failure to abide by these provisions could lead to termination of access. *See also Hebb* v. *Hebb* (1986), 76 N.S.R. (2d) 102, 189 A.P.R. 102 (T.D.) [hereinafter *Hebb* cited to N.S.R.] which was a very messy and hotly contested custody battle in which it was found that "[t]he conduct of both parties herein leaves much to be desired" (at 108). The presiding judge confirmed the recommendation of the social worker who had prepared a home-study report and awarded sole custody to the wife, despite her particular difficulties, on the basis that she had always been the primary care-giver. He concluded "that it would be positively harmful to these children were they removed from their mother" (at 108) and stated that he "would be deeply concerned about the children being exposed to violent temper outbursts on the part of their father" (at 109).

[62] *Grills*, *ibid.* at 394, where Bowker J. states that "[o]ne can only infer from these admitted facts that the father does have a propensity to physical violence which could have a bearing on the well-being of any child in his care."

[63] *See Grills*, *ibid.*; *Jeans*, *supra*, note 60, and *Hebb*, *supra*, note 61.

[64] *Grills*, *ibid.*; *see also Hebb*, *ibid.*

access to the husband pending final determination of the matter.[65] On occasion they will also deny access to the father altogether[66] and are careful to scrutinize applications to vary access from supervised to

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[65] *Taylor* v. *Taylor* (16 September 1985) (N.S.C.A.) [unreported]. Jones, J.A. heard this matter on the appeal of the respondent husband. The matter of custody and access had first been heard pursuant to divorce in the Supreme Court Trial Division when both parties had been seeking sole custody. Nathanson, J. awarded sole custody to the wife and access to the father under strict terms and conditions. The petitioner wife, respondent on the appeal, subsequently refused access to the husband because she was afraid of Mr. Taylor and did not feel that the children were safe with him, which fear was based on "incidents" which occurred during the marriage. The husband then brought an application in Family Court for enforcement of access, which was refused. The judge held that "the access portion of the original order be terminated unless and until there is medical evidence that the children will not be endangered." This recommendation of the Family Court judge was confirmed by Glube, C.J., of the Supreme Court Trial Division, which decision was then appealed. Jones, J.A. found that there was no evidence before the Family Court to support the recommendation for termination of the husband's access, ordered a rehearing of the original application before the Supreme Court Trial Division, but suspended the appellant's right of access until such time as the rehearing was completed, stating that "[t]he primary consideration in determining the right of access must be the welfare of the children." (at 3-4 of the written decision concurred in by Matthews, J.A.); *see also P.(M.R.)* v. *P.(P.)* (1989), 19 R.F.L. (3d) 437 (N.S. Co. Ct) [hereinafter *P.(M.R.)*].

[66] *Michel* v. *Hanley* (1988) 64 SASK. R. 249, 12 R.F.L. (3d) 372 (Q.B.) [cited to R.F.L.]. The parties lived in a common law relationship from March, 1984 to May, 1986. A child was born to them in April, 1986. The mother separated from the father following the most extreme incident of the violence which had begun in the fall of 1984. The father had seen the child only once since the parties separated. An interim order was in place granting him supervised access. The mother had refused to allow the father to exercise his access. The father was seeking a permanent order granting supervised access for three hours on alternate Sundays. It was admitted in evidence that the father had abused both alcohol and drugs during the course of the marriage and that he had plead guilty to a charge of assault causing bodily harm to his wife. At the time of hearing, he had received treatment for his substance abuse problems and had not used drugs since October, 1986, nor alcohol since December of the same year. The presiding judge noted that while the father had never attempted to harm the child, he had on different occasions threatened both the mother and child's grandmother that he would do so. He also noted that there was no evidence before him as to the fact that alcohol was the principal cause of the applicant's violent outbursts. He stated that there was no evidence that any benefit would accrue to the child through visits with the father and that there may be distinct disadvantages to granting him access since the mother was now engaged to a man who treated the child as his own and planned to adopt him. Access was therefore denied. The judge in this case explicitly rejected the position that there was an alleged legal principle "that a parent has a 'right' to access to a child", stating that "[m]erely determining that the granting of access will not pose a clear danger to the child, and thereby granting access because of a 'right' to access, does not resolve the question as to whether the granting of access would be in the best interests of the child" (at 374).

unsupervised where abuse of the wife and/or children has been demonstrated.[67]

They also seem sensitive to the problems created for the battered wife by the abuse itself, and have shown no reluctance to admit expert evidence relating to this issue. In *Young* v. *Young*[68] there were two children of the marriage. Following the separation of the parties, the children resided with the wife. Both parties sought sole custody. The wife alleged emotional, physical, verbal, and sexual abuse by the husband. The children expressed a desire to live with the father and have reasonable access to the mother. Various experts testified that the wife fit the mould of the abused woman and as to the effects on children of being witness to her abuse. The trial of the matter was heard in the Supreme Court. In awarding sole custody to the wife the trial judge found that it was in the best interests of the children that the *status quo* should prevail and that the children should remain with the wife. He comments as follows:

> I am of the view that it is in the best interests of the children that the status quo should prevail and they remain in the custody of Mrs. Young. . . . I am mindful of the fact that the stated preference of the children should be considered — and I have considered it — however,

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[67] *P.(M.R.)*, *supra*, note 65. The facts in this case were that the parties separated in 1984 subsequent to which the father was convicted of sexual assault of the three older children. There were four children of the marriage. In 1987, the parties consented to the father's having supervised access to the two younger children. The husband attempted to rehabilitate himself and applied for unsupervised access. The trial court heard evidence of the father's rehabilitation but not of the best interests of the child. The trial judge awarded unsupervised access to the father and the mother appealed. Hearing the appeal, Palmeter, C.J. Co. Ct, found that the trial judge erred in allowing unsupervised access in the absence of evidence concerning the best interests of the children. He accordingly allowed the appeal and remitted the matter back to Family Court for a new trial. In the course of his deliberations he commented as follows (at 443):

> The learned trial judge gave the respondent unsupervised access to the children because, to paraphrase [the trial judge], he trusted him. In my opinion, this finding of trust was clearly inconsistent with the learned trial judge's own findings of fact concerning the respondent. Using many of the words found in the decision, [the trial judge] found the respondent to be manipulative, dominating, duplicitous, dishonest, a bad example to his children and lacking in responsibility. In my opinion, the evidence adduced also showed the respondent to be demanding, abusive and violent. . . . The learned trial judge did not even accept the evidence of Dr. Brooks, the respondent's own expert, that the respondent was not a pedophile. At p. 277 of the decision [the trial judge] categorically stated that, in his opinion, the respondent was a pedophile. . . . With deference, in my opinion, the decision of the learned trial judge to trust the respondent and grant him access cannot be supported by the evidence and his own finding of fact. In my opinion, it is clearly wrong and perverse and I will allow the appeal on this ground also.

[68] (1989), 19 R.F.L. (3d) 227 (Ont. H.C.).

> there are other factors I should look at, notably, the abuse. I accept the evidence of Mrs. Young that she was abused by Mr. Young and I find the abuse to be emotional, verbal, physical and sexual. . . . Where her evidence of abuse differs with that of Mrs. Young [*sic*], I prefer and accept her evidence. I was impressed with her truthfulness and sincerity as a witness. I cannot say the same for Mr. Young. I found him to be glib and evasive. *The relevancy of this finding of abuse is that it goes to Mr. Young's ability to parent the children on a full-time basis.* I accept the expert evidence of Dr. Butler and Barbara Pressman that:
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> 1. An abuser who goes without therapy will continue to abuse in another relationship;
> 2. Children who witness abuse can become abused even though the abuse is not intentionally directed at them;
> 3. Abused male children often become abusers and abused female children may become compliant to abusers.[69]

He awarded liberal access to the husband, but stated that it should be "structured and reliable" and attached specific conditions to its exercise.

This decision appears to be a model of what one could expect when confronting this problem. In an annotation to the decision,[70] James G. McLeod comments that this case "is a major departure from previous case law to the effect that just because a person was an abusive spouse did not mean that he or she was a poor parent."[71] However, it might be pointed out that the trial judge did not find that Mr Young was a "poor parent". To the contrary, he states expressly that "[h]e is a devoted father who spends as much of his free time as he possibly can with the children"[72] but found nonetheless that the fact of the abuse of his wife was relevant to his ability to parent on a full-time basis and that Mrs Young was "best able to provide for the

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[69] *Ibid.* at 234-35 [emphasis added].
[70] *Annot.: Young v. Young* (1989) 19 R.F.L. (3d) 227.
[71] *Ibid.* at 228.
[72] *Ibid.* at 231.

children the nourishment required for their social and moral development."[73]

As we have already seen, the Canadian judiciary appears also to take a cautious approach to varying access from supervised to unsupervised where there is a history of domestic violence, and typically

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[73] *Ibid.* at 235. *See also Cytrynbaum* v. *Cytrynbaum* (12 February 1990), Vancouver D66051 (B.C.S.C.) at 6:

> The petitioner [husband] appears to have been incapable of controlling his temper. Business pressures, and later, marital discord resulted in abusive conduct on his part throughout the marriage. In the case of the children, that abuse was largely verbal, but the respondent is described by her family physician as an abused spouse. At one point or another, all of the children have expressed some fear in respect of his outbursts. The petitioner's attitude toward the documented history of physical abuse involving his wife ("She must have liked it because she stayed around"), falls far short of convincing me that he recognizes fully the problem which he had.

In this case, the appeal judge rejected the husband's expert witness' evidence which would have awarded custody to the father, partly because of his new relationship with a woman whom he believed would be a very good parent, and partly because he found the respondent wife to be "underreactive and passive" and found that "the best interests of Laurie dictate that she remain in her mother's custody" (at 12).

See also Nelson v. *Nelson* (24 July 1990), Prince Albert 03386 (Sask. Q.B.):

> The petitioner [husband] believes corporal punishment is acceptable, not for any philosophical reason but solely because it was inflicted upon him. He also appears to endorse spousal abuse as acceptable behaviour. Although the petitioner's animosity towards the respondent does not permit any generalization, in that incompatible spouses will often display rancorous attitudes to one another which they would never even consider as appropriate with respect to any other individuals, whether strangers or enemies, nevertheless the petitioner does not consider it inappropriate to involve the children in acrimonious confrontations with the respondent. The overwhelming desire of the petitioner to inflict harm on the respondent surmounts any consideration for the welfare of the children.

The appeal judge concludes at 18:

> There is no reason to fear that the petitioner would ever deliberately do anything to harm his children. He undoubtedly possesses nothing but the best intentions insofar as the welfare of the children is concerned. But there is reason to be concerned that his inability to disguise from the children his extreme hatred of the respondent, and his concomitant self pity, may cause emotional problems in the children and, at the very least, instill in them less than wholesome attitudes toward the inherent dignity of each individual in our society.

On this basis he awards custody to the respondent mother.

require expert evidence to assist them in reaching a decision.[74] *Cameron* v. *MacDonald*[75] also illustrates that in such circumstances the courts are not averse to requiring that the abusive father attend counselling before they will consider making such a change. In this case, the wife was awarded sole custody with reasonable access to the father in 1986. They separated when the wife sought refuge in Tearman House, a home for battered women and children in New Glasgow, Nova Scotia. In 1988 the wife applied to vary the order to restrict the father to daytime access due to his propensity for violence. On the hearing of this matter in Family Court, the trial judge restricted access to daytime for a seven-week period but then permitted overnight access. The wife appealed to County Court seeking only supervised access and no overnight visits until the husband sought counselling. Evidence was also heard as to the fact that the father had physically abused his other children of a previous relationship. In rendering his judgement, the appeal judge discussed the importance of protecting children from assault by parents and stated that the abusive manner in which the husband had treated other children indicated a real possibility of danger of injury to the child if the father had unsupervised access. He ordered no unsupervised or overnight access until the husband produced a certificate from a psychologist or psychiatrist stating that he did not constitute a risk to the child.

One problem identified in the American literature is that women who flee from abusive relationships, leaving the children behind, may face being held to have "abandoned" the children, even when they seek refuge in a home for battered women.[76] No such tendency is evident in the Canadian cases. In *Renaud* v. *Renaud*[77] both parties were seeking sole custody. Following the separation, the wife and children remained in the home. However, when the wife left the children with a babysitter, the husband moved in and locked her out. Thus, at the time of hearing the husband had *de facto* custody and the wife reasonable access. The husband had denied access to the wife for

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[74] *See* cases cited under note 65. *See also K.(G.K.)* v. *L.(R.J.)* (1990), 25 R.F.L. (3d) 151 (Man. Q.B.). Here, following affidavit evidence of the wife as to the husband's drug and alcohol abuse, physical abuse to the children and the wife, alleged sexual abuse of the children, his lack of temper control and his suicidal tendencies, in support of her request that the husband undergo mental examination before being granted unsupervised access, the trial judge ordered a psychological examination of the husband to ascertain whether these tendencies may result in harm to the children, directly or indirectly, and what form of access, if any, would be in the best interests of the children.

[75] (1989), 92 N.S.R. (2d) 12, 20 R.F.L. (3d) 119 (Co. Ct).

[76] Keenan, *supra*, note 2 at 430. *See also* in *supra*, at 424, n. 130 which cites a decision in which a woman who had fled with her children to a shelter for battered women then faced an award of joint custody with physical custody to the father "because the court concluded that the shelter. . .was not an adequate facility for children." Happily, this decision was reversed on appeal.

[77] (1989), 22 R.F.L. 366 (Ont. Dist Ct).

a time but she obtained reasonable access when he agreed to a consent order to this effect. The relationship had been an abusive one and the wife had fled with the children to a shelter for battered women some six months prior to the separation. The trial judge found that both parties were "warm and loving parents and both are capable of giving fit and proper care to the children."[78] However, the character of the father was the reason that he gave for ultimately deciding to give sole custody to the wife:

> The husband impresses me as a devoted father who is quite capable of managing the best interests of his daughters. . . . However, my main concern is the character of the husband. Following the separation, he acted in a mean-spirited manner in not allowing the wife access to the children. . . . The wife had tried on many occasions to contact the children by telephone but she was repeatedly denied this meager access. His refusal to deliver to the wife her bicycle is an example of his vindictiveness. I am also concerned about the husband's fits of anger. During the marriage he was abrasive towards the wife and has continued to be so since the separation. I accept the wife's evidence that he physically assaulted her on two previous occasions during the marriage. I also accept her evidence that he verbally abused her during the marriage and also since the separation. Although the husband during the past year has parented the children in a fit and proper manner, I am not satisfied that it is in their best interests that he continue as custodial parent. In my view what is in the "best interests" for these two girls of tender years is that they reside with their mother. She was their primary caregiver from birth up until her banishment from the home by the husband. The husband has proven himself as a good parent; however, in the final analysis the girls are better off with their mother.[79]

However, lest we paint too rosy a picture of the current approaches taken by the Canadian judiciary to these issues, three of the cases examined reveal attitudes which appear to be more in line with those noted in the United States. The first of these is *Clothier* v. *Ettinger*.[80] In this case the husband brought an application to vary a consent order denying him access until a psychological examination was performed. Prior to the granting of that order, a previous consent order provided for access one day per week. The husband was seeking to have that order reinstated and the wife sought continued denial of access. As the trial judge saw it, the issue was whether or not the child was afraid of the father. The wife said she was but this was contradicted by the evidence of two third parties. The judge found that the child had learned any fear she has of her father from her mother and granted him limited and specific access on the basis that "children have a right to be influenced in their upbringing by both parents" and that "these rights of the child are not discontinued except in the most exceptional

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[78] *Ibid.* at 368.
[79] *Ibid.* at 369.
[80] (1989), 91 N.S.R. (2d) 428, 233 A.P.R. 428 (Fam. Ct) [cited to N.S.R.].

cases."[81] These findings were made despite the following comments made by the trial judge:

> Their relationship was not good one, there were many arguments, physical violence and abuse of drugs and alcohol. Both parents have been convicted of drug related offenses. I am satisfied on the evidence that Gary Clothier, from the time of the couples' return to Nova Scotia in May 1982 until last year, harassed Mrs. Ettinger and various members of her family. He has spied on them, made threats to them and caused a lot of upset and turmoil to many people. Mrs. Ettinger has understandably been afraid of Mr. Clothier. He has assaulted her on more than one occasion and was verbally abusive to her. At times, when Leslie was an infant and a toddler, she was present to observe this behaviour.[82]

Although cast in terms of the "rights" of a child to access to both parents, it is difficult not to see this as essentially an issue of parent's rights, particularly paternal parent's rights, and as illustrative of what one American commentator refers to as a "traditional deference to paternal authority" which she states is the tradition reflected in the history of custody law in the United States.[83] In the face of the facts in this case, one does have to ask whether the issue of the child's fear is the relevant one. There is no evidence from the decision as reported that there was any expert evidence as to the effects on the child of having witnessed the husband's abusive behaviour, or as to the effects further contact with him may have on her, which is surely relevant to a finding that reinstating the access would be in the best interests of the child. I also have some difficulty in the judge's finding that the wife's fear of the husband is justified but that since the child is not afraid, she should be entitled to her rights of access. Surely whether or not the child is afraid is irrelevant to the issue of what is in her best interests since it seems logical to assume that if the mother's fear was justified, the child's fear would also be justified. Children, especially young children, do not always know when they should be afraid, which is why "streetproofing" programs for children have been developed. But surely it is the justification for the fear which is relevant rather than the existence of the fear itself.

The second case to be discussed raises a different issue though one which is also a relic of the tradition of paternal authority out of which our modern law of custody has developed. *Peterson* v. *Peterson*[84] arose from the application by the wife to vary an *ex parte* order granting interim custody of two children to the husband after the couple separated when the husband learned of the wife's adulterous

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[81] *Ibid.* at 429.
[82] *Ibid.* at 428-29.
[83] Keenan, *supra*, note 2 at 411.
[84] (1988), 85 N.S.R. (2d) 107, 216 A.P.R. 107 (Co. Ct) [cited to N.S.R.].

affair. The wife was seeking custody. The Court dismissed the application, finding that it was in the best interests of the children that the husband should retain interim custody pending a final disposition of the matter following home-study reports. The evidence is lengthy and I will attempt to summarize it as briefly as possible. The incident which precipitated the separation was that the husband, armed with a metal bar, kicked down a motel room door, found his wife in bed with another man with whom he suspected she was having an affair, and began beating them both.

The testimony of the physician who attended her was that she was hit over the head with a metal bar. The husband was subsequently charged with assault. The husband also made their seven-year-old son witness the beating and his wife's humiliation. Nor was this the first incident of violence. Two other incidents are mentioned and discussed in some detail by the judge, both of which involved physical assaults against the other child by the husband. With respect to each of these three violent incidents, the judge made the following specific comments. With respect to the beating of the wife with the metal bar, he commented:

> [H]e displayed a lack of ability to control his violent tendencies that must be considered relevant to his ability to act as a parent of a child.[85]

In relation to the first incident involving the son, he stated:

> The disproportionately violent reaction to the crying of a four year old is conduct relevant to the ability of a person to act as the parent of a child.[86]

And in relation to the second incident involving the four-year-old son, he noted:

> That is the behaviour of a person with dangerously weak control over his violent predisposition. It is conduct relevant to his ability to act as a parent of a child.[87]

There was testimony by the wife that he had grabbed her and shoved her around many times. She stated that "[w]henever he was in a foul mood it would end up to be abuse on me".[88]

Despite these findings, and findings that the wife had better parenting skills and had been the primary caregiver, he found that preserving the *status quo* was in the best interests of the children, albeit stressing that this is only an interim, rather than a permanent,

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[85] *Ibid.* at 113.
[86] *Ibid.* at 113-14.
[87] *Ibid.* at 114.
[88] *Ibid.*

order of custody. He did increase the access to the wife. In this case it is difficult to escape concluding that the judge felt that the misconduct of the wife justified the result. Despite the fact that he accepted the evidence as to the husband's long-standing violent disposition, which was evident even before the couple were married, he states that there is no evidence of "intolerable cruelty" on his part and that it had been "tolerated" by the wife for the eight years of the marriage. This, he said, was not what broke up the marriage. What did break it up was the wife's adulterous relationship:

> The marriage came to a conclusion and the ideal lifestyle of the children ended, because Marlene Peterson allowed herself to become infatuated with Norman Smith. . .That factor appears to be the only fresh element which could account for the sudden deterioration in the marital relationship.[89]

"Ideal lifestyle" and "sudden deterioration" indeed. In commenting further on the conduct of the wife, he states:

> I do not find that it has been proven beyond a balance of probabilities that the act of adultery in which she was discovered represented a deliberate intention on her part to gamble with the fortune of her children, nor to put her desires ahead of the interests of the children. That was, however, the effect of her actions.[90]

But it was not her actions, but the judge's decision, which had that effect. One has difficulty not seeing this as punitive action against the wife for her marital misconduct, which is, in the face of the ongoing and long-standing violence of the husband against both the wife and the children, somewhat difficult to regard as justified. Why not view his continuing violent conduct as constructive desertion? Just as disturbing is the suggestion that the wife condoned the continuing violence of the husband and that the violence was therefore not a significant factor leading to the breakup of the marriage. This is just the sort of case which would seem to have demanded that the wife be allowed to continue in exclusive possession of the matrimonial home with the children at least until a final determination of the matter. His misconduct has been rewarded while hers has left the children in the control of someone found to be unable to control his violent disposition and still denying and minimizing his violent behaviour.

The last case to be discussed is also one which seems to pose the kinds of problems to which the American commentators have had to address themselves. In *Haygarth* v. *Haygarth*[91] the parties separated following a beating inflicted on the wife by the husband. Taking the

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[89] *Ibid.* at 109.
[90] *Ibid.* at 111.
[91] (29 November 1989), Estevan 470400901 (Sask. Q.B.).

two children of the marriage with her, she went to a transition house in Moose Jaw. They continued to reside with her when they returned to Estevan. However, following access exercised some six months after the return to Estevan, the children never returned to the mother. The children were two boys, aged 13 and 15. The mother subsequently received a default judgement for divorce granting custody of the children to her and specific access to the father. This was served on the father but he failed to respond and was subsequently served with a writ of *habeas corpus* and an application for Committal for Contempt. Subsequent to this, by agreement, the previous judgement was set aside with respect to custody, access and maintenance and the issue came on for hearing.

The trial judge accepted the evidence that the husband violated the previous order in refusing to return the children to the mother following access. He further accepted the evidence that the mother had been denied all access to the children since that time. He concluded that "the mother could provide a good home environment for the boys and give them the love, care and encouragement that they both need."[92] However, he also concluded that she could only do this "if the children were allowed to live with her without interference from the father and this, I have gathered from the evidence, would be highly unlikely."[93] He has virtually nothing good to say about the father. However, he concludes that even if the father "has deliberatedly manipulated the boys [*sic*] feelings toward their mother",[94] the fact that they now "prefer" to live with their father is determinative. He further found that no evidence had been adduced to indicate that either parent was "an unfit parent or an uncaring or unloving parent".[95] He expressly finds as follows:

> The evidence leaves no doubt in my mind that the preference the boys have for their father is a contrived preference arrived at by the systematic and calculated manipulation of the boys' thought processes. . . . He testified that he tried to persuade the boys to return to their mother but they refused to go or if they did go they refused to stay. It is difficult to believe the evidence of the father. He was very glib when offering his version of the facts, but on cross-examination he had difficulty answering a direct question with anything beyond a "I can't recall".[96]

Expert evidence was adduced as to the fact that spousal abuse, once started, tended to continue. The expert testified that "[i]t is as if the father was prevented from beating his wife with his fists so he resorted to beating her with her kids' affection."[97]

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[92] *Ibid.* at 5.
[93] *Ibid.*
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*

Despite these findings, he awards custody to the father and specific access to the wife which, he says, must be "unfettered access with no contact by the father during the period of such access whether in person or by telephone or whether it be to or from the children or contact at, near or on the day to or from school."[98] Whatever happened to the "friendly parent" provision of the *Divorce Act, 1985*? This result is quite unbelievable in the face of the facts as found by the trial judge. He awards custody solely on the basis of the childrens' "preference" despite finding that this is not a real preference, and finds that the father is not unfit even though abusive and manipulative to an extreme degree. It would appear to be the exact opposite of what should have been the result, that is, sole custody to the mother with clearly specified access to the father structured to protect her from his hostility and the boys from his continuing ability to coerce them into doing what he wanted, and wanted as much for revenge as out of any consideration for their welfare. Because he did not believe that the husband would leave the wife alone if she had custody, he gives them to the abusive husband — a strange logic indeed.[99]

IV. Conclusions and Recommendations

The American authorities all recommend statutory reform to meet the difficulties they have identified. Indeed, significant reform has already begun in California and the question now is "[w]hether Cali-

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[98] *Ibid.* at 13.

[99] The only other case located in relation to these issues and not yet discussed is *Castillo* v. *Castillo* (1986), 3 R.F.L. (3d) 423 (N.B.Q.B.) in which the husband attempted to kill his wife and was detained in a mental hospital at the time of hearing the wife's application for custody. The husband was seeking to be granted access. The Court declined to make an order for access due to the husband's confinement.

fornia is leading a national retreat on joint custody".[100] However, since their major target of attack is getting rid of presumptions of joint custody, or modifying them to provide for this disposition only if both parties are in agreement, and to clarify that this disposition is not necessarily preferable to any other form of custody, or in the best interests of children, they are not recommendations which apply generally in the Canadian context.[101] However, all Canadian statutes

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[100] Swift, *supra*, note 7 at 23. As Susan Swift outlines, the reform to the California statute has been the inclusion of a new provision designed to settle the controversy which arose as to whether the original statute alleged to create a presumption of joint custody really did so. She summarizes this debate as follows, at 22:

> The recent ten-year flood of joint custody legislation can be traced back to California's pioneering legislation enacted in 1975. . . . A presumption was created that joint custody was in the child's best interest where parents agreed to the arrangement. Where parents did not agree, custody was to be awarded according to an order of preference with joint custody and sole custody together being the first on the list. The statute provided: ". . . Custody should be awarded in the following order of preference, according to the best interests of the child: (b)(1) To both parents jointly . . .or to either parent."
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> Since its enactment, a difference of opinion has formed as to whether the statute established joint custody as a co-equal preference with sole custody or created a preference for joint custody above sole custody. . . . It is fair to say that this position [supporting joint custody as the first preference] was accepted by many judges, lawyers, mediators and others. . . . The amendment rose out of the legislative proposals made by the California Senate Task Force on Family Equity. . .[which] found that [these persons]. . .had misinterpreted the California law. . .thereby creating a *de facto* presumption in favour of joint custody which was never intended. . . . The Task Force found that clarification of the law was necessary to ensure that the "best interests of the child" is the primary standard for custody awards and that no particular custody arrangement is favoured in California [emphasis in text].

The provision added to the existing California statute reads as follows:

> (d) This section established neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan which is in the best interest of the child or children.

[101] *See* Kara, *supra*, note 2 at 630; Keenan, *supra* note 2 at 438-40; Sun & Thomas, *supra*, note 43; they suggest reforms in many areas throughout the course of their discussion. However, with respect to specific Canadian jurisdictions which might wish to make amendments to their existing legislation, perhaps two recommendations are in order. The Territorial Government of the Yukon ought to consider deleting ss. 4 from s. 30 of the *Children's Act* in order to remove its presumption of joint legal custody and the Government of Nova Scotia might wish to consider amending ss. 18(4) of the Nova Scotia *Family Maintenance Act*, in order to specify that the co-equal parental rights of guardianship of children during the course of a (legal or common law) marriage created by the section do not create a presumption of joint custody, legal or physical, following separation or divorce.

regulating custody and access should adopt the recommendation suggested by Linda Keenan that "[e]vidence of wife beating should create a statutory presumption of detriment to the child and of the abuser's unfitness for custody", and that only supervised access should be granted to the abuser unless and until the abuser undergoes therapy for his abusive behaviour.[102]

Further, all statutes which provide for court-ordered joint custody should include a provision stating that such awards shall be made if and only if both parents are in agreement. Lastly, where "friendly parent" provisions are in effect or contemplated, a further provision should be included stipulating that a battering spouse shall not be found to be a "friendly parent" to whom custody should be awarded on that basis. One should not penalize battered women for failing to remain "friendly" to their abusers, particularly when it is acknowledged that such conduct is detrimental to the best interests of the children.

However, there is one approach to the broader issue of reform in this area which would solve many of the problems we have identified. As is apparent from an analysis of the case law, whatever general test the courts apply in determining custody, the trend has been to give careful consideration to the issue of who has been the primary caregiver during the course of the relationship. Both explicitly and implicitly, courts have recognized that it is beneficial to children to continue to be cared for by the parent who has been primarily responsible for this in the past and who has already demonstrated the ability to provide the care and support needed. This has led several commentators to suggest that consideration should be given to legislating primary caretaker presumptions.

At least one commentator has pointed out that this would also have the additional benefit of discouraging litigation and providing certainty with respect to outcome. Sheila Holmes, citing R. Mnookin and L. Kornhauser,[103] comments as follows with respect to the factor of increased predictability of outcome:

> [I]n most cases litigation would be discouraged, and there would be a desired element of certainty. Mnookin and Kornhauser note:
>
> > When judicial results are unpredictable, the party with greater risk aversion has relatively less bargaining strength. According to the prevailing norms, the parent who does not want to risk the loss of the child is probably the "better parent". Consequently, the better parent has relatively less bargaining power [978-79].

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[102] *Supra*, note 2 at 410.

[103] *Bargaining in the Shadow of the Law: The Case for Divorce* (1979) 88 YALE L.J. 950.

> This argument supports a primary caretaker presumption. The primary caretaker almost inevitably will have fewer financial resources and may well sacrifice child support payments as a result of the disparity in bargaining tools.[104]

I agree wholeheartedly with Sheila Holmes' position that this is the solution best suited to present social needs in that it recognizes that the primary caretaker is most often the wife but does not enshrine parenting as a uniquely female role, and recognizes the reality that most women still are in inferior bargaining positions with respect to the related issues of custody, access and maintenance. This is particularly so with respect to women in abusive relationships who are often afraid to leave such relationships because they are afraid of losing custody of their children and will often settle for little or no maintenance, and agree to "liberal" access to the abusive spouse, in order to avoid the cost and emotional trauma of a court battle.

A primary caretaker presumption would make it easier for women to leave an abusive relationship secure in the knowledge that they would continue to have custody of their children. It would thus operate at least partially to offset the greater power an abusive spouse has in such relationships. It would not be too much to say that at least in cases in which a history of wife abuse is present, a primary caretaker presumption should prevail and is in no way inconsistent with making the disposition which is truly in the best interests of the child. It would also automatically disqualify an abusive spouse from being found to be a "friendly parent". In other cases, however, it should be rebuttable.

With respect to mediation, all authorities are unanimous in holding that while mediation can be a very effective tool in reaching settlement between embattled and embittered spouses, it is not appropriate in families characterized by wife battery.[105] They also agree as to why this is so, namely, that it fails to recognize the power imbalance between a battered wife and an abusive husband. This problem is aptly summarized by Laura Crites and Donna Coker as follows:

> Mediation is an increasingly popular means of settling contested divorce issues. However, it can be a damaging, if not dangerous, forum for abused wives. The power imbalance which grows out of the abusive relationship can place the victim at a distinct disadvantage during face-to-face negotiation. She can also be at risk of physical retribution following a mediation session. The Family Violence Program in Honolulu has recently begun a pilot program to provide premediation counselling to abuse victims and perpetrators. This program provides the opportunity to screen out those victims who would be at considerable risk if they mediated with a violent husband and to empower victims, through use

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[104] *Holmes*, *supra*, note 12 at 322.

[105] *See* Keenan, *supra*, note 2 at 437-38; Sun & Thomas, *supra*, note 43 at 572-73; Kara, *supra*, note 2 at 632.

> of coaching and counselling, to help them safely mediate. It also helps the perpetrator take responsibility for his role in the dissolution of the marriage. In lieu of such a program, the authors recommend that judges screen out all victims of spouse abuse from referral to mediation.[106]

As will be readily noted, however, if battered women who have been primary caretakers of their children were granted custody under a primary caretaker presumption, it would be unnecessary to build structures into the mediation process to take account of the power imbalance existing between the parents in such situations. It is unreasonable and unnecessary to demand that battered women should have to mediate with their batterers once it is accepted that exposure to such battery is harmful to children and that batterers are not "fit" parents. Primary caretaker presumptions could do much to encourage battering "husbands" to get the counselling and therapy they need in order to have the kind of continuing contact with children that is desirable. But it does not ignore the fact that those who refuse to accept responsibility for their violence should not have the power to be able to force their victims into continued contact through mediation or into agreements respecting access which may result in further detriment to the children.

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[106] *What Therapists See that Judges May Miss: A Unique Guide to Custody Decisions When Spouse Abuse is Charged* (1988) 27 JUDGES J. 8(10) 42. *See also* L.K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?* (1989) 3 C.J.W.L. 134.