FAMILY LAW

*Margaret E. Hughes**

I. INTRODUCTION

As there has been no survey of Canadian family law since the fall of 1968, [1] the period under review is January 1, 1969 to April 1, 1971. The length of the survey period and space limitations allow only a highlighting of the decisions reported and legislation passed or proposed during the survey period in three areas; divorce, nullity, and matters affecting children - custody, adoption and juvenile delinquency.

II. DIVORCE

The family law cases reported during the survey period are overwhelmingly concerned with the interpretation of the Divorce Act, 1967-68. [2]

A. *Jursidiction*

In Canada, "the court for any province" [3] has jurisdiction to entertain a divorce petition if

> (a) the petition is presented by a person domiciled in Canada; and
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> (b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period. [4]

In *Geldart v. Geldart* [5] it was held that where the petitioner is a married woman, the fact that her husband is domiciled in Canada is insufficient to establish jurisdiction even though at common law the wife acquires the domicile of her husband. A married woman's domicile must be determined according to section 6(1) as if she were unmarried and if she had attained her majority.

The phrases "ordinarily resident" and "actually resident" are not defined in the Divorce Act, but it has been held that a person may be "ordinarily resident" in a Canadian province while actually residing elsewhere for special purposes. In *Wood v. Wood*, [6] Mr. Justice Nitikman held that a member of the Royal Canadian Mounted Police ordinarily resident in

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* LL.B., 1966, University of Saskatchewan; LL.M., 1968, University of Michigan, Assistant Professor of Law, University of Windsor.

[1] Hubbard, *Domestic Relations: The Divorce Act, 1968*, 3 OTTAWA L. REV. 172 (1969).

[2] Divorce Act, Can. Stat. 1967-68 c. 24 now consolidated in CAN. REV. STAT. c. D-8 (1970).

[3] Divorce Act, CAN. REV. STAT. c. D-8, § 2 (1970) defines this expression by listing the courts to which it is applicable. The courts named are the existing superior courts of first instance in each of the provinces and territories.

[4] Divorce Act, CAN. REV. STAT. c. D-8, § 5(1) (1970).

[5] 3 D.L.R.3d 277 (N.S. Sup. Ct. 1969).

[6] 66 W.W.R. (n.s.) 702, 2 D.L.R.3d 527 (Man. Q.B. 1968).

Manitoba did not cease to be so resident because he was living elsewhere while carrying out his duty as a constable. Mr. Justice Houlden [7] and Mr. Justice Aikins [8] came to the same conclusion in respect of an officer and an enlisted man of the Canadian Armed Forces ordinarily resident in Ontario and British Columbia respectively, but who had actually resided out of Canada on military duty. The test applied was: "Where did this petitioner regularly, normally or customarily live in the year preceding the filing of the petition? Or . . . [w]here was his real home in that period?" [9]

The cases are conflicting however, on the interpretation of the phrase "that period" in the last part of section 5(1)(b). It has been held in Ontario [10] and Nova Scotia [11] that the "ten months of that period" refer to the one year period immediately preceding the presentation of the petition, while in Manitoba [12] and British Columbia, [13] it has been held that the period referred to is the whole period of ordinary residence, which must be at least one year but may be more, running to the date of presentation of the petition. The difference between these approaches is illustrated by the fact situation in *Marsellus v. Marsellus.* [14] In that case the petitioner had been ordinarily resident in British Columbia for ten years and actually resident there for six of those ten years, but actually resident in British Columbia for only twenty-two days in the one year immediately preceding the presentation of the petition. The interpretation chosen determined the court's ability to entertain the divorce petition. Although the stricter interpretation taken in Ontario and Nova Scotia is probably preferable in terms of grammatical construction, it can be said to create "gross inconvenience" and unfairness amounting to an injustice on the many persons domiciled in Canada and having ordinary residence in one province who are engaged in occupations which require them to spend protracted periods of time in other provinces, territories or countries. [15] On the basis that, "[i]n determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles, should, in all cases of doubtful significance, be presumed to be the true one . . . ." [16] the construction favoured in British Columbia and Manitoba is a viable alternative.

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[7] Hardy v. Hardy, [1969] 2 Ont. 875, 7 D.L.R.3d 307.

[8] Marsellus v. Marsellus, 75 W.W.R. (n.s.) 746, 13 D.L.R.3d 383 (B.C. Sup. Ct. 1970).

[9] *Supra* note 7, at 877, 7 D.L.R.3d at 309; *see also id.* at 748, 13 D.L.R.3d at 385.

[10] *Supra* note 7.

[11] Cuzner v. Cuzner, 15 D.L.R.3d 511 (N.S. Sup. Ct. 1970).

[12] *Supra* note 6.

[13] *Supra* note 8.

[14] *Id.*

[15] *Id.* at 751, 13 D.L.R.3d at 388 (per Aikins, J.).

[16] Marsellus v. Marsellus, 75 W.W.R. (n.s.) 746, at 750, 13 D.L.R.3d 383, at 387 (B.C. Sup. Ct. 1970) (per Aikins, J.) quoting from MAXWELL ON INTERPRETATION OF STATUTES 183 (11th ed.).

B. *Grounds*

1. *Matrimonial Offences*

In *Hollington v. F. Hewthorn & Co.* [17] it was held that a finding against a person in one proceeding was not admissible in evidence against him in another proceeding unless the parties were the same because it is generally "safer in the interests of justice that on the subsequent trial the court should come to a decision on the facts placed before it without regard to the result of other proceedings before another tribunal." [18] Whether the so-called *Hollington* rule applies to matrimonial proceedings has been debated during the survey period and conflicting decisions have been reported on the specific issue of whether a petitioner, on a petition for divorce based on adultery, can rely in order to establish adultery on the spouse's part, upon a decree absolute granted in another action in which his or her spouse was named as co-respondent. In *Love v. Love,* [19] Mrs. A petitioned for a divorce on the ground of the adultery of her husband, Mr. A, with Mrs. B. Adultery was found and Mrs. A was granted her divorce. Later Mr. B. petitioned for divorce on the ground of his wife's adultery with Mr. A. and the judgment nisi and the judgment absolute were filed as proof of the adultery alleged in the statement of claim. Mr. Justice Ferguson of the Ontario High Court stated: "A judgment for divorce on the grounds of adultery between A and B makes the issues of adultery *res judicata.* It is a judgment *in rem;* that is to say one that is good not only between the parties and their privies, but good as against the world and this is so because it is a judgment affecting status." [20] Ferguson distinguished the *Hollington* decision and held that the finding of adultery in one case is sufficient to establish the same adultery in another case if first, it be pleaded in the same manner as any other form of estoppel, and secondly, that the identity of the parties in the previous case be proved to be the same as in the case being tried. In *Meshwa v. Meshwa,* [21] Mr. Justice Aikins of the British Columbia Supreme Court held on similar facts that the *Hollington* rule applied to matrimonial proceedings and that a decree containing the finding of adultery in the prior suit is *res inter alios acta* and not admissible as evidence of adultery in the subsequent proceedings. The decree was held to have no evidentiary value and thus could not be used to set up res judicata.

In addition to adultery, section 3 of the Divorce Act makes sodomy, bestiality, rape, engagement in a homosexual act, bigamy and matrimonial cruelty independent grounds for divorce. Therefore, the issue whether findings against a person in previous judicial proceedings should be admissible in evidence against such person in subsequent matrimonial proceedings is important enough to be covered by legislation. In this regard the English Royal Commission on Marriage and Divorce, recognizing both the reasons for the *Hollington* rule and the fact that a petitioner is put to undue expense and inconvenience and the victim to unnecessary distress when the

[17] [1943] 1 K.B. 587 (C.A.).
[18] *Id.* at 602.
[19] [1969] 1 Ont. 291 (High Ct.).
[20] *Id.* at 292.
[21] 75 W.W.R. (n.s.) 459, 13 D.L.R.3d 502 (B.C. Sup. Ct. 1970).

offence must be proved de novo,[22] recommended a solution which fits between the *Love v. Love*[23] and *Meshwa v. Meshwa*[24] decisions. It recommended that an exception be made to the *Hollington* rule in matrimonial proceedings and that proof of a finding of adultery against a party to matrimonial proceedings or proof of a conviction for bigamy, rape or other sexual offences should be received as prima facie evidence only in subsequent matrimonial proceedings and should not be conclusive evidence of the adultery or of the act or acts of which the offender has been found guilty.[25] By shifting the burden of proof from the person alleging the offence to the person charged with the offence, the latter was left to establish in the subsequent matrimonial proceedings that the finding or conviction was erroneous.

At the time the Divorce Act, 1967-68 was passed, a considerable body of case law dealing with the meaning of "cruelty" as a ground for various forms of relief existed throughout Canada. Although it was made a ground for divorce, cruelty was not defined in the Divorce Act and the judiciary was uncertain whether cruelty under the Divorce Act required (1) conduct which caused danger to life, limb or health, bodily or mental, or a reasonable apprehension of it — the traditional *Russell* test,[26] (2) conduct which met the *Russell* test and which, in addition, rendered intolerable the continued cohabitation of the spouses,[27] or (3) conduct which made continued cohabitation intolerable whether or not such conduct also resulted in actual or apprehended injury to the petitioner's health.[28] Consensus on the test to be utilized has not been reached but the vast majority of judicial authority "having regard to the exact words used, the remedial character of the whole Act, the other provisions of the Act and the society in which we live and for which Parliament has legislated"[29] has interpreted section 3(*d*) broadly as requiring only proof of conduct of such a kind as to render intolerable the continued cohabitation of the spouses.

Whether the conduct complained of is cruelty within the meaning of section 3 (*d*) is essentially a question of fact to be determined in the circumstances of each particular case as there is no uniform standard that can

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[22] REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE (1951-55) (England), CMD. 9678, para. 930. This recommendation was substantially endorsed in the FIFTEENTH REPORT OF THE LAW REFORM COMMITTEE (1967), CMD. 3391, paras. 11-12, 24, 34-39. For a more detailed study, see Payne, *The Application of the Rule in Hollington v. Hewthorn in Matrimonial Proceedings—A General Analysis*, 17 CHITTY'S L.J. 8 (1969).

[23] *Supra* note 19.

[24] *Supra* note 21.

[25] REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE, *supra* note 22, at para. 931.

[26] Russell v. Russell, [1897] A.C. 395, 77 L.T. 249.

[27] Delaney v. Delaney, 66 W.W.R. (n.s.) 275, 1 D.L.R.3d 303 (B.C. Sup. Ct. 1968).

[28] Dodge v. Dodge, 1 N.B.2d 241 (1969); Lacey v. Lacey, [1970] 1 Ont. 279, 8 D.L.R.3d 289 (High Ct. 1969); Paskiewich v. Paskiewich, 2 D.L.R.3d 622 (B.C. Sup. Ct. 1968); Zalesky v. Zalesky, 67 W.W.R. (n.s.) 104, 1 D.L.R.3d 471 (Man. Q.B. 1968).

[29] Lacey v. Lacey, [1970] 1 Ont. 279, at 284-85, 8 D.L.R.3d 289, at 294-95 (High Ct. 1969).

be adopted to determine whether the respondent's conduct has rendered cohabitation intolerable. The court must determine the effect of the respondent's conduct complained of upon the mind of the petitioner having regard to "the physical and mental conditions of the parties, their character and their attitude toward the marital relationship." [30]

As the numerous cruelty cases reported during the survey period depend largely on their own particular facts, their precendential value is minimal. However, it is clear from the cases that cruelty within the meaning of section 3(*d*) connotes something more than unpleasantness and discontentment [31] or mere incompatibility of the parties. [32] The acts complained of must be "grave and weighty" and "they must, to fit the statute, be insufferable, unendurable, more than flesh and blood can stand, beyond bearing." [33] For lesser conduct, the parties must await the passage of time for divorce. [34] At the present time, there is some question whether the respondent's conduct must be "aimed at" [35] or "exercised . . . actively against the petitioner" [36] although, undoubtedly, malevolent intention to injure, where it does exist, is an important element. [37]

2. *Permanent Breakdown of the Marriage*

The opening part of subsection (1) of section 4 makes the permanent breakdown of a marriage a ground for divorce if the breakdown is attributable to one or more of certain prescribed circumstances set out in paragraphs (*a*) to (*e*) of subsection (1) and if the parties are "living separate and apart" at the time that the petition is presented, although only under subsection (*e*) must the spouses have been "living separate and apart" for a minimum period of time. [38] Proof of one of the requirements only, that is, the breakdown of the marriage or the "living separate and apart," will not justify the granting of a decree. [39] The circumstances listed in paragraphs (*a*) to (*d*) range from the relatively objective circumstances of the respondent's imprisonment or disappearance for a specified period of time, or the respondent's incapacity or refusal to consumate the marriage, to the relatively subjective circumstance of the respondent's gross addiction to alcohol or a narcotic.

The phrase "living separate and apart" is not defined in the Divorce Act and there is at present judicial disagreement over its interpretation. The viewpoint of the minority is that: "There is no reason to give the words

[30] Knoll v. Knoll, [1970] 2 Ont. 169, at 177, 10 D.L.R.3d 199, at 207 (per Schroeder, J.A.), *rev'g* [1969] 2 Ont. 580, 6 D.L.R.3d 201 (High Ct. 1969); *quoted with approval in* Quinn v. Quinn, 74 W.W.R. (n.s.) 144, at 147, 11 D.L.R.3d 372 (B.C. Sup. Ct. 1970) (per Macdonald, J.).

[31] Bustin v. Bustin, 1 N.B.2d 496, at 499 (1969).

[32] *Supra* note 29, at 296.

[33] Lacey v. Lacey, [1970] 1 Ont. 279, at 285, 8 D.L.R.3d 289, at 295 (High Ct. 1969).

[34] *Id.*

[35] *Supra* note 30, at 178, 10 D.L.R.3d at 208.

[36] *Supra* note 33, at 286, 8 D.L.R.3d at 296.

[37] Knoll v. Knoll, [1970] 2 Ont. 169, at 178, 10 D.L.R.3d 199, at 208 (per Schroeder, J.A.).

[38] The Divorce Act, CAN. REV. STAT. c. D-8, § 4(1)(*e*) (1970).

[39] Beaudet v. Beaudet, 1 N.B.2d 461 (1969).

'living separate and apart' any meaning other than the literal one. By themselves they describe a physical state of affairs and not a state of mind. I see no reason to qualify them by requiring proof of intent as well as proof of the physical act." [40] However, the weight of judicial opinion is that the phrase presupposes a total destruction of the matrimonial consortium and this, in turn, has been held to require that the petitioner prove by a preponderance of evidence or upon the balance of probabilities, both an animus separandi and a factum of separation. [41] "The words "separate and apart" are disjunctive. They mean . . . that there must be a withdrawal from the matrimonial obligation with the intent of destroying the matrimonial *consortium,* as well as physical separation. The two conditions must be met." [42] The majority viewpoint, it is submitted, is supported by section 9(3)(*a*) which clearly implies that an intention to live separate and apart mus be present at the beginning of the period of separation. [43]

Residence under one roof does not preclude a finding that the spouses are living separate and apart. "To hold otherwise would be to deprive the petitioner here of any remedy under the new *Divorce Act* simply because she is precluded, or was for a period of time precluded, by economic circumstances from acquiring a different suite in which to live." [44] Conversely, separate residences, even for long periods of time, do not preclude a finding that the spouses are not living separate and apart if the parties consider it only a temporary separation. The main factor is the intention of the parties to continue the matrimonial relationship. [45]

As section 4(1)(*e*)(i) encompasses any separation other than one which is attributable to the petitioner's desertion it is essential to determine the difference between separation and desertion. Traditionally desertion, like separation, has been held to require an animus and a factum of separation but it requires, in addition, that the separation occur without the consent of the other spouse *and* that the separation be without justification or excuse. In this regard, one of the more interesting issues that has arisen during the survey period is whether the factum of separation must occur by a mutual

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[40] Kallwies v. Kallwies, 12 D.L.R.3d 206, at 208 (Man. Q.B. 1970) (per Bastin, J.).

[41] Herman v. Herman, 3 D.L.R.3d 551, at 555 (N.S. Sup. Ct. 1969).

[42] Rushton v. Rushton, 66 W.W.R. (n.s.) 764, at 766, 2 D.L.R.3d 25, at 27 (B.C. Sup. Ct. 1968).

[43] The Divorce Act, CAN. REV. STAT. c. D-8, § 9(3)(a) (1970):

> (3) For the purposes of paragraph 4(1)(*e*), a period during which a husband and wife been living separate and apart shall not be considered to have been interrupted or terminated
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> (a) by reason only that either spouse has become incapable of forming or having an intention to continue to live so separate and apart or of continuing to live so separate and apart of his or her own volition, if it appears to the court that the separation would probably have continued if such spouse had not become so incapable . . . .

[44] *Supra* note 42.

[45] Lachman v. Lachman, [1970] 3 Ont. 29, 12 D.L.R.3d 221 (1970); *but see* Foote v. Foote, [1971] 1 Ont. 338, 15 D.L.R.3d 292 (High Ct. 1970) where one isolated act of intercourse between the parties during the three years meant that the separation had not been in full force for the required period.

rejection of the matrimonial consortium for the spouses to seek relief under section 4(1)(*e*)(i) or whether a unilateral abandonment is sufficient. In *Kennedy v. Kennedy,* [46] where a husband who was unable to reconcile himself to his wife's permanent hospitalization for an incurable disability, resolved never to visit her again and thus terminated the matrimonial consortium, the court held that there must be a rejection of the matrimonial consortium by both parties for the spouses to seek relief pursuant to section 4(1)(*e*)(i). Subsequently the majority of Canadian courts dealing with the problem, either by accepting this mutuality requirement for separation or merely by emphasizing the lack of consent to separation on the part of one spouse, have held that where the parties are living separate and apart due to circumstances beyond their control, such as where the occupation or health of one of the spouses demands a state of separation or isolation, and one of the spouses abandons the matrimonial consortium during such enforced separation thus causing the permanent breakdown of the marriage, such spouse has deserted the separated or committed spouse and may seek a divorce pursuant to section 4(i)(*e*)(ii) only after the expiration of five years from the discontinuance of their association.

In *Lachman v. Lachman,* [47] Mr. Justice Jessup disagreed with the *Kennedy* decision and pointed out, quite correctly, that if such mutuality of rejection must exist to invoke section 4(i)(*e*)(i), then that subsection is operative only where there is a separation by mutual consent which would mean that the spouse who has been deserted would not be able to invoke s. 4(i)(*e*)(i) "at least until she too has been without desire to reconstruct the marriage for the requisite period." [48] However, after holding that unilateral abandonment of the matrimonial consortium is sufficient under section 4(i)(*e*)(i) if it results in the breakdown of the marriage, Jessup allowed the petitioner to petition successfully under section 4(i)(*e*)(i) but he did not deal with the more difficult question of why the spouse who abandons the matrimonial consortium during the enforced separation is not guilty of desertion and required to seek relief pursuant to section 4(i)(*e*)(ii).

No Canadian court appears as yet to have followed the appealing reasoning presented in *G. v. G.* [49] where it was held that the spouse who abandons the matrimonial consortium during the enforced separation might also petition for divorce on the ground of separation on the basis that his or her withdrawal from the matrimonial consortium was a justifiable consequence of the enforced separation such as would negate any finding of desertion.

> [A]s for the charge of desertion, counsel for the husband argued . . . that it is only misconduct on the part of the complainant spouse which in law constitutes justification for the respondent to live separate and apart. It must, said counsel, be either a matrimonial offence or some grave and weighty matter approximating to a matrimonial offence. I can see no good reason for so limiting the law. There may be some supervening cause beyond the control of the parties which makes it impossible for the spouses to live together; in common sense that is good cause for separation and

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[46] 67 W.W.R. (n.s.) 91, 2 D.L.R.3d 405 (B.C. Sup. Ct. 1969).
[47] Lachman v. Lachman, [1970] 3 Ont. 29, 12 D.L.R.3d 221 (1970).
[48] *Id.* at 225.
[49] [1964] P. 133, [1964] 1 All E.R. 129.

> it would be absurd to stigmatise either spouse as a deserter .... [I]t seems to me that if the health of one spouse demands a state of isolation or separation, the law would be flying in the face of good sense if it were not to recognise that as affording justification for the spouses living separately. Again, if one spouse is suffering from a contagious disease of a serious nature, I can see no reason in principle why that might not justify the other spouse in living apart, so as to provide a defence to a charge of wilful separation without cause; and if the contagion is incurable that might afford justification for the other spouse to say that he or she will live apart permanently, so as to provide a defence to a charge of desertion. I cannot think that where cohabitation would be dangerous to the health of a respondent, he or she is not entitled to live separate and apart, even though that danger may arise from the misfortune rather than the fault of the complainant. [50]

One Canadian case achieved the same result as that in *G. v. G.* but utilized different reasoning. In *Kallwies v. Kallwies* [51] the husband, following an accident, had been an incurable mental incompetent confined to a hospital and the wife had continued to visit him during the three year period immediately preceding the presentation of her divorce petition. Mr. Justice Bastin held that one of the situations which gave rise to great hardship during the period prior to the passage of the Divorce Act was where one spouse was incurably insane, and, as the Divorce Act is remedial legislation, it should be given such a fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act.

> There is no logical reason to refuse to make a finding that there has been a permanent breakdown of the marriage because of a laudable concern for the stricken spouse. There is no reason to assume that Parliament intended to make the natural expression of compassion a bar to relief, or to make the existence of an adulterous relationship a condition of granting it.
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> ...To hold that in a situation where one spouse is hopelessly insane or suffering from incurable incapacity there must be a finding of desertion on the part of the other spouse is to introduce the concept of matrimonial offence where it was never intended. [52]

Despite these expressed sentiments, Bastin appears to have based his decision that the petitioner was not in desertion, not on the presence of a justified withdrawal from the matrimonial relationship due to the enforced separation but rather, on his interpretation of the words "living separate and apart" as requiring proof only of the factum of separation and not the animus of separation. [53] If that is the rationale, then it is contrary to the weight of Canadian judicial opinion at the present time.

C. *Corollary Relief*

Three of the many issues relating to corollary relief that have been dealt with by the courts during the survey period have been selected for notice. The first is the issue whether sections 10 to 12 of the Divorce Act, which

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[50] *Id.* at 134-35, [1964] 1 All E.R. at 130-31.
[51] 12 D.L.R.3d 206 (Man. Q.B. 1970).
[52] *Id.* at 209.
[53] See text accompanying note 40.

deal with maintenance and custody as corollary relief in divorce proceedings, are valid enactments under the federal power in relation to marriage and divorce contained in section 91(26) of the B.N.A. Act. In *Niccolls v. Niccolls*, [54] County Court Judge Tyrwhitt-Drake held that while Parliament may not legislate as to maintenance and custody as a civil right it may do so when those issues arise as a necessary adjunct to the dissolution of a marriage. In *Papp v. Papp*, [55] which involved an appeal from an interim custody order made under section 10(*b*) of the Divorce Act, Mr. Justice Laskin noted the limited nature of the maintenance and custody jurisdiction bestowed by the Divorce Act as illustrated first, by the limited definition of "children of the marriage", and secondly, by the fact that an order for corollary relief under the Divorce Act is dependent upon the grating of a decree nisi of divorce. He concluded that the Divorce Act did not purport to deal with custody and maintenance per se but only as a type of corollary relief and as such was valid legislation under the federal power in relation to marriage and divorce.

> I do not myself favour the language of "trenching" and of "necessarily incidental" or "ancillary".... Convenient as the language may be to signal situations in which the doctrine of exclusiveness of jurisdiction does not apply... it is not sufficiently neutral in its acknowledgement of common domain.... Where there is admitted competence, as there is here, to legislate to a certain point, the question of limits (where that point is passed) is best answered by asking whether there is a rational, functional connection between what is admittedly good and what is challenged.
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> All of this provides a frame of reference only and in itself does not answer the question whether Parliament in legislating in relation to marriage and divorce may embrace custody, either as "necessary and proper" (to use the American formula) or as "incidental" (to use the Australian formula) to the execution of the power invoked. Assistance in providing an answer exists in examining the aspect of the legislation under review, not in the sense merely of the subject dealt with, but in the sense as well of the purpose or object in view. In this exercise... the legislation must be taken as a whole and evaluated from the standpoint of its coherency as an integrated federal scheme. I can pose the issue shortly, if not more illuminatingly, by asking whether the custody provisions of the Divorce Act complement rather than supplement the admittedly valid divorce portions. [56]

Laskin concluded that the custody provisions were as bound up with the direct consequences of marriage and divorce as alimony and maintenance and thus could be said to complement the divorce portions of the Divorce Act.

What makes the judgment of Laskin even more interesting is the implication in it that a provincial legislature might be able to deal with custody and such incidents of the matrimonial relationship as alimony only in the absence of competent and conflicting federal legislation.

> *Lee v. Lee*, 54 D.L.R. 608,... a judgment of the Alberta Appellate Division, was cited to me as holding that alimony was not comprehended within

[54] 68 W.W.R. (n.s.) 307, 4 D.L.R.3d 209 (B.C. Sup. Ct. 1969).
[55] [1970] 1 Ont. 331, 8 D.L.R.3d 389 (1969).
[56] *Id.* at 335-36, 8 D.L.R. at 393-94.

> federal authority in relation to "marriage and divorce" and, hence, by parity of reasoning, it is urged that neither is custody. The Court does say that in the case which was concerned with a claim for alimony dissociated from any petition for divorce or for judicial separation. [sic] In context, I take the Alberta judgment to say that alimony does not fall within the exclusive jurisdiction of Parliament under s. 91(26) of the Constitution so as to preclude provincial legislation where Parliament has not itself legislated. To this extent I agree with it, but if it is to be taken as an assessment of the legislative capacity of the marriage and divorce power when affirmatively exercised I must respectfully disagree. [57]

The paramountcy of the Federal Parliament over the custody of children implied by Laskin was disputed by Mr. Justice Wright in *Bray v. Bray,* [58] an undefended petition for divorce together with an application for custody of the children of the marriage, one of whom at the time of the divorce petition was a resident of Quebec and physically present there and subject to a custody order of the Montreal Social Welfare Court. The petitioner's argument was that while the Supreme Court of Ontario does not normally have jurisdiction over children in other provinces, it now has that power by virtue of section 11(1)(*c*) of the Divorce Act with respect to the custody of children of the marriage upon divorce of the parents. Wright first held orally that the Ontario Supreme Court does not have power under section 11 to make an order with regard to the custody, care and upbringing of the children of the marriage residing in other provinces. [59] Later, in his written comments, he seemed uncertain as to whether or not section 11 conferred this power but if it did, he was refusing to exercise the power that he might "have in the undefended divorce proceeding to make an order providing for the custody of a child in Quebec already subject to a custody order in that Province" [60] because although section 11(1)(*c*) of the Divorce Act is intra vires, as determined by *Papp v. Papp,* [61] it is not paramount over validly enacted provincial legislation respecting custody of children of divorcing and divorced parents. Wright felt that the custody provisions of the Divorce Act are permissive and not obligatory [62] and should be regarded as supplementary to the existing provincial powers and jurisdiction with regard to the custody of children. [63] Provincial jurisdiction, he felt, was founded not only on the power in relation to property and civil rights but also on the power of the court to administer the prerogative of the Crown in the right of the province as *parents patriae.* In a rather confusing judgment, Wright held that the primary jurisdiction relating to custody remains in the province especially in view of the fact that the provincial enactments require the custody jurisdiction to be exercised having primary regard to the welfare of the child while the Divorce Act, he felt, substituted a new test of the conduct, conditions, means and other circumstances of the parents. [64] "Conflicts of federal and provincial

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[57] *Id.* at 338-39, 8 D.L.R. at 396-97.

[58] [1971] 1 Ont. 232, 15 D.L.R.3d 40 (High Ct. 1970).

[59] *Id.* at 234, 15 D.L.R.3d at 42.

[60] *Id.* at 239, 15 D.L.R.3d at 47.

[61] *Supra* note 55.

[62] *Supra* note 58, at 237, 15 D.L.R.3d at 45.

[63] *Supra* note 60.

[64] *Supra* note 58, at 237 and 241, 15 D.L.R. at 45 and 49.

laws with regard to the custody of children are not resolved by constitutional law but in each case by regarding the welfare of the child as the paramount factor." [65]

Section 11(1) provides that "upon granting a decree nisi" the court may make an order for maintenance. The issue which has arisen is whether the phrase "upon granting a decree nisi" should be strictly construed to mean that any application for maintenance under the Divorce Act must be made no later than the time of the trial of the divorce petition to which it is ancillary or whether a more "elastic interpretation" [66] of "upon" is permissible. Although a few courts have held that an application for maintenance is not forever barred merely because no order was made upon the granting of a decree nisi [67] or that a "reasonable time" after granting of the decree nisi will be allowed in which the spouse may petition for maintenance, [68] the majority of decisions have held that the phrase "upon granting" must be strictly construed and that section 11(2) which provides for the subsequent variation of orders made under subsection (1) cannot be invoked to found an original application for maintenance. [69] Thus, to prevent future hardship, the practice has developed in some jurisdictions of making a nominal order at the time of the decree nisi in favour of a spouse who does not presently need maintenance in order to preserve the right of the spouse to claim substantial maintenance by way of an application for variation under section 11(2) if the financial circumstances of such spouse changes materially.

A third issue that has arisen during the survey period regarding corollary relief is whether Canadian courts upon granting a decree nisi of divorce may make an order pursuant to section 11(1) requiring one spouse to pay both a lump sum and periodic payments for the maintenance of the other spouse. In Ontario in *Johnstone v. Johnstone,* [70] it was held that the reference in section 11(1) to the making of "one or more of the following orders" gave the court the jurisdiction to grant one or more of the orders set out separately in paragraphs (*a*), (*b*), and (*c*) but that the court could not make an order under paragraph (*a*) requiring the spouse to pay both a lump sum and periodic payments. The court was restricted under paragraph (a) to ordering one or the other. The opposite result has been reached in Alberta and Manitoba. [71]

III. NULLITY

In *Rose v. Rose,* [72] an action for a declaration that a marriage was null and void by reason of the inability of the defendant husband to consummate

[65] *Supra* note 58, at 241, 15 D.L.R. at 49.

[66] Bryant v. Brant, 74 W.W.R. (n.s.) 81, 11 D.L.R.3d 461 (B.C. Sup. Ct. 1970).

[67] Whyte v. Whyte, 69 W.W.R. (n.s.) 536, 7 D.L.R.3d 7 (Man. 1969).

[68] Todd v. Todd, 68 W.W.R. (n.s.) 315, 5 D.L.R.3d 92 (B.C. Sup. Ct. 1969).

[69] Butterfield v. Butterfield, 11 D.L.R.3d 498 (B.C. Sup. Ct. 1970).

[70] [1969] 2 Ont. 765, at 767, 7 D.L.R.3d 14, at 16 (High Ct.).

[71] Ceicko v. Ceicko, 5 D.L.R.3d 360 (Man. Q.B. 1969); Kumpas v. Kumpas, 71 W.W.R. (n.s.) 317 (Man. 1970); Feldman v. Feldman, 14 D.L.R.3d 222 (Alta. 1970).

[72] [1970] 1 Ont. 193, 8 D.L.R.3d 45 (High Ct. 1969)

the marriage, the issue was whether the Supreme Court of Ontario, having regard to section 26(2) of the Divorce Act, 1967-68, had jurisdiction to issue an order declaring the said marriage null and void. The court held first, that the Divorce Act (Ontario), 1930, conferred on the Supreme Court of Ontario the jurisdiction to grant decrees of annulment on grounds other than a defect in solemnization, and second, that prior to the Divorce Act, 1967-68, an action for annulment of marrage was a "matrimonial cause." Therefore, under section 26(2), the law enacted in the Divorce Act (Ontario), 1930, with respect to nullity was retained when the Divorce Act, 1967-68 was passed.

Canadian courts have been concerned during the survey period with the trick [73] or sham marriage [74] situation where either one party or both parties to the marriage enter into the marriage only for the purpose of securing permanent entry into Canada and with no intention of living together as man and wife. The marriage is never consummated and the parties never cohabit. There are two separate issues: first, whether the marriage may be declared void due to a lack of genuine consent to being married and secondly, whether, if it is a valid marriage, the court is improperly aiding a scheme to defraud the immigration authorities in granting a decree nisi of divorce.

Fraud, as applied to the marriage contract, has traditionally been held in English and Canadian law to have no effect on the validity of a marriage unless the fraudulent misrepresentation goes to the identity of the other party to the marriage or to the nature of the ceremony. In addition, consent to the marriage for an ulterior motive has traditionally been held to have no effect on a marriage duly celebrated by parties who have the capacity to enter into a marriage. However, in *Johnson v. Smith,* [75] a trick marriage situation, Mr. Justice Stewart, of the Ontario High Court departed from tradition and followed instead the sham marriage doctrine enunciated by Judge Learned Hand in *United States v. Rubenstein.* [76]

> Mutual consent is necessary to every contract; and no matter what forms or ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved.... Marriage is no exception to this rule: a marriage in jest is not a marriage at all.... It is quite true that a marriage without subsequent consummation will be valid; but if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood.

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[73] Where one party to a marriage is "tricked by fraud" into consenting to the marriage. The term as used in this article is restricted to the situation where the fraudulent party enters into the marriage with no intention of cohabiting with the tricked party or of consummating the marriage.

[74] Where both parties go through the marriage ceremony purely for the purpose of representing themselves as married to the outside world with no intention of cohabiting and with the understanding that they will put an end to it as soon as it has served its purpose to deceive. *See* United States v. Rubinstein, 151 F.2d 915, at 918-19 (1945).

[75] [1968] 2 Ont. 699, 70 D.L.R.2d 374 (High Ct.)

[76] 151 F.2d 915 (1945).

> and it is not ordinarily understood as merely a pretence, or cover, to deceive others. [77]

Stewart held that there was a lack of consent to the marriage, the marriage having been induced by the fraud of the respondent.

The British Columbia Supreme Court in *Gardner v. Gardner,* [78] a sham marriage situation, followed the traditional English cases and distinguished the *Johnson* decision on the basis that the latter dealt with a trick situation. However in *Iantsis v. Papatheodorou,* [79] a reference to the Ontario Court of Appeal to determine whether the *Johnson* case was rightly decided, the court reviewed the traditional nullity cases dealing with fraudulent or innocent misrepresentation or concealment and overruled the *Johnson* decision. The court held that all that was alleged in the *Johnson* case and in the case before the court, was a mental reservation on the part of the defendant and that mental reservations on the part of one or both of the parties to a marriage do not affect its validity. [80]

The second issue, which is whether, the trick or sham marriage being recognized as a valid marriage, the court is improperly aiding a fraudulent scheme in granting a decree nisi of divorce, has not as yet been fully explored. In *Gardner v. Gardner,* [81] which involved a petition for divorce on the ground of the adultery of one of the spouses, Mr. Chief Justice Wilson concluded that the sham marriage was a valid marriage and therefore, "[i]t follows, adultery being proved, that the decree for dissolution must go". [82] It is probably preferable that these situations be dealt with under the Immigration Act, perhaps by a specific offence or by a charge of conspiracy to obtain the entry of a person into Canada by false representations and by wilful concealment of material facts, [83] than under the Divorce Act by a refusal on the part of the court to grant a decree nisi.

IV. CHILDREN

A. *Custody*

The custody cases reported during the survey period comprise an infinite variety of fact situations and since they, like cruelty cases, turn so much on their own facts, their precedential value is minimal. However, it is clear that the principles applied to settle interparental custody disputes, even in divorce actions, [84] have remained unchanged. The welfare of the child is the paramount consideration and in arriving at a decision as to what is best for the welfare of the child, the courts have continued to consider a number of

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[77] *Id.* at 918-19.

[78] 13 D.L.R.3d 250 (B.C. Sup. Ct. 1970).

[79] [1971] 1 Ont. 245, 15 D.L.R.3d 53 (1970).

[80] *Id.* at 250, 15 D.L.R.3d at 58.

[81] *Supra* note 78.

[82] *Id.* at 252.

[83] This was the charge in United States v. Rubinstein, 151 F.2d 915 (1945).

[84] The factors designated as material to the exercise of the court's discretion under § 11(1) of the Divorce Act have not displaced the "welfare of the child" as the paramount consideration in determining the issue of custody. *See* Papp v. Papp, [1970] 1 Ont. 331, 8 D.L.R.3d 389 (1969).

"principles:" (1) a child of tender years should normally be with its mother; [85] (2) a girl should normally be with her mother and a boy, unless of tender years, with his father; [86] (3) the children of a marriage should normally be kept together; [87] (4) the child's wishes should be considered if he is sufficiently mature; [88] and (5) the parents' plans for the care, maintenance and upbringing of the child [89] as well as (6) the conduct and wishes of the parents should be considered. [90]

These principles are often contradictory and the interpretation of and weight to be applied to each principle in determining the best custodian continues to vary between judges. For example, in *Beauroy v. Beauroy,* [91] the trial judge refused to separate the four children of the marriage who ranged in age from four months to nine years. He awarded custody of the four children to the mother although he felt that the wife's adulterous conduct had destroyed the marriage and he indicated that he would have awarded custody of the children to the father but for the constant care required from the wife for the newborn child who was ill.

The conduct of the parents *inter se* and in relation to the cause of the break-up of the marriage is relevant only in so far as it aids the court in determining what is best for the welfare of the child [92] but again the weight attached to such conduct varies considerably. *Nielsen v. Nielsen* [93] involved, *inter alia,* the increasingly common parental action of the removal by force of a child from the jurisdiction. In this case, the defendant husband, who had assumed custody of the four children of the marriage when his wife required hospitalization, refused to return three of the children to his wife. When divorce, custody and maintenance proceedings were instituted against him in Ontario, he removed the three children to British Columbia and denied the mother any knowledge of their whereabouts or circumstances. Mr. Justice Galligan held that being a good parent involves not only providing love and affection, an ability to discipline and guide the children, and an ability and willingness to provide reasonably comfortable and adequate accommodation, but it requires, in addition, the providing of a happy, secure and loving home in the family environment and wilful misconduct of a parent in breaking up the family home in conduct which is not conducive to the welfare of the children. [94] Therefore, although an isolated act of adultery does not disentitle a parent to custody, it is a factor to be considered when it has led to the break-up of the family home. As the husband had committed adultery with his wife's sister, when he knew that such a relationship would have serious repercussions on the mental health of his wife, and, for his own purposes, had removed the children of the marriage from the jurisdiction

[85] Nielsen v Nielsen, [1971] 1 Ont 541, at 553 (High Ct. 1970).
[86] Pawelko v Pawelko, 1 Fam L.R 174, at 180 (Sask Q.B. 1971).
[87] Beauroy v Beauroy, 1 N.S.2d 531 at 544 552-53 (1970) Nielsen v Nielsen, *supra* note 85
[88] *Supra* note 85, at 554.
[89] *Id.*
[90] *Id.* at 551.
[91] 1 N.S.2d 531 (1970)
[92] Papp v Papp, [1970] 1 Ont. 331, at 345, 8 D.L.R.3d 389 (1969).
[93] [1971] 1 Ont. 541 (High Ct. 1970).
[94] *Id.* at 552.

and denied them access to their mother, the court felt that he had acted in a manner directly contrary to the welfare and best interests of the children. As there was no evidence that the mother had ever acted against the interests of her children, the court concluded that "the conduct of the parties clearly indicates that the welfare of these children would be best served by their being with their mother." [95]

Disagreement continues to exist over whether the proper test for settling third-party custody suits [96] is the parental right or the best interests of the child test. [97] In addition, many of the courts verbalizing the latter test continue to utilize devices that result in the application of a disguised parental right test rather than a neutral determination of the best interests of the child. The most common device has been the presumption that custody by the biological parent will be in the best interests of the child unless the parent is shown to have forfeited the right by misconduct—often referred to as the prima facie right of the natural mother to custody if the child is illegitimate, and of the natural parents if the child is legitimate. In *Re Logue*,[98] the mother of an illegitimate child appealed a custody award to the natural father on the ground that the trial judge had treated the application as if the parties were married persons with equal rights to custody and had failed to consider or recognize the prima facie right of the mother of an illegitimate child to the custody of such child. On appeal Mr. Justice McGillivray stated: "Upon the authorities at common law the right of the mother to custody of an illegitimate child was unquestioned, though later modified by the equitable rule that the welfare of the child should be the primary consideration. This rule was only applied, however, . . . where, through some deficiency on the mother's part, she was deprived of custody." [99] The appeal was allowed because the "preferred claim" of the mother had not been brought to the trial judge's attention or considered by him. A similar result was reached in *Vandenberg v. Guimond* [100] where the trial judge's award of custody of two illegitimate girls, aged seven and three, to the putative father on the basis of what was in the best interests of the children, was reversed. The Manitoba Court of Appeal felt that it was well established that the mother of an illegitimate child had the right to its custody and "the law implies that in order for a father to gain custody of an illegitimate child, the amount or degree of neglect by the mother must be greater than that which is required in the case of a legitimate child." [101]

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[95] *Id.* at 553.

[96] Custody disputes between the natural mother and father of an illegitimate child, or between the natural parent or parents of a legitimate child and a stranger.

[97] *Re* Fulford, [1970] 3 Ont. 493, 13 D.L.R.3d 389 (Surr. Ct.). *But see Re* Logue, [1971] 1 Ont. 255, at 261 (1970) (per Arnup, J.A.): "In the light of those cases, if the *prima facie* right of the mother is to be abrogated in favour of the single criterion, the welfare of the child, the Legislature and not the Courts must do so." *See also* Vandenberg v. Guimond, 66 W.W.R. (n.s.) 408, 1 D.L.R.3d 573 (Man. 1968) *rev'g* the trial judgment of Hall, J.

[98] [1971] 1 Ont. 255 (1970).

[99] *Id.* at 258.

[100] 66 W.W.R. (n.s.) 408, 1 D.L.R.3d 573 (Man. 1968).

[101] *Id.* at 416 (per Dickson, J.A.). *See also Re* Fulford, [1970] 3 Ont. 493, 13 D.L.R.3d 389 (Surr. Ct.); *Re* Crossman, 2 N.B.2d 806 (1970) *aff'g* 2 N.B.2d 574 (Q.B. 1970); *Re* Mugford, [1970] 1 Ont. 601, 9 D.L.R.3d 113 (1969), *aff'd.*

The second device has been a shift in the burden of proof to the third party on the issue of unfitness. In *Re Crossman* [102] the widowed mother of a three-year old child was eighteen years old and had a limited education and limited resources. The child had been living in the deceased father's uncle's home where he was happy and well-adjusted to his environment when the mother, in her capacity as the surviving parent of a legitimate child, claimed the child's return. The trial judge referred to the welfare of the child principle and then stated: "Surely it is necessary . . . to establish that the parent is so completely lacking in the qualities of a satisfactory parent that the detriment to the child's welfare would be beyond question." [103] The trial judge held that notwithstanding the mother's shortcomings, it was not shown that she was incapable of providing a home and proper care for the child and he reluctantly directed that the child be delivered to his mother. The custody award was upheld by the New Brunswick Supreme Court. [104]

The "best interests of the child" is also the test for determining the non-custodial parent's right of access to the child. However, because of the presumption that the welfare of the child requires that the child should know and identify with both parents, access rights are rarely refused unless the non-custodial parent is guilty of misconduct toward the child or by so involving the child that the child will be harmed if permitted to come into contact with the parent. Thus it has been felt that the rights of parents are given greater weight by the judiciary when the issue is not one of custody but of access by the non-custodial parent. This practice was objected to by Mr. Justice Stewart in *Re Tuohimaki* [105] which involved an application by a father for access to his illegitimate child.

> The interests of the child are, of course, paramount . . . I entirely agree that the considerations are different in determining rights of access and custody. I cannot agree that as a rule of general application access may not be refused except in cases where danger to the child is apprehended. I think the over-all welfare, which of course includes not only the physical surroundings but the mental, moral and spiritual, are to be considered as a whole whenever possible, and the decision based on how the scales fall according to the interests of the child and not either parent. [106]

Stewart dismissed the application holding that, while a putative father should be entitled to access to his illegitimate child if it is in the child's best interests, it was not in the child's best interests in this case.

As custody awards are never final the conduct of the parents always remains relevant. In *Jones v. Jones* [107] the Ontario Court of Appeal held that persistent interference by the father, the custodial parent, with the non-custodial mother's access rights placed his continued custody of the child in great jeopardy.

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[102] 2 N.B.2d 574 (Q.B. 1970).
[103] *Id.* at 579 (per Dickson, J.A.).
[104] 2 N.B.2d 806 (Sup. Ct. 1970).
[105] [1971] 1 Ont. 333 (High Ct. 1970).
[106] *Id.* at 338.
[107] 1 Fam. L.R. 295 (Ont. 1971).

B. *Adoption*

As a general rule, if a child is legitimate, both parents or the surviving parent must consent to the child's adoption and, if a child is illegitimate, the mother alone has the right to consent. [108] At the present time all Canadian jurisdictions have statutory provisions permitting the court, under certain circumstances in cases where the parent is unwilling or unable to consent to the adoption of his or her child, to dispense with the required consent at the time of the adoption hearing and it has been the exercise of this power that has been in issue in most of the adoption cases reported during the survey period. Adoption, involving as it does the termination of the ties that bind the child to his natural parents and the substitution of new ties with the adoptive parents, is regarded as much more serious for the natural parents than a custody dispute, whether it be an interparental or third party custody dispute, [109] and thus the courts have consistently emphasized parental rights and parental conduct in considering whether to dispense with a required consent to adoption notwithstanding the apparent constraints of the statutory tests for dispensing with consent. This is illustrated by the 1969 case of *Re Desmarais* [110] in which the Ontario Court of Appeal considered whether to dispense with the mother's consent to adoption when the mother had placed her child with the adoptive parents under an agreement whereby she and her husband promised never to interfere with the child's welfare. Despite the fact that the Ontario statutory test is whether "having regard to all the circumstances of the case, the court is satisfied that it is in the best interests of the child that the requirement [of consent] be dispensed with," [111] the court held that the right of the natural parent to the custody of the child is entitled to prevail unless there is abandonment, misconduct or very serious and important reasons connected with the child's welfare that require that custody be given to some other person. These are in fact the guidelines that were established by Mr. Justice Cartwright in *Martin v. Duffell* [112] at a time when the statutory test for dispensing with consent was much more restrictive. [113] The court implied that a neutral determination of the best interests of the child, although perhaps a suitable test for determining custody, was not a suitable test for dispensing with parental consent to adoption, despite the statutory test, because of the nature, quality of finality and far-reaching consequences of an adoption order. [114]

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[108] Ontario and Quebec require, in addition, the notification and consent of the natural father where the child is living with and being supported by the father. The Child Welfare Act, ONT. REV. STAT. c. 64, § 73(2) (1970); The Adoption Act, Que. Stat. 1969 c. 64, § 6 (*a*)

[109] Desmarais v. Casper, [1969] 1 Ont. 700, at 704 (per Schroeder, J.A.)

[110] *Id.*

[111] The Child Welfare Act, ONT. REV. STAT. c. 64, § 73(5) (1970)

[112] [1950] Sup. Ct. 737, [1950] 4 D.L.R. 1. *aff'g* [1950] Ont 39, [1950] 1 D.L.R. 694 (1949)

[113] The Adoption Act, ONT. REV STAT. c 218, § 3(3) (1937) which provided that the court could dispense with any consent required by the act "if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the infant or cannot be found or is incapable of giving such consent or, being a person liable to contribute to the support of the infant, either has persistently neglected or refused to contribute to such support or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with...."

[114] *See also Re* Desmarais, [1969] 1 Ont. 700, at 704, 3 D.L.R.3d 617, at 621.

Adoption applications are increasingly being made by the natural parent who has been awarded custody of the child in a divorce decree and his or her new spouse for the purpose of regularizing the child's position in the family so that, as far as possible, his status and rights will be indistinguishable from the status and rights of the children born of the new marriage. Most of the courts dealing with adoption applications of this type have applied the test of Cartwright and have required abandonment, misconduct or very serious reasons having regard to the welfare of the child before they would dispense with the consent of the parent who did not have custody. However, several recent cases may indicate a softening or disregard of the principles set down by Cartwright [115] and a more literal interpretation of the statutory test when the adoption application is by a stepparent and a natural parent on the basis that the proceedings are more akin to proceedings for custody than proceedings for adoption. "It should be stressed that this is not a case of a contest between natural parents and strangers, but a contest between natural parents themselves in the very unnatural situation created by divorce." [116]

In *Goldstein v. Brownstone* [117] the natural father, a medical doctor, saw little of his wife and daughter during his marriage. The marriage foundered and a decree of divorce was granted with custody of the child awarded to the mother with rights of access to the father. Both parties remarried and the mother and her new husband applied for a decree of adoption of the child and an order dispensing with the father's consent. Judge Solomon, finding that the child was "being emotionally disturbed by the attempts of the natural father to see her" and that "genuine as such attempts might be, [they] only create more emotional disturbance and insecurity for the child," [118] granted the decree dispensing with the father's consent. The father's appeal was dismissed by the Court of Appeal on the ground that:

> Sec. 99C of *The Child Welfare Act* empowers the judge to make a decree of absolute adoption without requiring the consent of the parent who is not a party to the application if it is, in his opinion, having regard to all circumstances, "in the best interests of the child" so to do. That is the sole criterion, the best interests of the child. It may seem harsh that no mention is made of the interests of the natural father whose parental rights are brought to an end by the decree of adoption. Thereafter he has no more rights than a stranger. But that is the way in which the legislation reads. In determining whether the best interests of the child will be served in granting the decree, the judge will no doubt consider, as one of the circumstances which he must take into account, whether those interests will be served by severing the tie with the natural parent. But be it observed that in the end it is the interests of the child and not those of the parent which are paramount. [119]

The father had argued that, following various Alberta decisions, the words

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[115] For a more comprehensive analysis see Hughes, *Adoption in Canada* in CANADIAN STUDIES IN FAMILY LAW (D. Mendes da Costa ed. to be published, autumn, 1971).

[116] *Re* Application for Adoption, 64 D.L.R.2d 538, at 543 (N.S. County Ct. 1967) (per O'Hearn, J.).

[117] 75 W.W.R. (n.s.) 193, 15 D.L.R.3d 102 (Man. 1970).

[118] *Id.* at 196, 15 D.L.R.3d at 105.

[119] *Id.* at 194-95, 15 D.L.R.3d at 104.

"having regard to all circumstances" necessarily imported a need to establish neglect, abandonment or moral turpitude on his part before the court could destroy his parental rights by dispensing with his consent to adoption, and he argued that the only possible charge which could be brought against him was that he was somewhat less than assiduous in exercising his rights of visitation. The court rejected this argument and distinguished the Alberta section which provides that the consent of the parent shall not be required if the judge "for reasons which appear to him sufficient" deems it necessary or desirable to dispense with his consent, on the basis that: "The emphasis [in Alberta's provision] is upon the conduct of the guardian or parent. The philosophy underlying the Manitoba legislation is different. The legislation in Manitoba is concerned with the "best interests of the child". That is the test, not the wider test which [the appellant] urges." [120] The court found that it was in the best interests of the child to dispense with the consent and so dismissed the appeal. It should be noted, however, that unlike the earlier cases, the interpretation of the power to dispense with any required consent if such dispensation is "in the best interests of the child" was not limited by the Manitoba Court of Appeal to cases where the contest was between the custodial parent and his or her new spouse and the non-custodial parent and in future might be applied to contests between parents and strangers in blood.

C. *Juvenile Delinquency*

The most dramatic and controversial development in family law during the survey period was Bill C-192, "An Act respecting young offenders and to repeal the Juvenile Delinquents Act," which received first reading in the House of Commons on November 17, 1970. The bill received second reading on April 6, 1971, and was referred to the Standing Committee on Justice and Legal Affairs where it remains for further study at the time this article is written.

Bill C-192 is a complex, detailed and difficult to read piece of legislation, the main thrust of which is to provide young offenders with the due process protections that are normally provided for adults charged with offences and tried in adult courts. Although the embodied philosophy remains, as stated in the present juvenile delinquency legislation, [121] the treatment of the individual, not as a criminal, but as a misdirected and misguided young person requiring help, guidance, encouragement, treatment and supervision, [122] the legislation has been criticized as implementing an inflexible, punitive approach. "The Bill is, in fact, a Criminal Code for Children, which is distasteful in its terminology, legalistic in its approach, punitive in its effect." [123]

The bill raises the minimum age of criminal responsibility from seven to ten years [124] and, by setting the upper age limit for persons falling within

[120] *Id.* at 195-96, 15 D.L.R.3d at 105.

[121] Juvenile Delinquents Act, CAN. REV. STAT. c. J-3, § 38 (1970).

[122] Bill C-192, § 4.

[123] CANADIAN MENTAL HEALTH ASS'N, THE YOUNG OFFENDERS ACT and THE CHILDREN OF CANADA (1970).

[124] Bill C-192, § 2(*s*). In Ontario this amounts to a lowering of the age of accountability from twelve to ten years.

the terms of the bill at seventeen years or, where the province desires it, at eighteen years, [125] it perpetuates the present lack of a uniform age standard throughout Canada. The bill deals only with violations of federal acts, regulations and by-laws, leaving each province to legislate regarding provincial and municipal offences, and the oft-criticized, all-encompassing offence of delinquency is eliminated in favour of a procedure under which a young person must be charged with a specific offence. [126] The bill provides the court with a wide range of options in dealing with offences, including absolute discharge without conditions of any kind and fixes a maximum "sentence" of three years in a training school or two years under the care and supervision of a Children's Aid Society. [127] Under the bill, the court may not utilize the indefinite or indeterminate sentence presently being used in some provinces but must commit a young person to a definite term. This, it is felt by many, is contrary to the goal of rehabilitation as it requires that the young person be released, whether rehabilitated or not, when the term expires and conversely, that the child be detained for the full term even if the training school authorities are satisfied that he should be released earlier. This provision has been criticized first, as forcing a judge to determine the length of treatment a juvenile should undergo by the seriousness of the offence, not by the needs of the child, and second, as assuming, contrary to experience in the field of corrections, that a judge can measure in advance the amount of time required for treatment and rehabilitation. The use of indeterminate sentences along with procedures for an independent periodical review of the child's progress to prevent abuse of such sentences has been recommended as more in keeping with the bill's stated philosophy. [128]

Two other sections that have provoked a great deal of criticism are section 30(1)(*k*) which permits a youth charged with a serious offence to be committed to a training school until twenty-one and then sentenced by a higher court to a further term, and section 74(1) which allows the court to order that the child be fingerprinted and photographed.

Bill C-192 contains many welcome provisions relating to arrest, pre-trial detention, notice of proceedings and appeals that will help safeguard the rights of the young offender. Nevertheless, it is hoped that changes will be made in the bill before third and final reading as "[n]ew legislation must not succeed in protecting the young offender from injustice at the expense of his ultimate welfare." [129]

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[125] Bill C-192, §§ 2 (*c*), 3.

[126] *Id.* at § 2(*s*).

[127] *Id.* at § 30.

[128] AD HOC COMMITTEE OF THE PROVINCIAL JUDGES (FAMILY DIVISION), REPORT TO THE HON. ARTHUR WISHART (Ont. Dec. 1970).

[129] Grosman, *Young Offenders Before the Court*, 2 CAN. B.J. No. 2 (n.s.) 6, at 7 (1971).