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Joint Custody as Norm: Solomon Revisited

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Joint Custody as Norm: Solomon Revisited

Abstract

Most jurisdictions in Canada and the United States have, to a greater or lesser extent, endorsed the notion of joint custody in recent years. The author suggests that-the move toward joint custody has resulted from a combination of two major factors: the notion of parental equality and the application of the best interests of the child test. The growing prominence of equal parental rights has created a strong temptation to approach custody as a Solomonic exercise in dividing the children equally between those with equal rights over them. The indeterminacy of the best interests test may readily encourage custody determinations on this basis as well. Joint custody has been received less enthusiastically in Canada than in the United States. The author suggests that the tendency of the Supreme Court of Canada to reject the sameness of treatment approach to equality may well explain this.

Keywords

Joint custody of children; Canada

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JOINT CUSTODY AS NORM: SOLOMON REVISITED©

BY ALISON HARVISON YOUNG*

Most jurisdictions in Canada and the United States have, to a greater or lesser extent, endorsed the notion of joint custody in recent years. The author suggests that the move toward joint custody has resulted from a combination of two major factors: the notion of parental equality and the application of the best interests of the child test. The growing prominence of equal parental rights has created a strong temptation to approach custody as a Solomonic exercise in dividing the children equally between those with equal rights over them. The indeterminacy of the best interests test may readily encourage custody determinations on this basis as well. Joint custody has been received less enthusiastically in Canada than in the United States. The author suggests that the tendency of the Supreme Court of Canada to reject the sameness of treatment approach to equality may well explain this.

Dans des années récentes, la plupart des juridictions au Canada et aux États-Unis ont adopté, à différents degrés, la notion de la garde conjointe. L'auteure suggère que l'avance vers la garde conjointe résulte d'un combinaison de deux facteurs majeurs: la notion de l'égalité parentale et l'application du test qui met l'accent sur les meilleurs intérêts de l'enfant. La prédominance croissant des droits égaux des parents a donné lieu à une forte tendance à traiter la question de la garde des enfants comme un exercice de Solomon qui consiste dans le partage égal des enfants entre ceux qui ont des droits sur les enfants. Aussi, le test basé sur les meilleurs intérêts de l'enfant est si indéterminatif qu'il peut encourager que les déterminations de garde soient faites de cette façon.

La notion de la garde conjointe a été reçue avec moins d'enthousiasme au Canada qu'aux États-Unis. L'auteure suggère cette différence s'explique par la tendance de la Cour suprême du Canada à rejeter la théorie de l'égalité fondée sur le traitement pareil.

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I. INTRODUCTION

Some authors have observed in recent years that "joint custody is sweeping the country."[1] Although such statements generally refer to the United States, joint custody has also been an influential notion in Canada.[2] Whatever one might think of it, joint custody has struck a chord with policy-makers, legislators, and judges across both countries. Given the traditional vision of the law as resistant to reform and slow to change, that legislators have actually changed laws to accommodate joint custody is a remarkable phenomenon.[3]

This paper will focus upon the ideological explanations underlying this "sweep," and will consider whether these explanations apply as well to Canada as to the United States. I will argue, after considering some other possible explanations, that the ideology of equality, and particularly the American vision of equality as sameness, underlies the appeal of joint custody. Equality has moulded our ideas of the best interests of the child test, which judges use to determine custody, and not the other way around. The inherent indeterminacy of the best interests test has also been a key factor in reinforcing the ideology of equality and joint custody; in the absence of legal devices that really help a judge to decide between the parents (such as the tender years doctrine, a maternal presumption[4]), the

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1 See J.B. Singer & W.L. Reynolds, "A Dissent on Joint Custody" (1988) 47 Md. L. Rev. 497 at 497 and 512. M. McKnight, in "Issues and Trends in the Law of Joint Custody" in J. Folberg, ed., *Joint Custody and Shared Parenting*, 2d ed. (New York: Guilford Press, 1991) 209 at 209 writes that "[j]oint custody has swept the country, leaving few family law codes and practices untouched." For a table of American legislation concerning joint custody, see J. Folberg, ed., *ibid.*, Appendix A at 297.

2 In the United States, the major legislative initiatives in joint custody were undertaken in the early 1980s. Although several states have taken a second look at and have, in some cases, softened their joint custody provisions following psychological studies (discussed below) and legislative task forces (for example, the California State Senate Task Force on Family Equity, June 1987), the fact remains that joint custody has continued to exert a forceful influence over the law and over judicial interpretation.

3 The trend has also been influential in Britain. Although it must be acknowledged that, under the *Children Act* (U.K.), 1989, c. 3, there is no such thing as joint custody, or even custody, British law still seeks to encourage joint parental involvement and gives the non-residential parents the right to information regarding the child so that they may participate in the decision-making process: see P.M. Bromley & N.V. Love, *Family Law*, 8th ed. (London: Butterworths, 1992) at 333-34.

4 The tender years doctrine created a presumption in the case law in favour of maternal custody when all other factors were equal and when the child in question was under approximately seven years of age. S.B. Boyd, "From Gender Specificity to Gender Neutrality? Ideology in Canadian Child

option of giving custody to both may be an attractive way out of often agonizing dilemmas. I will also suggest that, although equality has been a very important value in Canada in recent years, the core of the ideology of equality is taking on a shape very different from the sameness of treatment vision, which prevails in the United States. The heart of equality in Canada is increasingly seen as a remedial notion,[5] which readily recognizes difference and is concerned with trying to remove the effects of difference and disadvantage. The implication for joint custody is that, where equality may incorporate difference, the notion that mothers and fathers should be treated as though they were the same and the notion that the law should see them as having equal shares over the child has a less potent normative appeal.

The term "joint custody" encompasses a number of different arrangements.[6] Joint legal custody refers to the notion that the parents, following a separation, will share decision-making authority for major decisions with respect to the education, healthcare, and religious upbringing of the children. It does not, at least in principle, presuppose any particular division of living arrangements.[7] Joint physical custody refers to a divided living arrangement, which generally involves alternating periods of residence between the parents. Although the division need not be equal, joint physical custody differs from an agreement for "generous access" in two ways. First, the parents generally both provide homes for the child; the child keeps a room and personal effects in both houses. Second, the time division is more equal than in the traditional access arrangement. For example, in some cases the custody arrangement allows the child to alternate weeks, months, or even years between parental homes. In other cases, the arrangement allows the child to divide the week, and spend, for example, Wednesday to Saturday with one parent and Thursday to

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Custody Law" in C. Smart & S. Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge, 1989) 126 at 130.

5 McIntyre J. alludes to the "remedial component" of equality in *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171 [hereinafter *Andrews*].

6 J.B. Singer & W.L. Reynolds, *supra* note 1 at 503, underline the distinction between joint physical and joint legal custody. J. Folberg, in "Custody Overview" in *Joint Custody and Shared Parenting*, *supra* note 1 at 5-7, begins with an overview in which he sets out useful definitions.

7 Recent studies have found that "joint legal custody" may not differ significantly in practice from the more traditional "sole custody and reasonable access" situation. See, for example, C.R. Albiston, E.E. Maccoby & R.H. Mnookin, "Does Joint Legal Custody Matter" (1990) Stan. Law & Pol. Rev. at 167, which found that one and a half years after divorce, fathers with joint legal custody do not see their children more often, cooperate more with their former wives, nor participate more in decisions regarding their children's lives. This study became part of the larger work, E.E. Maccoby & R.H. Mnookin, *Dividing the Child* (Cambridge, Mass.: Harvard University Press, 1992).

Sunday with the other.[8] Joint physical custody is much less common than joint legal custody. One recent study from California, which has led the way in introducing and encouraging joint custody, indicates that 79 per cent of divorced parents with children had joint legal custody decrees; of these, only 20 per cent had joint physical custody as well.[9]

The term "joint custody" is ambiguous in another important aspect: it does not indicate whether joint custody, legal or physical, arose by agreement between the parties or by the imposition of a court order, in spite of the opposition of one or both parents.[10] More recent writing and empirical studies on joint custody support the contention that the difference is a crucial one. Indeed, the earlier studies, which presented optimistic pictures of joint custody, were based on samples of subjects who had agreed to joint custody. Increasingly, authors are proposing that joint custody should never be imposed, at least when the parents cannot agree, that a primary caretaker presumption should be applied.[11]

II. EXPLAINING THE APPEAL OF JOINT CUSTODY

A. *The Social Science Explanation*

At least until quite recently, most proponents defended joint custody as "scientifically proven" to be in the best interests of the child. They would

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8 *Colwell* v. *Colwell* (1992), 38 R.F.L. (3d) 345 at 349 (Alta. Q.B.) [hereinafter *Colwell*] offers a succinct statement of current law on divided custody:

> To find [divided custody to be] in the best interests of any child would require more to be shown than ... [that] mere decision making is to be shared. The benefits of the security of one home, one set of routines, and one set of expectations are significant; it would be an exceptional case where the sacrifice of these benefits would be justified in the best interests of the child.

The judge in *Colwell* cites Professor James McLeod, in his annotation to *Parsons* v. *Parsons* (1985), 48 R.F.L. (2d) 83 at 84 (Nfld. Unif. Fam. Ct.) [hereinafter *Parsons*], for the proposition that recent mental health literature questions whether joint custody is as beneficial as was initially imagined.

9 Albiston, Maccoby & Mnookin, *supra* note 7 at 167. California law explicitly splits the notion of joint custody into joint *legal* and joint *physical* custody: see Cal. Fam. Code § 3003-04 (West 1995).

10 For a discussion of these divisions, see L.J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: The Free Press, 1985) at 245-47.

11 See, generally, P. Bookspan, "From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? ... Should it?" (1994) 8 B.Y.U. J. of Pub. Law 75.

almost invariably cite the Wallerstein and Kelly study[12] and others, which suggest that children who maintained relationships with the non-custodial parent tended to adjust better to life after divorce than those who did not.[13] However, the research has simply been too equivocal and inconsistent to have driven the changes in attitude that took place towards joint custody. A psychologist from McGill University made the point effectively in a recent paper:

> Unfortunately, the research is plagued by numerous methodological problems, namely the lack of longitudinal research, small and nonrepresentative samples, and the lack of rigorous control over specific arrangements (eg family situations with joint legal custody are virtually indistinguishable from family situations with sole custody; Brown 1984, Arditti, 1992). Moreover, investigations of joint custody most frequently employ joint legal custody arrangements, resulting in very limited implications or erroneous conclusions about joint residential custody (Emery, 1988). This remains the most remarkable limitation in this research area. Nevertheless, since the passage of the *Federal Divorce Act* in 1985, Canadian courts appear to be increasingly in favour of joint custody and support their decision by drawing upon available, yet inconclusive data (Irving & Benjamin, 1987). In policy formation, this is a clear cut case of putting the cart before the horse.[14]

In addition, writers tended to cite the early research of authors such as Wallerstein and Kelly by interpreting their findings too generally. For example, in *Surviving the Breakup* Wallerstein and Kelly recommended joint *legal,* not joint *physical* custody, and yet, proponents of joint physical custody often cite their work. Moreover, Wallerstein has insisted that the study never recommended the imposition of joint physical custody on parents without their complete agreement.[15] In general, policy-makers have seized the well-established proposition that children generally do best after divorce when they maintain relationships with both parents, and jumped to the conclusion that joint physical custody is the optimal way of achieving this.

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[12] J.S. Wallerstein & J.B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (New York: Basic Books, 1980).

[13] See Singer & Reynolds, *supra* note 1, for a critical discussion of some of the research and the inferences that have been drawn. Singer and Reynolds criticize the "unjustified leap from the common sense proposition that children do better after divorce if they maintain frequent contact with both parents to the startling conclusion that joint custody is the only way to ensure such contact. Neither logic nor data support this leap": *ibid.* at 502. See R.F. Cochran, Jr., "Reconciling the Primary Caretaker Preference and the Joint Custody Preference" in Folberg, *supra* note 1, 231 for a discussion of a study which suggests that too much contact can be counter-productive. Cochran states that "[i]t may be that children benefit from more contact with the less-seen parent than is provided by traditional visitation, but that the benefits of increased access ... are subject to diminishing marginal returns."

[14] L. Kurtz & J. Derevensky, "Child Custody and Public Policy: Issues, Questions and Answers" (paper presented at the Second International Conference for the Child, Organization for the Protection of Children's Rights, Montreal, October 1992).

[15] As cited in M.A. Mason, *The Equality Trap* (New York: Simon & Schuster, 1988) at 82.

What conclusions, if any, arise from the research to date? First, subsequent research has greatly qualified the early research, which appeared to show joint custody (whether legal or physical) as a positive arrangement for children. The most obvious qualifier of the early Wallerstein and Kelly work (in addition to their recommendation of joint legal custody but not joint physical custody) was that their sample included only families that had agreed to joint custody. This is of crucial importance because the research repeatedly identifies conflict between parents as a strong negative indicator for the adjustment of children following divorce. In such situations, a custody arrangement which forces warring parties to co-parent is likely to intensify the conflict in which the children are involved. [16] While many jurisdictions are reluctant to order custody in the absence of spousal agreement, this factor has arguably not been given the legal importance which it deserves.[17] Is the mere consent of the parties to a joint legal custody order sufficient, or should a court seek satisfactory proof that the parents really are able to cooperate in the upbringing of their children?

Second, joint legal custody may not, in the result, mean very much as a practical matter. It may frequently have the attributes of the traditional arrangement: sole custody to the mother with generous access to the father. Maccoby and Mnookin found no significant effects of joint custody on the level of non-resident fathers' contact or support.[18] Similarly, they did not find that joint custody increased their involvement in decision-making, reporting that "where the children had one primary residence, it was usually

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16 Although there have been many problems with empirical research on the subject of joint custody, there is a consensus on one important point: involvement in parental conflict has very negative effects on children. Forcing a greater degree of sharing between two warring spouses increases the amount of conflict and increases the exposure of the children to the conflict. F. Furstenberg & A.J. Cherlin, in *Divided Families: What Happens to Children When Parents Part* (Cambridge, Mass.: Harvard University Press, 1991) at 75 write: "The admittedly limited evidence so far suggests to us that custody arrangements may matter less for the well-being of the children ... than the two factors we noted earlier: how much conflict there is between the parents and how effectively the parent (or parents) the child lives with functions ... Even the frequency of visits with a father seems to matter less than the climate in which they take place." Dr. Richard A. Gardner, a professor of Child Psychiatry at Columbia University, warns: "Joint custody is a terrible compromise for warring parents. When recommended in such situations, what may actually result is a *no-custody* arrangement that is merely called joint custody. Neither parent has power or control, and the children find themselves in a no-man's-land exposed to their parents' crossfire and available to both as weapons. The likelihood of children developing a psychological problem in such a situation is practically 100 percent": see R.A. Gardner, "Joint Custody is Not For Everyone" (1982) 5 Fam. Advoc. 7 at 9.

17 Maccoby and Mnookin, *supra* note 7 at 210, noted the importance of parental conflict as a factor in the adjustment of children after divorce. They also observed that prior to their work, no documentation existed that addressed the nature and extent of communication between divorced parents concerning the children.

18 *Ibid.* at 289.

the residential parent who took primary decision-making responsibility."[19] Third, joint physical custody may put children at risk when there is substantial parental conflict. Unlike joint legal custody, it does make a difference. When children are going back and forth between two homes frequently, parents, especially of very young children, must interact, and parental conflict in such circumstances will almost inevitably affect the children detrimentally.[20]

Finally, one of the most interesting aspects of Maccoby and Mnookin's important study is the gendered theme, which emerged from their work. In approximately 70 per cent of the families studied, the children lived with their mothers, although the children typically saw their fathers fairly regularly. In only one of six families were the living arrangements more evenly balanced. In these families, the children spent between one-third and one-half of their residential time with each parent over a typical two-week period. Even in these cases, the children spent the bulk of their residential time with their mothers. The researchers found only approximately 10 per cent of cases where the children lived with their fathers. Moreover, the patterns of residence change revealed a phenomenon, which has been dubbed "mother drift," the major attributes of which are:

1. Mother-residential households were more stable, with fewer changes than either dual-residence or father-residence households; and
2. when a residential move of either parent triggered a change in the children's residence, they almost always moved into the mother's household rather than the father's.

The custodial provisions of the legal decree were relatively powerless in the face of this phenomenon:

> When we compared the custodial provisions of the legal decree with the actual residence of the children, we found that the decree can function to confirm mother residence if it exists initially and to bring it about if it does not exist initially, but that the decree was much less powerful in moving children out of maternal residence once it was established.[21]

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[19] *Ibid.*

[20] *Ibid.* at 284.

[21] *Ibid.*

The authors conclude that these findings suggest that "there is a strong inertial pull—based on social custom rather than law—toward mother residence."[22]

The conclusions, which have emerged from the recent empirical research culminating in Maccoby and Mnookin's recent work, do not provide any justification for the broad changes in policy embraced by many jurisdictions. As Maccoby and Mnookin have written,

> Although in the aggregate data we found no evidence to support claims for the positive *or* negative effects of joint legal custody, it is important to emphasize that this does not preclude such effects in some families over the longer term. Nevertheless, it appears that joint legal custody is neither the solution to the problem of maintaining the involvement of divorced fathers, nor a catalyst for either increasing or softening conflict in divorcing families. *Broad claims either advocating or condemning joint legal custody therefore seem unwarranted.*[23] [emphasis added].

In short, despite the lack of solid empirical footing, joint custody found a very receptive audience among policy-makers during the 1980s.[24] There was little such empirical evidence then and there is little now. Moreover, the argument that joint custody is an effective way of getting fathers more involved has not been borne out, as Maccoby and Mnookin's results indicate.[25] Joint custody has not lived up to its promise of making parents more equal. While it has not made fathers more "equal" in the daily lives of their children, there is a good argument that the rhetoric of parental equality and joint custody has masked and discounted the dominant role that mothers continue to play in child-rearing. For example, Fineman asserts that the modern vision of gender neutrality in custody determinations has favoured fathers: "It removes, by labelling them gendered, the things women typically tend to do for children, which are grouped under the term 'nurture.' Neutrality in this regard, in the context of an active and operating gendered system of lived social roles, is anti-

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[22] *Ibid.* at 270. "Although our study has not examined the impact of co-parental conflict on children, follow-up work in the context of the Stanford Child Custody Study as well as the research of the others strongly suggests that such conflict can create grave risks for children": *ibid.*

[23] *Ibid.* at 289. The authors, however, state that they would "cautiously support a presumption in favor of joint legal custody largely on symbolic grounds." They further assert that "[j]oint legal custody will not make divorced parents equal partners in the lives of their children, but it does affirm the idea that in the eyes of the law fathers should play a continuing role in their children's lives despite the divorce": *ibid.*

[24] In fact, social science can be seen as part of the larger social and ideological movement that created the climate that has fostered joint custody. See M. 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 at 100-07.

[25] *Supra* note 18 and 19 and accompanying text.

maternal and is hardly gender neutral in its impact."[26] There is also considerable anecdotal evidence to suggest that joint custody is a useful means for the reduction or elimination of child support if the determination of support is based on the assumption that when parents share custody, they pay support in proportion to the time the children spend in their care. Apart from the problem that women earn less money and yet still must maintain a household large enough for their children, the mother drift phenomenon revealed by Maccoby and Mnookin[27] adds another element of unfairness. Once support amounts are set on the basis of equal time, amounts payable to the mother are, in practice, unlikely to be revised upwards as the living arrangements become less "equal." A final illustration of the risks of the joint custody rhetoric for women is the role it can have in settlement discussions. Although Maccoby and Mnookin mention that no empirical evidence exists to support the claim that women often agree to joint custody out of fear of losing support,[28] considerable anecdotal evidence suggests that they may often do so. Mary Ann Mason, for example, tells of a California attorney representing mostly men who admitted to her that "[a]bout sixty percent of my male clients ask for joint custody now, but only about ten percent really want it. It's a good bargaining position."[29] In this sense, women have been subordinated by the discourse of parental equality and joint custody. Although the implicit social norm remains one of mother custody, the explicit legal norm significantly understates the reality. The fact that women are no longer presumptively entitled to custody has had a disempowering effect, particularly as it has been the one arena in which women have had some real control.[30] As I have indicated, it is my argument that the appeal of the ideology of equality has been central to the popularity of joint custody to policy-makers and jurists. This, however, does not render irrelevant another crucial and related factor: the problems inherent in the best interests of the child standard.[31]

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[26] M. Fineman, "The Politics of Custody and Gender: Child Advocacy and the Transformation of Custody Decision Making in the U.S.A." in Smart & Sevenhuijsen, *supra* note 4, 27 at 34.

[27] Maccoby and Mnookin, *supra* note 7 at 96 and 197. See also above at 791.

[28] *Ibid.* at 11.

[29] Mason, *supra* note 15 at 83.

[30] C. Smart, "Power and the Politics of Child Custody" in Smart & Sevenhijsen, *supra* note 4 at 19.

[31] Another explanation is the need—recognized by most writers—for a custody test far easier to apply, and more economic than the current best interests of the child standard. See M. Fineman, *supra* note 26 at 27-28; and R.F. Cochran, Jr., "Reconciling the Primary Caretaker Preference, the Joint Custody Preference, and the Case-by-Case Rule" in Folberg, *supra* note 1 at 218.

B. *The Effect of the Best Interests Standard*

As many authors have pointed out, the removal of the tender years doctrine, along with any presumptions that prefer one parent over the other, and its replacement with the "best interests" test for the allocation of custody has had some serious effects. First, it has led to a higher level of indeterminacy regarding custody decisions.[32] Second, it has rendered the decision much more difficult and time-consuming for judges to make. As Mary Ann Mason has written,

> the abolition of the presumption in favour of mothers as the best custodians for young children has left only the vague guideline of the "best interests" of the child. Our society lacks any clear-cut national consensus on what the best interests of the child are, and the judge must make a determination based on a confusing legislative laundry list of factors to consider. Not only does this make it difficult for the judge to make a decision, it encourages litigation, since the determination is unpredictable. As noted, it also leaves the door open for custody blackmail.[33]

As Maccoby and Mnookin have observed, very few custody cases actually go to court as contested matters. Nevertheless, some evidence suggests that the litigation rates are higher in jurisdictions that have the best interests standard, rather than presumptions.[34] Moreover, it is very difficult to assess the extent to which the fear of losing custody of her child may lead a mother to bargain away her property or child support entitlements, or to agree to forms of access or joint custody that she might not otherwise be willing to do. In other words, there is some reason to exercise caution in assuming that mothers, even early in the process of breakdown, freely enter into agreements for joint custody, however consensual the agreement appears.

It is important to recognize, as Mary Ann Mason has done, that the best interests test can be seen, at least in part, as an expression of the equality rights of the parents. Although the best interests test appears to be child-centred, it has emerged as the determining standard at least partly as a gender-neutral standard of parental rights to replace maternal preference. The rhetoric of equality contributed to the development of the best interests test; the indeterminacy of the best interests test, reinforced

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[32] Maccoby and Mnookin doubt whether the test is really so problematic. They argue, *supra* note 7 at 282, that the strength of the social norm that mothers are the primary custodians for children and the preference for primary custodians gives the test less indeterminacy for most parents than it seems to have. Some other studies have examined comparative litigation rates and found that they are higher in jurisdictions with best interest tests, as opposed to, for example, the primary caretaker presumptions.

[33] M. A. Mason, "The De-regulation of Family Law: In Whose Best Interests?" (1993) 3:2 The Responsive Community: Rights and Responsibilities.

[34] See generally Bookspan, *supra* note 11.

once again by the ideology of equality, rendered the Solomonic solution of joint custody very appealing to jurists. Put another way, the combination of ideology and practical reality set the stage for the joint custody trend. The point is illustrated by an American custody decision quoted by Mary Ann Mason:

> Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes. Joint custody allows parents to have an equal voice in making decisions and it recognizes the advantage of shared responsibility for raising the young. But serious questions remain to be answered: how does joint custody affect the children? What are the factors to be considered and weighed? [35]

C. *Equality as the Force Behind Joint Custody*

The suggestion that the central explanation behind the joint custody boom has to do with the pervasive appeal of the ideology of equality is neither earth-shattering nor novel. The feminist critiques of equality theory are powerful, and I suspect, familiar to this audience and I will not review them here.[36] My examination of the issue with a specifically Canadian focus will include a few points about the equality climate in Canada, about the treatment of joint custody in Canada as opposed to the United States, and about the potential impact of the developing concept of equality as recently applied in other related areas of family law.

D. *The Equality Climate in Canada*

In 1982, when the Canadian *Charter of Rights and Freedoms*[37] came to life, the Canadian constitutional and legal landscape assumed a much greater similarity to American legal culture than had existed previously. For the first time, the Supreme Court of Canada found itself looking more frequently to the United States Supreme Court than across the Atlantic to the House of Lords. As will be discussed below, however, Canadian law has by no means slavishly followed the precedents developed

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[35] *Supra* note 15 at 81. See also *Dodd* v. *Dodd*, 403 N.Y.S. 2d 401 at 402 (1978).

[36] See, for example, M. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991); C. MacKinnon, *Feminism Unmodified: Disclosures on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987); and Smart, *supra* note 30.

[37] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

south of the border. The *Charter* has captured the imaginations and hearts of Canadians, and the notion of equality is one of the principal ideologies reflected in it. Section 15,[38] which also contains a clause permitting affirmative action,[39] has been subject to remarkably little direct judicial interpretation so far, at least by the Supreme Court of Canada, but the notion of equality is clearly an important ideology.[40] Canadian feminists have had high hopes for section 15 as containing the seeds of a substantive vision of equality, while father's rights lobbyists have tried to harness the persuasive power of equality (as sameness of treatment) in their attempts to promote joint custody reforms. Equality, as elusive a concept as it may be, has become a powerful symbol and force for Canadians. Its simplest version is sameness of treatment: parents are equal, parents have equal rights over their children, and parents should be treated equally after separation or divorce. Joint custody, at least at first glance, is very compatible with this version. But if this were the whole story, one might expect Canadian judges and policy-makers to endorse joint custody as enthusiastically as their American counterparts. This is not happening. The reason in my view derives from a fundamental difference in the ideology of equality as it is emerging in Canada, as opposed to the version which has emerged and which remains dominant in the United States.

Historically, Canadians have not been as "rights" oriented or as individual oriented as Americans.[41] Americans essentially linked this

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[38] Section 15 of the *Charter* came into effect on 17 April 1985.

[39] Section 15(2) of the *Charter* reads: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[40] The Supreme Court has revisited its decision in *Andrews, supra* note 5, in cases such as *Dickason* v. *University of Alberta*, [1992] 2 S.C.R. 1103 [hereinafter *Dickason*] (mandatory retirement); *Canada* v. *Schachter*, [1992] 2 S.C.R. 679 (maternity and paternity benefits); *Généreux* v. *R.*, [1992] S.C.R. 259 (whether equality rights are respected by court martial procedure); *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 483 (mandatory retirement); *Vancouver General Hospital* v. *Stoffman*, [1990] 3 S.C.R. 483 (mandatory retirement); and *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 (differences between provinces in criminal procedure). It is also important to note that some of the most significant equality cases, particularly those concerning women, have not been *Charter* cases. See, for example, *Lavallée* v. *R.*, [1990] 1 S.C.R. 852 [hereinafter *Lavallée*], whose central issue was the interpretation of the *Criminal Code* provisions on self-defence where a battered woman who kills her abusive spouse. See also *Canadian National Railway Co.* v. *Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, where interpretation of the statutory remedial powers of the Canadian Human Rights Commission was in issue.

[41] A recent indication of this is the generous interpretation given to section 1 of the *Charter* (Section 1 functions to preserve laws which otherwise have been found to offend the *Charter*, if to preserve them "can be demonstrably justified in a free and democratic society"). See *Dickason*, *ibid.*; *R.* v. *Wholesale Travel Group*, [1991] 3 S.C.R. 154; and *R.* v. *Butler*, [1992] 1 S.C.R. 452. An interesting

individualism to the notion of equality that has developed in their country. As Colleen Sheppard has written,

> U.S. constitutional law takes as its starting premise the idea that equality means sameness of treatment. To be treated equally is to be treated the same. It asserts that all *individuals* should be treated the same and not treated differently because of unfair or discriminatory attitudes or stereotypes about the abilities or talents of the groups to which individuals belong. This is presented as the "neutral" starting point of legal equality. Integral to the sameness of treatment premise is a focus on equality as a process or procedure as opposed to a result or a condition.[42]

According to Sheppard, the emphasis upon sameness of treatment was a response to the injustices of slavery and the subordination of Blacks. By way of illustration, she cites Justice Harlan's dissent in *Plessy* v. *Ferguson*:

> Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[43]

Although, as Sheppard goes on to explain, subsequent historical developments[44] have placed a great deal of pressure on this paradigm, sameness of treatment remains the central and defining core of the American ideology of equality.[45]

The development of the constitutional notion of equality in Canada is taking place in a very different context. As Sheppard observes,

> [i]n the United States context, racial integration was an important component of the struggle towards racial equality. In Canada ... we see precisely the opposite concern. The struggle for equality for francophone minorities outside of Quebec has been a struggle not for integration, which would spell assimilation, but for the right to education in separate schools. This example may also illustrate a greater receptivity in Canada to collective or group rights

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comment on the last case is J. Cameron, "Abstract Principle v. Contextual Conceptions of Harm: A Comment on *R.* v. *Butler*" (1992) 37 McGill L.J. 1135.

[42] C. Sheppard, "Equality in Context: Judicial Approaches in Canada and the United States" (1990) 39 U.N.B.L.J. 111 at 113.

[43] *Ibid.* at 114. See *Plessy* v. *Ferguson*, 163 U.S. 537 at 559 (S.C. 1896).

[44] See *ibid.* where the author remarks on "the emergence of the modern regulatory state following the depression. Inherent in this task of legislating was classification and differential treatment."

[45] There is hope for the relaxation of the rather formal notion of equality in the United States. S. Foster, in "Difference and Equality: A Critical Assessment of the 'Concept of Diversity'" (1993) Wis. L. Rev. 105, assesses the concept of diversity as it has been used by courts as a justification for affirmative action policies. She indicates that courts are increasingly accepting diversity and therefore recognizing differences. Many in the United States fear, however, that society will be permanently defined and structured according to race.

> in contrast to what I argue is a predominantly individualistic approach in the United States.[46]

In other words, recognition and accomodation of difference has been central to the development of equality ideology in Canada, and this example contains two of its key concerns. First, it is concerned with the social and historical disadvantage that certain groups and individuals may experience, and second, the emphasis is on resulting disadvantage, rather than on difference or distinction alone. As many writers have suggested, the political and legal culture of Canada is more receptive to the notions of community or social rights than is the political and legal culture of the United States.[47]

The leading case to date on the articulation of the section 15(1) equality guarantee is the *Andrews* decision.[48] In that case, the Supreme Court had to consider the constitutionality of provincial legislation which imposed a citizenship requirement for the practice of law, and in doing so, the Court rejected the "similarly situated" test. McIntyre J. held that the language of section 15 of the *Charter* was deliberately chosen to avoid some of the problems with the *Canadian Bill of Rights.*[49] For example, the Supreme Court had concluded in *Bliss* v. *Canada (A.G.),*[50] a case argued under the *Canadian Bill of Rights*, that discrimination on the basis of pregnancy did not violate the guarantee of equality before the law because it was not discrimination based on sex. In a frequently cited passage from *Andrews*, McIntyre J. stated that,

> [i]t must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do 'not preclude any law, program or

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[46] *Supra* note 42 at 111. See also Madame Justice B. McLachlin, "The Role of the Court in the Post-*Charter* Era: Policy-Maker or Adjudicator?" (1990) 39 U.N.B.L.J. 43.

[47] See, for example, R.M. Elliot, "The Supreme Court of Canada and Section 1—The Erosion of the Common Front" (1987) 12 Queen's L.J. 277 at 281-83; and C. L. Smith, "Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees" (1992) 55 Law & Contemp. Probs. 211.

[48] *Supra* note 5.

[49] R.S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III. The *Canadian Bill of Rights* is an ordinary statute and therefore subject to repeal by Parliament, while the *Charter* is a constitutional document governed by a special amending formula involving the provincial legislatures as well.

[50] [1979] 1 S.C.R. 183.

> activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.'[51]

As C. Lynn Smith has written on the *Andrews* case,

> [t]he Court therefore escaped formalism by rejecting the 'similarly situated' test and adding the dimension of 'disadvantage' to the measurement of equality. In determining whether or not to uphold allegedly discriminatory legislation, Canadian courts no longer limit their analysis to whether the claimant and the treatment are sufficiently similar to or different from selected comparators. Instead, the Court will consider whether the claimant is a member of a group which has experienced persistent disadvantage on the basis of a personal characteristic ... and whether the questioned classification continues or worsens the disadvantage.[52]

In other words, the inquiry pursuant to section 15 is purposive[53] and remedial. Smith has summarized the emergent approach succinctly:

> At the core of its approach to equality rights in these decisions is the kind of simple yet profound insight that the concept of 'equity' exemplifies in the law of remedies. The insight—embodied in what I refer to as the 'equality principle'—is that equality rights are constitutionally guaranteed in order to counterbalance certain types of inequalities between people. They are not primarily designed to address 'inequality' in a generic or abstract sense.[54]

III. JOINT CUSTODY IN CANADA

Before considering the implications of the emergent Canadian equality ideology for joint custody, it will be useful to review briefly the current legal treatment of joint custody in Canada. In Canada, both the provincial and federal levels of government deal with custody.[55] In spite of strong lobbying on the part of fathers' rights groups, who argued that their equality rights as guaranteed by the *Charter* entitle them to a legislated

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[51] *Supra* note 5 at 171.

[52] Smith, *supra* note 47 at 222-23.

[53] The Supreme Court of Canada's interpretation of the *Charter* has consistently been "purposive." See, for example, *Canada (Director of Investigation & Research, Combines Investigation Branch)* v. *Southam Inc.*, [1984] 2 S.C.R. 145 (*sub nom. Hunter* v. *Southam*), which addressed the section 8 right to be free from unreasonable search or seizure; and *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344, which considered the issue of Sunday closing laws and freedom of religion.

[54] Smith, *supra* note 47 at 211. For another excellent discussion of the equality theory being developed in Canada, see K. Mahoney, "The Constitutional Law of Equality in Canada" (1992) 44 Me. L. Rev. 229.

[55] The shared jurisdiction arises because under the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91 and 92, the Parliament of Canada has the power to enact laws relating to marriage and divorce (s. 91(26)), but the provinces have the power to legislate on the solemnization of marriage (s. 92(12)), and property and civil rights (s. 92(13)).

presumption of joint custody,[56] such proposals have been rejected. Now, however, the courts issuing orders pursuant to the federal *Divorce Act*[57] or provincial family law clearly have the option to award joint physical or legal custody. Section 16(4) of the *Act* provides that a court may award custody to "one or more persons."[58] Provincial law, however, varies. The Civil Code of Quebec, as interpreted by the jurisprudence, provides that both parents retain what the common law recognizes as joint legal custody over children. Article 647 of the Code stipulates that parental authority comprises the rights of physical custody, supervision, and education. Until 1977, parental authority was referred to as paternal authority (*puissance paternelle*). The leading decision on the issue of parental authority is *C.(G.)* v. *V.-F.(T.)*.[59] In that case, the Supreme Court commented upon this civil law notion, an effect of filiation. The Court held that an award of custody removes from the non-custodial parent the exercise of custody (*garde*), but not the enjoyment (*jouissance*) thereof.[60] Thus, if the custodial parent dies, custody is automatically transferred to the other parent, who has retained parental authority all along.

Some common law provincial statutes contain presumptions of joint custody rebuttable on proof that such an arrangement would be contrary to the best interests of the child.[61] Prince Edward Island has enacted a statute providing that following a separation, parents have joint legal custody until a separation agreement or court order otherwise provides.[62] The statute

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[56] References to the *Charter*, equality, and discrimination may be found throughout the testimony of the fathers' rights groups. See House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceeding and Evidence*, Nos. 32-50 (11 June 1985 to 23 October 1985), and some excerpts from this testimony *infra* note 68.

[57] R.S.C. 1985 (2d Supp.), c. 3 [hereinafter the *Divorce Act*].

[58] Section 16(4) of the *Divorce Act* reads: "The Court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons."

[59] [1987] 2 S.C.R. 244 [hereinafter *C.(G.)*].

[60] *Ibid.* at 265.

[61] *Ibid.* at 265. See the *Children's Act*, R.S.Y. 1986, c. 22, s. 30(4):

> 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 the child ought to be shared by the mother and the father jointly.

Section 18(4) of the *Family Maintenance Act*, R.S.N.S. 1989, c. 160 has been interpreted as a presumption of joint custody, rebuttable on evidence that this would not be in the best interests of the child. For interpretations of this statute, see *Hemeon* v. *Deamel* (1992), 117 N.S.R. (2d) 260 (Fam. Ct.) [hereinafter *Hemeon*] discussed *infra* note 92; and *Murray* v. *Murray* (1989), 93 N.S.R. (2d) 66 (Fam. Ct.) [hereinafter *Murray*].

[62] *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 3.

does not state what the court requires to issue a contrary order.[63] Saskatchewan has recently enacted legislation that explicitly states that the parents are joint legal custodians of their children.[64] This presumption, however, is weaker than it appears, because the general statement reflects the respective rights of the parents during the marriage and, accordingly, seems to amount to a statement of principle, which, unlike the Prince Edward Island statute, says little about what happens upon separation. In addition, the general principle is subject to a number of significant exceptions, including agreement of the parties and court orders. Moreover, the prevailing principle governing the judge in making an order remains the best interests of the child.[65] Manitoba struck an interesting compromise in the face of intense lobbying for joint custody presumptions. It did not enact such a presumption, but in addressing the concerns of non-custodial parents who felt excluded, it provided that they retain, unless otherwise ordered, a right "to receive school, medical, psychological, dental and other reports affecting the child."[66]

The federal *Divorce Act* also governs custody determinations upon divorce and allows, but does not presume, joint custody.[67] In short, a review of the provincial and federal statutory provisions reveals that most have undergone revision within the last decade to permit or facilitate joint custody. But despite the push for legislative reform in the direction of joint custody which has taken place largely on the initiative of fathers' rights lobbyists,[68] the courts have remained the central institutions for the

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[63] *Ibid.*

[64] *Children's Law Act*, S.S. 1990-91, c. C-8.1. Section 3 (1) reads as follows: "Unless otherwise ordered by the court and subject to subsection (2) and an agreement pursuant to subsection (3), the parents of a child are joint legal custodians of the child with equal rights, powers and duties."

[65] The Saskatchewan statute, *ibid.*, nevertheless, contains at section 8(c) a specific prohibition against a tender years doctrine or maternal preference. It states that, in deciding upon custody, the court shall "make no presumption and draw no inference as between parents that one parent should be preferred over the other on the basis of a person's status as a father or mother." This reflects the concern that judges discriminate against fathers in custody determinations.

[66] *Family Maintenance Act*, R.S.M. 1987, c. F-20, s. 39(4). The *Divorce Act*, *supra* note 57, has a similar provision at s.16 (5): "Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries and to be given information, as to the health, education and welfare of the child."

[67] *Supra* note 57 and accompanying text. The Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C. 12, has a similar provision at section 28(a): "The court to which an application is made under section 2 by order may grant the custody of or access to the child to one or more persons."

[68] Members of various fathers' rights groups testified before the House of Commons Standing Committee on Justice and Legal Affairs, *supra* note 56. They adapted the discourse of discrimination and equality, used by women's and civil rights groups since the 1960s, to their cause; namely, the enactment of a joint legal custody presumption. For example, on June 13, 1985, Mr. Pancres Nagy, of

interpretation and application of custody norms.[69] This is partly because the prevailing standard for custody determination is the notoriously indeterminate best interests of the child test. Even when legislation expressly permits joint custody,[70] courts have had to grapple with the question of when it is in the best interests of the child.

In practice, court ordered joint custody, whether under federal or provincial law, almost always means joint *legal* custody.[71] Such arrangements may not be any different in practice from the traditional sole custody and access arrangements, although, as many feminists have pointed out, joint legal custody may encourage and legitimize continuing interference by the father in the mother's life, particularly because her life and decisions will be intertwined with those of her children.[72]

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the Association des hommes separes ou divorces de Montreal, said,

> Our society was based ... on sexual prejudice. Women had all sorts of disadvantages in the workplace, in salary scales and promotion. The discrimination was based on the assumption that they belonged to the home and the family. But this stereotype which produced discrimination against women also produced discrimination in favour of women, not many, but in many very important areas [custody among them]. (34:22)

On June 20, 1985, Mr. Brian Demaine, the Co-Director of Fathers for Equality in Divorce, said: "If the full spirit of section 15 of the *Charter* is fearlessly instilled into the final version of Bill C-47, the Canadian divorce law will at last be cleansed of its most outrageously anti-male legislation still extant and all Canadians will be far more equal than they are today" (38:38). Earlier, Mr. Demaine had argued that the Committee would "not ... hear any more extensive and blatant examples of overt discrimination in this democracy than of the prejudice against divorced fathers in Canada today" (38:37).

Members of Parliament were quick to assume that joint custody was in the best interests of the child, even though they were aware of the lack of research to substantiate that assertion. Hence, on October 23, 1985, Mr. John Nunziata, an MP for the Liberal Party, said:

> We know there are no existing statistics in Canada to support the idea that joint custody is better than sole custody. But I think it is obvious that when we speak of the best interests of the child the love and affection of both parents and the involvement of both parents in the upbringing of the child are in the best interests of the child. There is no question in my mind. (50:31)

For more on fathers' rights activists, especially their testimony before the Subcommittee on Equality Rights of the Standing Committee on Justice and Legal Affairs, see G. Dulac, "Le Lobby des pères, divorce, et paternité," (1989) 3 C.J.W.L. 45.

[69] It should also be noted that as the Manitoba reforms illustrate, the notion of sole custody has evolved as well and does not carry the absolute, exclusive parental control that it was once thought to. See *Hines* v. *Hines* (1992), 40 R.F.L. (3d) 274 (N.S.) and the annotation by J.G. McLeod, who argues that the distinction between joint legal custody and sole custody with parental access is blurring.

[70] See *supra* note 61 and accompanying text.

[71] See, for example, *Colwell*, *supra* note 8. B. Hovius, in *Family Law: Cases, Notes and Materials*, 3d ed. (Toronto: Carswell, 1992) at 751 (note 2) mentions two cases in which joint custody was used in the sense of joint physical custody: *Huber* v. *Huber* (1975), 18 R.F.L. 378 (Sask. Q.B.); and *Donald* v. *Donald* (1980), 3 Sask. R. 202 (Q.B.). Recent cases specify joint physical custody or use the term, "divided custody."

[72] See A.M. Delorey, "Joint Legal Custody: A Reversion to Patriarchal Power" (1989) 3 C.J.W.L. 33 at 40-42. Weitzman argues that joint custody has allowed men to retain power over their former wives after separation. In her view, it gives men a veto over women's decisions and therefore allows men to

An important question has been avoided to a surprising extent during the joint custody debate, and that is how joint legal custody differs—if at all—from sole custody. Does a parent who has been awarded sole custody thereby acquire all decision-making power over the children to the exclusion of the other parent? For L'Heureux-Dubé J., writing in *Young* v *Young*, this was a key question.[73] The basic issue in *Young* was whether a court order, which placed restrictions on the extent to which a non-custodial father could involve the children in his religion during visits, constituted a violation of his religious freedom under the *Charter*. L'Heureux-Dubé J., holding that the *Charter* does not apply to custody matters, forcefully expressed the view that the only issue in custody and access is the best interests of the child, and not the rights of the parents. Parents have rights under the law, she asserted, to the extent that these rights permit the parents to act in the best interests of their children. She argued persuasively that sole custodians require such decision-making authority in order to protect the interests of their children effectively, and that the law recognizes this exclusive authority on the part of sole custodians:

> It has long been recognized that the custodial parent has a duty to ensure, protect and promote the best interests of the child. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being.[74]

Further on, she continued:

> The perception that upholding the authority of the custodial parent emphasizes the rights of the parent at the expense of the interests of the child misconceives the problem. It is precisely to ensure the best interests of the child that the decision-making power is granted to the custodial parent, as that person is uniquely situated to assess, understand, ensure and

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veto their lifestyles: Weitzman, *supra* note 10 at 361. C. Smart, in Smart & Sevenhuijsen, *supra* note 30 at 21, makes the same point. But see Maccoby and Mnookin, *supra* note 7 at 289, where the authors report finding that mothers with joint legal custody who were primary residential parents were the decision makers regarding the children.

[73] [1993] 4 S.C.R. 3 [hereinafter *Young*]. The Court was unanimous in finding that the grant of discretion conferred to trial judges through the application of the best interests test according to Sections 16(8) and 17(5) of the *Divorce Act*, *supra* note 57, did not infringe the *Charter* guarantees of freedom of religion and expression. On the issue of the restrictive order imposed by the trial judge on Mr. Young's access, the majority (L'Heureux-Dube, LaForest, and Gonthier JJ. dissenting) held that the appeal with respect to the restrictions should be dismissed, and the decision of the British Columbia Court of Appeal removing the restrictions should be affirmed. The restrictions imposed by the trial judge included, *inter alia*, that Mr. Young would be prohibited from taking his children canvassing, or to religious services and meetings, and that he would be restricted in the extent to which he could discuss the Jehovah's Witness religion with his children.

[74] *Ibid.* at 38. L'Heureux-Dubé also refers to the parallel situation in Quebec pursuant to arts. 647 and 569-70 of the *Civil Code of Quebec*. She refers to *C.(G.)*, *supra* note 59, at 280, in which Beetz J. held that the effect of a custody award is to remove the right of the non-custodial parent to exercise his or her parental authority.

> promote the needs of the child. This, of course is also consistent with the fact that the custodial parent bears both the legal obligation to care for the child and the legal liability for the child's acts.[75]

It is crucial to note at the outset that L'Heureux-Dubé's judgment, in favouring sole legal custody, cannot be treated as the law of the land.[76] Only LaForest and Gonthier JJ. concurred with this opinion as a whole, and the other judgments, of Cory and Iacobucci JJ., did not address this issue at all. Sopinka J., for example, does not discuss this point, but expresses other views, which tend to suggest that the custodial parent should have exclusive decision-making authority. McLachlin J.'s judgment, to the extent that she emphasizes the continuing roles of both parents following divorce, tends to be directly antithetical to the view expressed by L'Heureux-Dubé J., although McLachlin J. does not expressly discuss this point in depth. For the purpose of our discussion on joint custody, however, it is clear that L'Heureux-Dubé J.'s view is that the best interests of the child are generally served better by sole custody.

It remains open to question whether a parent with sole custody has exclusive decision-making authority with respect to the children, although the issue has recently also arisen in the so-called "mobility rights" cases.[77] These cases arise when the custodial parent wishes to move, typically because of remarriage or employment relocation. Under older case law, determining which parent had sole custody would have resolved the issue.[78] Recently, the courts have considered whether there is a non-removal clause in the court order or agreement between the parties, and whether the parent who wishes to move is doing so for legitimate reasons. The courts seem to be hesitant to allow a parent to move with the children when the motivation behind the move is to sever or diminish the relationship between the children and the other parent. For present purposes, the interesting point is that the mere characterization of the custody arrangement as "sole" rather than "joint" does not dispose of the issue, even

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75 *Young, supra* note 73 at 51-52.

76 For example, McLachlin J.'s opinion presupposes the contrary view, although she does not expressly discuss the point in depth, as does L'Heureux-Dubé J.

77 See, for example, *Carter* v. *Brooks* (1990), 30 R.F.L. (3d) 53 (Ont. C.A.); *Colley* v. *Colley* (1991), 31 R.F.L. (3d) 281 (Ont. U.F.C.); and *Fasan* v. *Fasan* (1991), 32 R.F.L. (3d) 121 (Ont. Gen. Div.). For a summary of earlier decisions, see H. Niman, "Custody, Access and Parental Mobility Rights" (1989) 4 Can. Fam. L.Q. 95.

78 See, for example, *Wright* v. *Wright* (1973), 1 O.R. (2d) 337 (C.A.); and *Field* v. *Field* (1978), 6 R.F.L. (2d) 278 (H.C.J.).

presumptively.[79] In light of L'Heureux-Dubé J.'s discussion on the point in *Young*, the most that can be said is that the lines have been drawn.

The issue of the relationship between the best interests of the child and the rights of the parents arose squarely in *Young*[80] and *P.(D.)* v. *S.(C.)*,[81] and unfortunately, no consensus emerged. In *Young* and *P.(D.)*, a clear majority of the Court held that custody and access issues should be determined on the basis of the best interests standard and not on the basis of parental rights. There was, however, considerable disagreement as to what would suffice to show that the best interests of the child justified a restriction of access affecting the father's religious activities. In *Young*, the trial judge had imposed an order which provided that the father could not take the children to religious services or meetings, or take them canvassing. In addition, it restricted him from discussing the Jehovah's Witness religion with the children.[82] L' Heureux-Dubé J. (with LaForest and Gonthier JJ. concurring) held that the *Charter* does not apply to parents in the family context, although *Charter* values should remain an important consideration in judicial decision-making. Her decision arguably represents the high-water mark of a child-centred approach, because her analysis would render it juridically irrelevant that the impugned order significantly affected the religious activities of the father, and restricted him from discussing the Jehovah's Witness religion with the children. L'Heureux-Dubé J. cited expert opinion, evidence the trial judge had accepted, that the religious dimensions of the visits were upsetting to the children. This expert opinion agreed with her finding that the "best interests of these children were served by removing the source of conflict."[83] She was unequivocal in her view that the interests of the children, as presumptively determined by the custodial parent, and not the rights of the parents, should form the exclusive core of such determinations. Cory and Iacobucci JJ. agreed that what is in the best interest of the child should determine the issue of access. They

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[79] This is another example of the effects of the indeterminacy of the best interests tests in custody and related issues. Increasing numbers of authors are calling for presumptions, and particularly primary caretaker presumptions, to avoid providing incentives to litigate. Indeed, empirical research is showing more litigation in jurisdictions that have the best interests standard as opposed to those with presumptions: see Bookspan, *supra* note 11. Similar problems arise with the incidents of custody and will continue to do so unless the courts similarly create greater certainty in dealing with them. In some states, a custody arrangement will specify which parent has the ultimate say on certain issues, such as religion. An alternative is to resort to presumptions at this level as well by giving the custodial parent the presumptive right to make certain decisions so long as the custodial parent does so in good faith.

[80] *Supra* note 73.

[81] [1993] 4 S.C.R. 141 [hereinafter *P.(D.)*].

[82] *Supra* note 73.

[83] *Ibid.* at 104.

disagreed, however, with the finding that the best interests test could preclude the non-custodial father from even discussing religion with the children.[84] The underlying rationale seems to be based on their view that it was unlikely that religious discussions (as opposed to indoctrination) would be contrary to the best interests of the children. McLachlin J. concluded that, although the ultimate criterion for determining limits on access to a child is the best interests of the child, it would be necessary to establish harm or risk of harm to the children to ensure that the restrictions on access did not unduly infringe the father's religious freedom. In her view, the trial judge's concern that the father's relationship with the children would continue to deteriorate if he persisted in his religious instruction during his periods of access was not a sufficient reason for restricting access.[85] Her analysis, then, arguably shifts the focus of inquiry in the direction of (parental) rights discourse, in the sense that the nature of the parental interest or right in question is directly relevant and can change the standard applicable to the child. Sopinka J.'s view, however, is perhaps the most difficult to digest: he agreed that the standard is the best interests of the child, but asserted that it must be reconciled with the *Charter*. In the result, this removed the restriction on the father from discussing his religion with the children.

At first glance, *P.(D.)*[86] seems more straightforward than *Young*, if only because the lead judgement, written by L'Heureux-Dubé J., attracted a more coherent base of support; the only dissenters were McLachlin and Sopinka JJ. The facts were very similar to those in *Young*. The mother, the custodial parent, was a Roman Catholic, while the father had converted to become a Jehovah's Witness. The two cases mainly differ in the orders made at trial and in the treatment of the evidence by the appeal courts. First, the order in *P.(D.)* specified that the father could teach his faith to the child but also specified that he could not "indoctrinate" her. The order had not prohibited the father from discussing his religion with his child, unlike the trial judge's order in *Young*. Second, the Court of Appeal and the Supreme Court both emphasized the trial judge's observation that "the main problem for the child results from the applicant's religious fanaticism" and that such religious fanaticism was disturbing to such a young girl.[87] As in *Young*, Gonthier and LaForest JJ. concurred with L'Heureux-Dubé J.'s reasons, which track those she wrote in *Young*. The starting points are the pre-eminence of the best interests of the child, along with the view that the

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[84] *Ibid.* at 110.

[85] *Ibid.* at 129.

[86] *Supra* note 81.

[87] *Ibid.* at 152.

custodial parent retains presumptive decision-making authority concerning the children. The greater degree of consensus among the Court in *P.(D.)*, however, was due to Cory J.'s reasons with which Iacobucci J. concurred. Cory J. agreed that the lower court's decision had clearly established that the restrictions imposed would serve the best interests of the child. This is quite consistent with his reasons in *Young*, which expressed great concern about the restrictions placed on the father respecting even the discussion of his religion with the children. The order in *P.(D.)* had not gone so far, but instead stipulated that the father refrain from "indoctrinating" the children. Nevertheless, all the judgements, except the dissents, raise a red flag in a broader sense. The trial judge's finding of harm was based on the fact that, first of all, the parents practised very different religions and second, on the "religious fanaticism" of the father. Regarding the first point, McLachlin J. correctly noted that all of the judges below seemed to have been willing to infer harm from the mere presence of conflict between the parents on the issue of religion.[88] Indeed, unlike the situation in *Young*, no evidence existed to suggest that the child was adversely affected at all by exposure to her father's religious zeal. Upon returning home, she would repeatedly refer to "Jehovah," and told her mother that her father had said that it was wrong to celebrate Hallowe'en and Christmas, but no evidence suggested that the child was disturbed by this at all. Regarding the second point, the trial judge seemed to have based the finding of "religious fanaticism," arguably a loaded phrase, on little more than the fact that the father was a committed Jehovah's Witness. This raises the concern that the identity and level of social acceptability of particular religions might drive findings as to what constitued harm or the best interests of the children. One wonders, for example, if a committed Roman Catholic would be so readily considered a fanatic. Moreover, it is unclear from a consideration of *Young* and *P.(D.)* whether, or to what extent, a best interests standard really differs from a harm standard.

What can we conclude from *Young* and *P.(D.)*? On one hand, we can conclude very little. It is very difficult to extract any degree of consensus on any of the legal issues before the Court. No broad consensus emerged on the legal authority of a sole custodian or an access parent, nor on the precise relevance of a constitutionally guaranteed parental right to access determination. This difficulty increases when one attempts to apply the various reasons to the facts of the cases and the reasons of the courts below. On the other hand, we can make a few general observations, which are useful in locating the decision within the tradition of custody decision-making in Canada. The key point is that the judges all agreed that the

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[88] *Ibid.* at 196.

ultimate standard was the best interests test. Problematic as this test is (and the facts of these cases could serve as a graphic indicator of this), the durability of the best interests test is at least a potent symbol of the idea that the child should remain at the centre of the debate. *Young* does not support the view that a discourse of parental rights should hijack custody and access issues.[89]

What, then, can we say about the state of the law on joint custody in Canada? Although custody decisions are notoriously case-specific, indeterminate (some would say), and therefore inconclusive, a number of comments can be made. Joint custody, when granted, is generally framed in terms of the best interests of the child.[90] The rationale is that as ongoing contact and involvement with both parents is good, joint custody is better, and, therefore, joint custody is in the best interests of the child.[91] Judges rarely refer explicitly to equal parental rights as a reason for awarding joint custody,[92] although the notion often lurks just below the surface. In other words, although the notion of equal parental rights has clearly had some influence, Canadian courts have preferred a more child-centred approach to one centred on parental rights.[93]

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[89] Although, it should be noted that McLachlin J.'s dissenting judgments in both cases might be used to construct such an argument.

[90] For example, even legislation that appears to enact a joint custody presumption stipulates that the prevailing principle for judges to consider is the best interests of the child, and the enumerated factors to be considered under this test often include primary caretaker considerations. For example, see the *Children's Law Act*, *supra* note 64. Accordingly, the joint custody presumption, even where it exists, is quite weak.

[91] This is one of the leaps made on the basis of early empirical research. See John Nunziata's comments on the advantages of joint custody: *supra* note 68.

[92] But *Hemeon*, *supra* note 61 at 268, offers a striking illustration of this approach. Daley, J.F.C., said:

> Given s. 18(4) of the *Family Maintenance Act* [*supra* note 61], the proper procedure in this province in my view is to begin on the premise that joint entitlement to the child is the starting point. In other words, the law gives both parents equal rights to the child and that is the order to be made unless the welfare of the child requires a different order. In my view, an equal entitlement custody order would have the burden of proving that it was not in the best interests of the child to make an order recognizing this entitlement.

[93] E. Canacakos, in "Joint Custody as a Fundamental Right" (1981) Ariz. L. Rev. 785, provides an illustration of the American concern about parental rights. The author argues that joint custody must be ordered unless the party opposed can prove that this would cause harm to the child. This agreement is based on the constitutional doctrine of "parental autonomy," as elaborated in cases interpreting the Fourteenth Amendment of the U.S. Constitution. The doctrine requires that both parents be allowed to continue to have rights over their children unless an overriding state interest exists to prevent this. Canacakos cites, at 791, *Quilloin* v. *Walcott*, 434 U.S. 246 (1978) at 255, and *Poe* v. *Ullman*, 367 U.S. 497 (1961) at 551-52 (per Harlan J., dissenting) in support of her proposition. Because fundamental rights are at stake, a presumption rebuttable upon satisfaction that joint custody would not, on a balance of probabilities, be in the best interests of the child, would be unacceptable. Counsel

The continuing dominance of a child-centred approach is illustrated by the fact that, in spite of some of the legislative provisions mentioned above which appear to enact joint custody presumptions, our courts have been very reluctant to give joint custody to spouses whose history indicates an inability to cooperate.[94] Canadian courts have also been generally reluctant to award joint custody when one of the parents is opposed to such an order, even if the parents have not been locked in bitter combat.[95] A 1986 Manitoba Court of Appeal decision, however, stated that "as a matter of common sense ... the mere expression of an unwillingness to share custody should not preclude an order of joint custody if the court considers such unwillingness to be the manifestation of temporary personal hostility engendered by the trauma of a recent separation."[96] This decision seems to presuppose that joint custody should be the norm, and appears to be willing to run the risk of continuing the conflict between the parents, which is likely to affect the children adversely.[97] Nevertheless, even in this case,

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for the father in *Young*, *supra* note 73, presented similar arguments.

[94] For a discussion of this, see J.D. Payne & B. Edwards, "Cooperative Parenting After Divorce: A Canadian Legal Perspective" in *Joint Custody and Shared Parenting*, *supra* note 1 at 285. Parrett J., in Poulin v. Poulin, [1993] C.C.J. No. 1054 (QL) (B.C.) at 8, writes:

> For ... joint custody to work there must be a level of mutual respect, an ability to communicate, and the vision to see, independent of their own interests, the best interests of the children. Where these qualities are present, the parents can function jointly while minimizing their own conflict to ease the burden on ... the children. Such a process maintains the relationship with both parents, but the key to its success is the absence of the conflict between the parents which adds immeasurably to the difficult adjustments faced by the children. Where these qualities are absent, joint custody and joint guardianship are a recipe for disaster, placing the children at the center of the conflict, prolonging it and removing any process of effective decision making.

Some disturbing decisions do award joint custody in such cases, but these seem to have been few and far between. In *Teigler* v. *Santiago* (1984), 2 F.L.R.R. 86 (Ont. C.A.), the Court ordered monthly alternating residence despite the parents' quarelling. Joint custody was ordered because it appeared to suit the child. See also *Faunt* v. *Faunt* (1988), 12 R.F.L. (3d) 331 (Alta. C.A.). Despite the father's lack of agreement (he wanted sole custody), the Court ordered joint custody (in the form of annual alternating residences)—an arrangement to which the parents had earlier agreed.

[95] The authority usually cited for this proposition is *Kruger* v. *Kruger* (1979), 11 R.F.L. 232 (Ont. C.A.), in which Thorson J.A. stated that a court should be guided by the precept that parents should try such an arrangement only when both are willing, thoughtful, and mature, and understand what is involved.

[96] *Abbott* v. *Taylor* (1986), 28 D.L.R. (4th) 125 at 132. Twaddle J.A. justified this by explaining that to say otherwise should encourage one parent to avoid the participation of the other in deciding questions as to their child's future by a mere statement of willingness to share the responsibility. This case, along with the frequently cited case of *Heyman* v. *Heyman* (1990), 24 R.F.L. (3d) 402 (B.C.) [hereinafter *Heyman*], suggests that in Western Canada parental agreement may no longer be a *sine qua non* of joint custody.

[97] See the discussion above at note 16.

Twaddle J.A., writing for the Court, awarded the ultimate decision-making authority (the Manitoba equivalent to sole legal custody) to the mother.

To summarize, then, there is room for some debate over the direction of the trend regarding joint custody in Canada. Although legislation is still being revised to facilitate joint custody awards, courts continue to be rather circumspect in making such awards. Moreover, as discussed above, the lines differentiating joint legal custody and sole custody have been, and continue to be, difficult to draw. It seems clear, however, that the courts continue to approach custody issues from a largely child-centred perspective, rather than from a parental rights perspective.[98] This view finds some support in that the rights-based arguments of fathers' rights proponents have failed in Canada in some crucial respects. Most jurisdictions, and most importantly, the federal parliament, have refused to enact joint custody presumptions. In so refusing, they have refused to adopt the notion that custody should be allocated on the basis of the rights of the parents. Rather, the inquiry remains centred on the child, although the influence of the fathers' rights groups is clear. The point is that the heart of the discourse has not shifted to one of parental rights.[99] I do not mean to suggest, however, that the interests or rights of parents, such as substantive equality or the religious views of a parent, should be irrelevant. But the starting point of any inquiry involving children should be the children. Certain fundamental values, such as religious freedom or equality, will—and should—permeate our analysis and affect our understanding of the issues, but should not drive the discourse and displace the children from the centre of the inquiry.

IV. THE CANADIAN VISION OF EQUALITY AND ITS IMPLICATIONS FOR JOINT CUSTODY

What are the implications of the emergent Canadian equality ideology for joint custody? First, and most importantly, the displacement of the sameness approach from the core of equality also displaces the

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[98] In *Hume* v. *Hume*, [1989] P.E.I.J. No. 75 (QL), a father, petitioning for joint custody, complained of discrimination and resorted to equality based arguments to support his case. Matheson J. dismissed these arguments, expressing the opinion that they were based on his interests, and not his children's as they should have been.

[99] This is illustrated in *C.(G.)*, *supra* note 59, in which the custody dispute was between a father, alienated from his children, and an aunt and uncle, with whom the children had been living since the mother's death. Although the father retained his parental authority, which can only be removed for serious cause, *i.e.*, abandonment, abuse or neglect, and the right to supervise and be informed, the Court awarded physical custody to the aunt and uncle on the basis of the best interests of the child.

appealing moral basis of joint custody, which is the idea that parents should be treated alike. Put another way, equality no longer provides instant legitimacy for joint custody. Over the past few years, a number of feminist writers publishing in Canada have expressed concern over the possible effects of the ideology of equality on women in the context of child custody. In 1989, Susan Boyd wrote as follows:

> In the context of child custody decisions, the judiciary may be increasingly influenced by an 'ideology of equality' which assumes that since women and men have been granted formal equality by the *Charter* and are not distinguished between in the 'best interests of the child' standard, they are now equal in the wider social and economic context. If so, judges (who often express publicly their reluctance to 'choose' between parents in custody cases) may ignore real differences in the life situations of most mothers and fathers by first assuming the social and economic equality of women and men, and then applying apparently gender neutral standards such as 'stability' and 'continuity' which may prejudice the chances of mothers in being awarded custody. ... A second reaction by the judiciary might be to opt for joint custody and to encourage mediation as easy methods of expressing equality of parents.[100]

Boyd, a Canadian, expresses a serious concern, but seems to allow for the possibility of a notion of equality that does not insist on masking the differences between mothers and fathers. Martha Fineman, an American, seems to be more pessimistic about the possibilities, seeing equality as an ideology that minimizes or discounts difference and reinforces the historical oppression of women. Accordingly,

> The ideology of gender equality has provided the theoretical and normative framework for much of the discourse surrounding reform in custody rules. This paradigm is appealing both because it is relatively simple, and its reference to the theoretically dominant ideology of equality corresponds with other developments in human rights, such as the paradigm of racial equality. A gender-neutral framework, however, masks real inequalities between men and women. Gender-neutral rules are applied in a gendered world to gendered lives. ... To the extent that the dictates of equality theory treat gender as irrelevant to social policy, then that equality theory is flawed and incomplete.[101]

Fineman's critique of equality may already have been anticipated in Canada, for as I have discussed above, the vision of equality that is emerging in Canada *does* take difference into account, not merely as an exception, but as part of the central core of the concept. Accordingly, joint custody is less likely to hold sway in Canada than it has had in jurisdictions such as California.

This vision of equality has found expression in a number of recent cases in which *Charter* provisions were not directly at issue. In these cases, the Supreme Court of Canada has interpreted equality to mean something

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[100] S.B. Boyd, "Child Custody, Ideologies, and Employment" (1989), 3 C.J.W.L. 111 at 124.

[101] Fineman, *supra* note 24 at 90-91.

other than formal equality or sameness of treatment. The cases may offer some hints as to the approach that would be taken to custody issues. First, in *Lavallée*,[102] the Supreme Court of Canada expanded the legal parameters of self-defence in order that the notion of "reasonableness" could include the circumstances of a battered woman, who, afraid that her spouse would kill her later that night, shot him in the back of the head as he left the room. As Wilson J. wrote, the test had previously been based on the parameters of the bar-room brawl, requiring that the threat be "imminent," a requirement that, if simply applied to women, would amount to death sentences for most women who are physically smaller and weaker than their spouses. In other words, the judgement took into account differences in the social and physical realities of men and women. Second, and very recently, the Supreme Court in *Moge* v. *Moge*[103] considered the different social realities that women face as a significant factor in assessing spousal support following divorce. In holding that economic self-sufficiency is merely one objective of support orders and not a pre-eminent one, L'Heureux-Dubé J. quoted Twaddle J.A.'s decision, which stated that "[e]conomic self-sufficiency may be appropriate for a wife who has had the same opportunities as her husband, but it surely leads to inequality for one who lacked them."[104] The readiness of the Canadian Supreme Court to lift the veil of formal equality suggests that joint custody is unlikely to be seen as a necessary or even as a desirable incident of the notion of equality. L'Heureux-Dubé J. observed in *Young*, albeit in *obiter dicta*, that social reality remains some distance from the ideals of equality and shared parenting:

> But the reality of divorce and the circumstances of the parties cannot easily be dismissed. When implementing the objectives of the [*Divorce*] *Act*, whether considering joint custody or fashioning access orders, courts, in my view, must be conscious of the gap between the ideals of shared parenting and the social reality of custody and child care decisions. Despite the neutrality of the *Act*, forces such as wage rates, job ghettos and socialization about care-giving still operate in a manner that cause many women to "choose" to take on the care-giving role both during marriage and after divorce. Hence, "we remain a good distance away

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[102] *Supra* note 40.

[103] [1992] 3 S.C.R. 813 [hereinafter *Moge*]. In that case, the Supreme Court affirmed the decision of the Manitoba Court of Appeal, (1990) 64 Man. R. (2d) 172 (C.A.), which reversed an order of the trial division, (1989) 60 Man. R. (2d) 281 (Q.B.), terminating support payments to a woman.

[104] *Ibid.* at 829. More precisely, the Court held that, according to the *Divorce Act*, *supra* note 57, c. D-3.4, where there has been no agreement as to maintenance following divorce, the Court must not seek to make economic self-sufficiency a pre-eminent objective. According to the Court, self-sufficiency is an objective among others—one that should only be pursued where practicable. The Supreme Court decision in *Moge* restricts the scope of the application of the famous trilogy of divorce cases (*Pelech* v. *Pelech*, [1987] 1 S.C.R. 801; *Richardson* v. *Richardson*, [1987] 1 S.C.R. 857; and *Caron* v. *Caron*, [1987] 1 S.C.R. 892), which had emphasized the importance of achieving self-sufficiency as soon as possible.

> from the kind of equality which would make decisions between mothers and fathers as to who is going to leave the work-force to care for young children truly gender neutral."[105]

To the extent that fathers are treated differently in custody decisions, the difference arises from the differences which generally exist in the social reality of parenting roles. In spite of the return of women in large numbers to the workplace, and in spite of the rhetoric about domestic equality and job-sharing, study after study has shown that women still perform the lion's share of domestic and child-rearing tasks.[106] The adoption of norms such as joint custody, which assume the equal division of child-care responsibilities during marriage as a social norm, simply does not reflect reality. This has been recently reinforced by the "mother drift" phenomenon, documented by Maccoby and Mnookin.[107] In addition, as some authors have argued, it may perpetuate the subordination of women by depriving them of the one arena of power they have traditionally possessed.[108] These social realities and differences are very much the sort that Canadian courts have shown a willingness to consider (as cases such as *Moge* and *Lavallée* illustrate) but which a sameness approach to equality is likely to suppress.

These cases then, and the values that underlie them, pave the way for an analogous treatment of custody issues. Canadian courts are unlikely to embrace the view that a father is entitled, even presumptively, to joint custody as a matter of equality. First, as we have discussed, Canadians tend to be rather less enthusiastic about rights discourse, and rather less individualistic than their American neighbours. This seems to be even more so in cases involving children where the best interests of the child test has prevailed. The courts have recently explored the question of the relationship between constitutional rights and the best interests of the child standard in *Young* and *P.(D.)*, but, as discussed above, this has raised more questions than it has answered.

A second point relates to the argument that awards of sole custody to mothers are discriminatory with respect to fathers, a common refrain among fathers' rights activists.[109] Again, while this might have some appeal according to the American equality tradition, it is more problematic in

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[105] *Young, supra* note 73 at 49.

[106] Several of these studies are discussed by J. Drakich, "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood" (1989) 3 C.J.W.L. 69 at 83-85. The author argues that, although film and other media often portray fathers as highly involved in their children's lives, these portrayals do not correspond to the prevailing social reality.

[107] Maccoby & Mnookin, *supra* note 7 at 93-97 and at 791.

[108] See Smart in Smart & Sevenhuijsen, *supra* note 30.

[109] See *supra* note 68.

Canada. To begin with, it is now well established that mere difference of treatment does not constitute inequality. Accordingly, that mothers more often are awarded custody does not mean that fathers are discriminated against. The courts have required some disadvantage in a social or systemic sense to identify discrimination. Given that the studies show that divorced fathers as a class do better financially than divorced mothers, and that they are considerably more likely to remarry, this disadvantage would be virtually impossible to show.[110] Although her judgement cannot be said to reflect that of the rest of the Court, it is certainly clear that L'Heureux-Dubé J., as discussed above, would be unsympathetic to such arguments.

Canadian courts, as we saw above in the discussion of joint custody in Canada, take an approach to custody which is both child-centred and based in reality. As in the area of equality, custody is not a matter for the application of abstract standards, but rather a determination which always requires consideration of context. Put another way, the context is a central part of the norm. The attitude of Canadian jurists suggests that any norm rooted in an abstraction, without taking account of context and social reality, is doomed to failure. The approach to joint custody in Canada should not, then, be surprising. Even where joint legal custody is a presumption, it gives way easily to the best interests of the child, as for example, when the parents are unable to cooperate. Generally, joint custody is an option, but one subject to a number of conditions, which require a searching consideration of the circumstances when the parents are not in agreement.

The problem that this raises is the following. Having made the argument that a joint custody presumption would not be appropriate for the Canadian legal and social climate, the question arises as to what the appropriate standard should be. At the risk of being accused of avoiding difficult questions, I would reiterate that the purpose of this paper has been to consider the values underlying joint custody and not to devise the ideal custody standard. Having said this, however, either a primary caretaker presumption or a maternal presumption (and I emphasize that this is a presumption) would be preferable alternatives. Both, and especially the maternal presumption, could reduce any incentive to litigate due to the indeterminacy of a wide-open best interests standard or a joint custody presumption. Custody blackmail, whether in subtle or overt form, would be much less likely.

Both the maternal presumption and the primary caretaker presumption have found persuasive advocates. Martha Fineman has

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110 See Weitzman, *supra* note 10 at 202 and at 322ff.

advocated the primary caretaker presumption.[111] Mary Ann Mason has argued for a maternal presumption.[112] Although it is beyond the scope of this paper to advocate one approach or another, it is important to recognize that the primary caretaker presumption in the United States may originate in the fear that the tender years doctrine was unconstitutional, and that a maternal presumption would also be unconstitutional. Even in the United States, it is not as clear as some have assumed that a gendered presumption or test would be unconstitutional.[113] The United States Supreme Court has never ruled on the issue. The central point for Canada, however, is that there is an argument to be made that, in light of the emerging views on equality and in light of decisions such as *Moge* and *Lavallée*, it cannot be assumed that a maternal presumption would be unconstitutional.

V. CONCLUSION

In Canada, the idea of joint custody has not been received by legislators and judges with the same degree of enthusiasm that it has enjoyed in the United States. I have suggested that this results, first of all, from a different social and historical culture, and secondly, from a different emerging notion of equality which itself arises out of the Canadian climate. The result is that joint custody does not have the initial normative appeal that it has enjoyed in the United States. As the focus on the social reality in the context of equality illustrates, Canadian courts have relied heavily on the reality of children's lives in the determination of custody, as well as in their consideration of fundamental values, such as equality and religious freedom. In this sense, the Canadian approach to equality is relevant in two ways. First, as equality notions have formed the moral justification for joint custody in the United States, the differences in Canadian equality ideology may have implications for the appeal of joint custody in Canada. Canadian courts have moved away from the sameness of treatment model, which has permeated American law and, as I have argued, influenced trends in custody both directly and indirectly. Second, the Canadian approach to equality may be a metaphor for the approach to custody and other issues generally. Canadian courts are somewhat less individualistic in orientation and less willing to apply abstract standards in

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111 Fineman, *supra* note 26 at 46.

112 Mason, *supra* note 15.

113 See Bookspan, *supra* note 11.

the absence of a serious consideration of social context and social reality. Equality and other fundamental values remain important but the sameness approach to equality has been treated with scepticism and as one which may even foster and perpetuate inequality.

Even in the United States, legislators and policy-makers are calling for a return to more predictable custody standards which are more solidly grounded in the daily social reality of the lives of children and their parents.[114] For the reasons I have discussed, and in particular, in the absence of a pervasive sameness approach to equality, Canadians are well placed to meet this challenge in the coming years.

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[114] See, for example, the California State Senate Task Force on Family Equity, *supra* note 2.