

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)**

B E T W E E N :

ROBIN JAMES GOERTZ

**APPELLANT
(Respondent)**

- and -

**JANET RITA GORDON
(Formerly JANETTE RITA GOERTZ)**

**RESPONDENT
(Petitioner)**

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervenor

- and -

**MINISTRY OF THE ATTORNEY GENERAL FOR ONTARIO
OFFICE OF THE CHILDREN'S LAWYER**

Intervenor

**FACTUM OF WOMEN'S LEGAL
EDUCATION AND ACTION FUND (LEAF)**

**CAROLE CURTIS
CAROLE CURTIS, B.A., LL.B.
Barristers and Solicitors
260 Richmond Street West
Suite 506
Toronto, Ontario
M5V 1W5**

**Telephone: (416) 340-1850
Fax: (416) 340-2432**

**DONNA WILSON
WOLOSHYN MATTISON
Barristers and Solicitors
200 Scotiabank Building
111 - 2nd Avenue South
Saskatoon, Saskatchewan
S7K 1K6**

**Telephone: (306) 244-2242
Fax: (306) 652-0332**

**CAROL BROWN
SCOTT & AYLEN
Barristers & Solicitors
Suite 1000
60 Queen Street West
Ottawa, Ontario
K1P 5Y7**

**Telephone: (613) 237-5160
Fax: (613) 230-8842**

**Ottawa Agent for the Intervenor,
Women's Legal Education and Action
Action Fund (LEAF)**

**Solicitors for the Intervenor,
Women's Legal Education and Action Fund (LEAF)**

TO: **THE REGISTRAR OF THIS COURT**

AND TO: **NOEL S. SANDOMIRSKY**
HLECK KANUKA THURINGER
Barristers and Solicitors
14th Floor, 2500 Victoria Avenue
Regina, Saskatchewan
S4P 3X2

Telephone: (306) 525-7200
Fax: (306) 359-0590

Solicitors for the Appellant

**GOWLING, STRATHY &
HENDERSON**

Barristers and Solicitors
2600 - 160 Elgin Street
Box 466, Station A
Ottawa, Ontario
K1N 8S3

Telephone: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agent

AND TO: **NEIL TURCOTTE**
CUELENAERE, KENDALL,
KATZMAN & RICHARDS
Barristers and Solicitors
510 - 128 Fourth Avenue South
Saskatoon, Saskatchewan
S7K 1M8

Telephone: (306) 653-5000
Fax: (306) 652-4171

Solicitors for the Respondent

NELLIGAN POWER
Barristers and Solicitors
Suite 1900
66 Slater
Ottawa, Ontario
K1P 5H1

Telephone: (613) 238-8080
Fax: (613) 238-2098

Ottawa Agent

AND TO: **DANIEL GOLDBERG**
MINISTRY OF THE ATTORNEY
GENERAL FOR ONTARIO
THE OFFICE OF THE CHILDREN'S LAWYER
14th Floor
393 University Avenue
Toronto, Ontario
M5G 1W9

Telephone: (416) 314-8000
Fax: (416) 314-8050

Solicitors for the Intervenor,
The Children's Lawyer

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PART I: THE FACTS

1. The Women's Legal Education and Action Fund ("LEAF") adopts the facts as set out in the Respondent's factum.

PART II: POINTS IN ISSUE

2. The issue in this appeal is the interpretation of the best interests of the child test under sections 16 and 17 of the *Divorce Act* in relocation cases.

PART III: THE ARGUMENT

A. WOMEN'S SOCIAL AND ECONOMIC DISADVANTAGE FLOWING FROM PRIMARY RESPONSIBILITY FOR CHILDREN IS A SEX EQUALITY ISSUE

a. THE GENDER-BASED DIVISION OF LABOUR PRIOR TO SEPARATION

3. Historically, women have been almost exclusively responsible for the unpaid labour of child care, whether or not they have also been employed in paid work. Currently women in marital and non-marital relationships (hereinafter "spousal relationships") continue to bear prime responsibility for the child care, regardless of employment.

Moge v. Moge, [1992] 3 S.C.R. 813 at 861.

M. Gunderson, L. Muszynski, and J. Kleck, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990) at 13, 14, 20, 22, 24-27.

Statistics Canada, *Women in Canada: A Statistical Report*, 3rd edition, Target Groups Project, Cat. No. 89-503E, at 70, 83.

4. Child care is largely treated as a private responsibility. The work world is generally unresponsive to family needs, having been historically structured on the assumption of the mother taking responsibility for domestic work and child care at home.

Moge v. Moge, *supra* at 861.

L. Duxbury and C. Higgins, "Families in the Economy", chapter 3 in M. Baker, ed., *Canada's Changing Families: Challenges to Public Policy* (Ottawa: The Vanier Institute of the Family, 1994) at 34-35.

Rosalie Abella, *Report of the Commission on Equality in Employment*, Royal Commission on Equality in Employment (1984) at 28-29.

5. Women's primary responsibility for child care has socially defined women as secondary earners who are likely to limit their paid workforce participation. This division of labour has exacerbated women's inequality in the paid workforce by contributing to systemic pay and employment inequity.

Rosalie Abella, *ibid.* at 28-32.

6. At the same time, the division of labour during spousal relationships is gender-based in large part because it has frequently been economical for women to limit their paid workforce participation

to address child care needs. In response to the conflicting physical and emotional demands of paid work and responsibilities for home and family, women make sacrifices affecting their paid work opportunities. Women are much more likely than men to interrupt their workforce participation, work part-time or disrupt their workday to accommodate child care responsibilities.

Moge v. Moge, supra at 861.

Willick v. Willick, [1994] 3 S.C.R. 670, at 723.

N. Zukewich Ghalam, "Women in the Workplace", in *Canadian Social Trends: A Canadian Studies Reader*, Volume 2 (Toronto: Thompson Educational Publishing, 1994) 141 at 145.

E. Diane Pask and M. L. (Marnie) McCall, eds., *How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support* (Calgary: Canadian Research Institute for Law and the Family, 1989) at 56-72.

Statistics Canada, *Women in Canada: A Statistical Report, supra* at 69, 70, 74.

Susan B. Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" (1990), *Canadian Journal of Family Law Quarterly*, 1-30, at 3-11, 19.

b. THE GENDERED NATURE OF CHILD CARE FOLLOWING SEPARATION

7. For most women, the assumption of primary child care responsibilities after separation, is simply a continuation of the responsibilities held by them prior to separation.

Young v. Young, [1993] 4 S.C.R. 3 at 49.

Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Cambridge, Mass.: Harvard University Press, 1992) at 268.

Janice Drakich, *In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood* (1989), 3 *Canadian Journal of Women and the Law* 69, at 83-85.

i. CUSTODIAL PARENTS ARE PRIMARILY WOMEN

8. When married and unmarried spouses separate, it is overwhelmingly mothers that have sole custody of their children, usually by agreement of the parties. In 1991, mothers were awarded custody in 74% of all custody decisions settled in court, and 77% of single parent families were headed by separated and divorced women.

Young v. Young, supra at 49.

Statistics Canada, *Women in Canada: A Statistical Report, supra* at 18 and 25.

Federal/Provincial/Territorial Family Law Committee, Department of Justice, Canada, *Custody and Access: Public Discussion Paper* (Ottawa: Minister of Supply and Services Canada, 1993) at 13.

C. James Richardson, *Divorce and Family Mediation Research Study in Three Canadian Cities*, (Minister of Supply & Services, 1988) at 268 - 270.

ii. WOMEN HAVE PRIMARY RESPONSIBILITY FOR CHILDREN IN JOINT CUSTODY ARRANGEMENTS

9. In recent years, there has been an increased number of "joint custody" awards and agreements. In joint custody arrangements, mothers usually continue to assume primary responsibility for their children by providing most of the day-to-day care and decision-making. As well, children continue to reside primarily with their mothers.

Young v. Young, supra at 49, 50.

Lapointe v. Lapointe (20 October 1995), unreported, Man.C.A. at 20, 21.

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C. J. Richardson, *Divorce and Family Mediation Research Study in Three Canadian Cities, supra* at 320.

Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody, supra* at 268.

Federal/Provincial/Territorial Family Law Committee, *Custody and Access: Public Discussion Paper, supra* at 13.

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Statistics Canada, *Women in Canada: A Statistical Report, supra* at 18, 25.

10. Absent changes in social structures, it is highly predictable that women will continue to be primarily responsible for children following separation, whether in sole or joint custody arrangements.

Young v. Young, supra at 49.

Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody, supra* at 279.

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c. THE SOCIAL AND ECONOMIC DISADVANTAGE OF WOMEN WITH SOLE OR PRIMARY CUSTODIAL RESPONSIBILITY AFTER SEPARATION

11. The employment compromises made by women, before and after separation, impede their ability to support themselves and their children following separation. Women who interrupt their employment experience losses in numerous employment related areas, including seniority, opportunity for advancement, development of job skills, keeping skills up-to-date, fringe benefits, and the ability to accumulate future benefits such as pensions and disability insurance.

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Moge v. Moge, supra at 861.

E. Diane Pask and M. L. (Marnie) McCall, eds., *How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support, supra* at 56-65.

12. Custodial mothers have difficulty meeting their child care responsibilities because of the workworld's unwillingness to accommodate family responsibilities, and the lack of affordable, quality child care and other social support systems, which are continually being eroded by government fiscal restraint.

Willick v. Willick, supra at 714, 715, 720.

Brockie v. Brockie (1987), 5 R.F.L. (3d) 440 (Man. Q.B.) at 447-448.

Janine Brodie, *Politics on the Margins: Restructuring and the Canadian Women's Movement* (Halifax: Fernwood Publishing, 1995), at 57-58

Helen McKenzie and Vivian Shalla, *Poverty in Canada* (Library of Parliament Research Branch, 1994) at 5.

National Council of Welfare, *Women & Poverty Revisited* (Ottawa: Ministry of Supply and Services 1990) at 49-52

- 10 13. Custodial mothers who face additional levels of discrimination beyond sex and family status, experience even greater difficulty in finding employment. Women with disabilities, immigrant women, aboriginal women and visible minority women experience higher levels of unemployment and have lower incomes than other women in Canada.

Statistics Canada, *Women in Canada: A Statistical Report, supra* at 9, 121, 122, 131, 137, 138, 145, 146, 152, 160, 166.

National Council of Welfare, *Women & Poverty Revisited* (1990), at 112 - 127.

- 20 14. When single mothers are unable to obtain paid work, a life of poverty is virtually unavoidable. Ninety-three percent of single mothers who had no employment earnings were below the poverty cut-offs in 1993.

Punam Khosla, *Review of the Situation of Women in Canada* (National Action Committee on the Status of Women, 1993) (drawing on Statistics Canada, *Perspectives*, Spring, 1993, Cat. No. 75-001E) at 27.

- 30 15. Single parent mothers are 5 to 6 times more likely to live in poverty than are mothers raising their children with a male partner. Three years after separation, the incomes of women and children had dropped by at least 30%; while on average, men's incomes more than doubled those of their former wives.

"Robert Glossop on the Canadian Family" in *Canadian Social Trends* No. 35, Winter 1994, Statistics Canada at 9.

National Council of Welfare, *Poverty Profile 1992* (Ottawa: Minister of Supply and Services Canada, 1994) at 4, 13, 14, 70.

- 40 C. A. Gorlick, "Divorce: Options Available, Constraints Forced, Pathways Taken", in chapter 7, N. Mandell, and A. Duffy, *Canadian Families: Diversity, Conflict and Change* (Harcourt Place Canada, 1995) at 216, 225.

Helen McKenzie and Vivian Shalla, *Poverty in Canada, supra*, at 5.

16. The difficulty in meeting their child care responsibilities is magnified for custodial mothers, particularly low income custodial mothers, who are socially isolated or geographically removed from family and community. Many women, such as immigrant women and aboriginal women, face

additional disadvantage due to extreme social and physical isolation from family and community, language differences, and lack of accessible support systems.

Ontario Advisory Council on Women's Issues, *Brief to the Ontario Government on Sole Support Mothers* (Toronto, 1987) at 16

Statistics Canada, *Women in Canada: A Statistical Report*, *supra* at 9, 121, 122, 131, 137, 138, 145, 146, 152, 160, 166

Marlee Kline, *Complicating the Ideology of Motherhood: Child Welfare Law and First Nations Women*, 18 *Queens Law Journal*, 306-342, at 312, 324-326, 339

10 Canadian Advisory Council on the Status of Women, *Sharing our Experience* (Ottawa, 1993), at 19 - 29

d. CUSTODIAL MOTHERS AND ABUSE

17. Twenty-nine percent of women who have been married or in a common law relationship have been physically or sexually assaulted by their partners on at least one occasion. One-fifth of women reported that the violence continued after separation. For some women, the assaults began at the time of separation, while for others, the violence escalated during separation.

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Statistics Canada, *Women in Canada: A Statistical Report*, *supra* at 104, 105, 113.

18. Legal processes are sometimes used by men as a means to harass women. One American study estimates that at least one-half of contested child custody cases involve families with a history of some form of family violence. Those men who cannot disconnect from the women they abuse, use the legal system as a new arena of combat.

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Final Report of the Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence - Achieving Equality* (Ottawa: Supply and Services, 1993) at 229-231

L. E. Walker and G. E. Edwall, "Domestic Violence and Determination of Visitation in Divorce", chapter 8, in D. J. Sonkin (ed.), *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (New York: Springer Publishing Co, 1987) at 127-133

B. THE INTERPRETATION OF SECTIONS 16 AND 17 OF THE DIVORCE ACT MUST BE CONSISTENT WITH THE CHARTER'S GUARANTEES OF SEX EQUALITY

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19. The *Charter* is the supreme law of Canada and, accordingly, statutes must be interpreted and applied in a manner consistent with the fundamental values enshrined therein. Where a statute is capable of more than one interpretation, the interpretation which most closely accords with *Charter* values should be favoured.

Young v. Young, *supra* at 92, 107.

P. (D.) v. S. (C.), [1993] 4 S.C.R. 141 at 181.

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at 1078.

Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513 at 558.

Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 544 at 581-582.

20. In accordance with this Court's evolving jurisprudence, while section 15 does not itself guarantee social equality, equal law is seen as a means of attaining an equal society. Thus, the purpose of section 15 is to ensure equality in the formulation and application of the law.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 171.

Willick v. Willick, *supra* at 705.

10 21. "An assessment of whether a particular interpretation of a statute is consistent with ... *Charter* values necessitates a contextual approach which contemplates the social framework in which the Act operates." "The social context of divorce is an evolving concept. So, too, are our understandings of the economic consequences thereof."

Willick v. Willick, *supra* at 679, 699 and 706

Moge v. Moge, *supra* at 861-864.

22. It is submitted that the *Divorce Act* provisions concerning custody, like those concerning support, must be interpreted so as to promote the values of substantive, rather than formal equality.

20 *Willick v. Willick*, *supra* at 705-706

Moge v. Moge, *supra* at 866-875

Andrews v. Law Society of Upper Canada, *supra* at 174

30 23. This Court has recognized that the legal treatment of women following separation has a significant impact on the social and economic status of women and their children, and as such, their substantive equality. It is submitted that the section 15 guarantee of sex equality requires that principles for determining the best interests of a child not impose a detrimental burden on women, by virtue of women's primary responsibility for care of children before and after separation. Restrictions on relocation perpetuate the relative disadvantage of women and their children.

Moge v. Moge, *supra* at 861

40 24. LEAF submits that with regard to issues of relocation, an interpretation of the custody provisions of the *Divorce Act* in a manner consistent with the *Charter's* equality provisions, recognizes;

- a) the relationship between the continuing gender-based division of labour before separation and women's post-separation custodial responsibilities;
- b) the impact of their pre-separation role on women's ability to support themselves and their children after separation; and
- c) the particular difficulties for single mothers in caring for themselves and their children within a social context of a workworld that is largely unresponsive to their needs and responsibilities.

C. CUSTODY AND RELOCATION

a. EVOLUTION OF THE LAW

25. At common law and until the mid 19th century, fathers were entitled to sole custody of their legitimate children as a matter of right, based on the view that fathers owned their wives and children. The exclusive right to custody included the right to determine where the child would live. Fathers' absolute rights to custody were gradually eroded due in part to legislation, and in part to the emergence of the equitable principle of the best interests of the child.

10 *Lapointe v. Lapointe, supra* at 7-8.

26. As Canadian custody jurisprudence developed, as set out in *Lapointe v. Lapointe*, the following propositions evolved concerning a parent's wish to relocate with a child in his or her care:

- a) a custodial parent was free to change the place of residence of a child in his or her custody without prior approval unless the power to make the decision to do so was restricted by court order or agreement;
- b) on an application by an access parent to forbid such a change, the onus was on the parent to show that the change was motivated by an intention to defeat his or her access rights, was unreasonable or was contrary to the best interests of the child;
- c) in deciding the best interests of a child, a judge would ordinarily defer to the decision of the parent to whom the ultimate decision-making power with respect to that child had been entrusted, this, of course, assuming that the custodial parent's decision was *bona fide* and reasonable;
- d) a custodial parent whose decision-making power with respect to residence was restricted could nonetheless apply to a court for an order permitting a proposed move;
- e) on such an application, the custodial parent had to show a sufficient change in circumstances to justify the removal of the restriction and the bestowal of the decision-making power with respect to residence on him or her; and,
- f) where such a custodial parent discharged his or her burden, the other parent was in exactly the same position as he or she would have been in on an application to forbid a change by a custodial parent whose decision-making power was unrestricted.

30 *Lapointe v. Lapointe, supra* at 15, 16.

b. CUSTODY AND RELOCATION UNDER THE *DIVORCE ACT*

40 27. Today, questions of custody of and access to a child are determined based solely on the best interests of the child.

Divorce Act, R.S.C. 1985, C.3. (2nd. Supp.), as amended, ss. 16(8) and 17(5).

Young v. Young, supra at 26, 117.

Lapointe v. Lapointe, supra at 17.

28. Section 16(7) of the *Divorce Act* contemplates that a custodial parent can relocate without court approval.

Lapointe v. Lapointe, supra at 16.

29. Under s.16(10) of the *Divorce Act*, the principle that a child is to have as much contact with each parent as is in the child's best interests, reflects that the focus is on the child's best interests, rather than on maximizing contact *per se* as a legislative goal. The concept of maximum contact was influenced by the principle of presumptive joint custody which has been firmly rejected throughout Canada by federal and provincial legislatures.

The Divorce Act, s.16(10).

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Lapointe v. Lapointe, supra at 17.

Federal/Provincial/Territorial Family Law Committee, *Custody and Access: Public Discussion Paper, supra* at 29-31

D. INTERPRETATION AND APPLICATION OF THE "BEST INTERESTS OF THE CHILD" TEST

a. GENERALLY

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30. The best interests test requires a judge to decide what is in the best interests of a particular child at the time the custody decision is made. While recognized factors are to be considered, the weighing of each factor is left to the discretion of the judge, and there are no presumptions to aid in this decision.

Young v. Young, supra at 117

E. Diane Pask and M. L. (Marnie) McCall "K.(M.M.) v. K. (U.) and the Primary Care Giver" (1991), 33 R.F.L. (3d) 418 at 421.

b. BEST INTERESTS AND RELOCATION

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31. In interpreting sections 16 and 17 of the *Divorce Act*, the courts have adopted various approaches to relocation cases. In *Carter v. Brooks*, the Ontario Court of Appeal stated the following considerations:

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- a) the only principle that governs is the best interests of the child;
- b) the best interests test cannot be implemented by the devising of a code of substantive rules, even if this could be done within the confines of a single case;
- c) the process should not begin with a general rule that one of the parties will be unsuccessful unless he or she satisfies a specified burden of proof;
- d) at the end of the process, if it is not possible for the court to conclude on a result which better accords with the best interests of the child, then the result must necessarily be in accordance with the legal status quo on the issue to be decided;
- e) an important factor to take into account, in favour of the custodial parent, is that the existing custody decision (by order or by agreement) shows that from a day-to-day point of view, the best interests of the child lie with the child's being with the custodial parent;

- f) an incident of custody includes the determination by the custodial parent of where the parent and the child shall live;
- g) if there is a new family unit as a result of a custodial parent having remarried, the well-being of that family unit bears on the best interests of the child;
- h) the nature of the relationship between the child and the access parent will always be of importance;
- i) the reason for the move is important. If the move is necessary, this would count in favour of the move;
- 10 j) the distance of the move is of basic concern. The greater the distance, the more severe the impact of the proposed move will be on the relationship with the access parent;
- k) the degree of severity of impact of the proposed move is also likely to be effected rather directly by the financial resources of the access parent;
- l) the child's views are relevant; and,
- m) the very general principle expressed in s. 16(10) of the *Divorce Act* (the maximum contact provision) should be taken into account, whether or not it is expressed in statutory form.

Carter v. Brooks (1991), 30 R.F.L. (3d) 53 (Ont.C.A.) at 61-65.

20 32. *Carter v. Brooks* effectively relied on only one of the considerations, that being, the test of necessity (as set out in paragraph 31(i) above). By placing the onus on the custodial mother to justify that a move is necessary, and by reviewing the reasons for her decision to relocate, the court eroded her ability to make decisions in the child's best interests.

30 33. More recently, an interpretation of sections 16 and 17 of the *Divorce Act* has emerged which reaffirms that custody is a package of responsibilities, including the responsibility to decide where a child lives. The most recent Court of Appeal cases reaffirm the principle in prior jurisprudence of giving deference to the custodial parent's ability to determine and act in the child's best interests.

Levesque v. Lapointe (1993), 44 R.F.L. (3d) 316 (B.C.C.A.)

MacGyver v. Richards (1995), 11 R.F.L. (4th) 432 (Ont.C.A.)

Lapointe v. Lapointe, supra

c. **FACTORS RELEVANT TO ISSUES OF RELOCATION**

40 i. **THE CUSTODIAL PARENT IS IN THE BEST POSITION TO DETERMINE THE CHILD'S BEST INTERESTS**

34. The person in the best position to make decisions about the child's well-being is the custodial parent. As the person responsible for exercising judgment on a daily basis, who is most familiar with the child's needs, and who will live with the reality of decisions, the custodial parent is better situated than a judge to determine what is in the child's best interests, including residence.

Lapointe v. Lapointe, supra at 18.

Young v. Young, supra at 41 - 42.

MacGyver v. Richards, supra at 444 - 445.

In the marriage of I and I (1995), 19 Fam. L.R. 147 (Fam. Ct. of Australia) at 158.

James C. McLeod, annotation to *Hines v. Hines* (1992), 40 R.F.L. (3d) 274 (N.S.S.C. - T.D.) at 277.

Karen M. Munro, "The Inapplicability of Rights Analysis in Post-Divorce Child Custody Decision Making" (1992), 30 Alberta Law Review 852-899 at 893-899.

ii. CUSTODY IS A SIGNIFICANT RESPONSIBILITY

10 35. Custody is an enormous undertaking for the custodial parent. The high level and constancy of the responsibility for custody is far greater than that of the parent who sees the child intermittently and exercises access.

Young v. Young, supra at 51.

Thomson v. Thomson, [1994] 3 S.C.R. 551 at 589.

MacGyver v. Richards, supra at 445.

Lapointe v. Lapointe, supra at 22.

20 *In the marriage of I and I, supra* at 164.

iii. THE BEST INTERESTS OF THE CHILD ARE LINKED TO THE WELL-BEING OF THE CUSTODIAL PARENT

36. The child's best interests are inextricably linked to the well-being of the custodial parent.

Moge v. Moge, supra at 871

Young v. Young, supra at 70.

Levesque v. Lapointe, supra at 328.

30 *MacGyver v. Richards, supra* at 446.

Lapointe v. Lapointe, supra at 19.

In the marriage of I and I, supra at 156.

Frank Furstenberg, Jr. and Andrew J. Cherlin, *Divided Families: What Happens to Children When Parents Part* (Cambridge, MA: Harvard University Press, 1991) at 71-72.

40 Frank F. Furstenberg, S. Philip Morgan, and Paul D. Allison, "Paternal Participation and Children's Well-Being After Marital Dissolution" (1987) *52 American Sociology Review* 695-701, at 697, 698.

Jeanne M. Tschann, Janet R. Johnston, Marsha Kline, and Judith S. Wallerstein, "Conflict, Loss, Change and Parent-Child Relationships: Predicting Children's Adjustment During Divorce" (1990) *13(4) Journal of Divorce* 1-22, at 18-20.

Department of Justice Canada, *Response to 99 Steps*, released 17 November 1995. at 8, 9.

37. The child's best interests are not only intimately intertwined with the well-being of the custodial parent, but with any new family unit. The custodial parent and the child are a new family unit on

separation. The court must consider the effect on the mother, and thus on the family unit, of restricting where she can live. The goal of maintaining present access may be desirable, but not at the cost of the well-being of the custodial mother and the child in her care.

Korpesho v. Korpesho (1982), 31 R.F.I. (2d) 449 (Man. C.A.) at 451, 452.

Carter v. Brooks, *supra* at 63.

Macgyver v. Richards, *supra* at 446.

Lapointe v. Lapointe, *supra* at 22.

In the marriage of I and I, *supra* at 164.

James C. McLeod, annotation to *Axam v. Séguin* (1994), 5 R.F.L. (4th) 186 (Ont. Gen. Div.), at 187.

Susan B. Boyd, "Is There An Ideology of Motherhood in (Post) Modern Child Custody?" paper presented at the Learned Societies Conference, Ottawa 1993, revised 1995, at 11-12

iv. ACCESS - ASSUMPTIONS AND REALITIES

38. Access, including its nature and duration, is determined solely on the basis of the best interests of the child rather than the needs and desires of the access parent. Custodial parents are expected and obliged to make decisions and to conduct their lives consistent with the child's best interests, not with the needs and desires of the access parent.

Thomson v. Thomson, *supra* at 589.

M. (B.P.) V.M. (B.L.D.E.) (1992), 42 R.F.L. (3d) 349 (Ont. C.A.), leave to appeal to S.C.C. refused (1993), 48 R.F.L. (3d) 232, at 360.

Macgyver v. Richards, *supra* at 446, 448.

Lapointe v. Lapointe, *supra* at 17.

39. Principles of interpretation that restrict the relocation of custodial parents have been based on certain assumptions and myths regarding access. These assumptions regarding access are not accurate, or are usually unexamined in relation to the facts of a particular case:

- a) the assumption that maximum contact with both parents is beneficial for all children. The reality is that maximum contact with both parents is not necessarily beneficial for all children, and therefore, ordering or agreeing to it is not necessarily in the best interests of all children. The majority of studies based on large national surveys in the United States, found little association between father visitation and children's well being;

MacGyver v. Richards, *supra* at 446.

Lapointe v. Lapointe, *supra* at 17.

Valerie King, "Variation in the Consequences of Non-Resident Father Involvement for Child's Well-being" (1994), 56 *Journal of Marriage and the Family* 963-972, at 963.

Denise Donnelly and David Finkelhor, "Does Equality in Custody Arrangement Improve the Parent-Child Relationship?" (1992), 54 *Journal of Marriage and the Family*, at 837, 842-844.

C. James Richardson, *Divorce and Family Mediation Research Study in Three Canadian Cities*, *supra* at 31 - 32.

Federal/Provincial/Territorial Family Law Committee, *Custody and Access: Public Discussion Paper*, *supra* at 29-31.

- 10 b) the assumption that where access has diminished, the problem is with the custodial parent interfering with access. The reality is that access parents do not necessarily exercise their access. In women's experience, the major problem with access is that men do not always exercise their access rights or that they do so erratically or unpredictably;

C. James Richardson, *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results*, A Report Prepared for the Department of Justice Canada, February 1988 (Ottawa: Minister of Supply and Services Canada, 1988) at 36, 38-39.

C. James Richardson, *Divorce and Family Mediation Research Studies in Three Canadian Cities*, *supra* at 287-8.

20 Frank F. Furstenberg, Jr., Christine Winqvist Nord, James L. Peterson, and Nicholas Zill, "The Life Course of Children of Divorce: Marital Disruption and Parental Contact" (1983) 48 *American Sociological Review*, 656-668, Table 6 at 663.

Federal/Provincial/Territorial Family Law Committee, *Custody and Access: Public Discussion Paper*, *supra* at 17.

- 30 c) the assumption that frequent access is more beneficial. The reality is that frequent access as opposed to amount of time spent, is not necessarily more beneficial for a child (that is, that one day per week for 7 weeks is not necessarily better than 1 full week). What counts is not the quantity of time, but the extent to which the access parent and child have a relationship in which the child feels valued. The regularity and predictability of visits is more important than frequency of visits;

M.B. Isaacs, B. Montalvo, and D. Abelsohn, *The Difficult Divorce: Therapy for Children and Families* (New York: Basic Books, 1986) at 273.

Judith S. Wallerstein and Sandra Blakeslee, *Second Chances: Men, Women and Children A Decade after Divorce* (N.Y.: Ticknor & Fields, 1989) at 238.

- 40 d) the assumption that proximity is a predictor of regular contact. The reality is that proximity is not always a predictor of regular contact. More significant is the commitment of the access parent to exercising access, and the relationship between the access parent and the child;

Frank F. Furstenberg, Jr., Christine Winqvist Nord, James L. Peterson, and Nicholas Zill, "The Life Course of Children of Divorce: Marital Disruption and Parental Contact", *supra* Table 7 at 665, 666.

- e) the assumption that the standard access arrangement is the most beneficial. The reality is that the overwhelming number of boiler-plate access arrangements in orders and agreements indicates a bias towards a standard structure. Underlying that bias is an

assumption that this arrangement is in the best interests of the child. The standard access structure (every other weekend, plus one week night) is not necessarily the best arrangement simply because it is typical;

- f) the assumption that the original access arrangement is the appropriate access arrangement for all time. The reality is that the access arrangement agreed to (or court ordered) at one time is not always the most suitable arrangement for all time. Access appropriate for a 2-year old child may not be appropriate for a 7-year old or a 13-year old. In reality, access is restructured on an on-going basis by parents, to take into account the ages and stages of the child.

MacGyver v. Richards, supra at 443.

Lapointe v. Lapointe, supra at 22.

Courtney v. Courtney (1992), 42 R.F.L. (3d) 450 (Ont. Gen. Div.) at 451-453.

Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody, supra* at 198-202.

- g) the assumption that the post-separation arrangement should follow the pre-separation arrangement as closely as possible. The reality is that post-separation arrangements cannot and should not attempt to look like the pre-separation arrangements. It is an impossible ideal, unrealistic, ignores any conflicts that exists between the parents, and assumes such an arrangement could work;

Martha A. Fineman, "Dominant Discourse, Professional Language, and Legal Changes in Child Custody Decision-Making" (1988), 101 Harv. L. Rev. 727-744, at 769.

- h) the assumption that change is bad for children. The reality is that change by definition, is not necessarily bad for children. If a child has stability of care, the child can deal with and accept change.

David Gately and Andrew I. Schwebel, "Favourable Outcomes in Children After Parental Divorce" in Craig A. Everett, ed., *Divorce and the Next Generation* (New York: The Haworth Press, 1992) at 57, 61.

d. PRINCIPLES FOR DETERMINING WHAT IS IN THE CHILD'S BEST INTERESTS IN ACCORDANCE WITH CHARTER VALUES

40. While the best interests of the child must be a child-centred test, it is submitted that the inextricable link between the well-being of the child and the custodial mother, requires a recognition of the realities and interests of the custodial mother. Promoting women's substantive equality is fundamental to the well-being of women and the children in their care. Accordingly, it is submitted that the concept of the best interests of the child should be interpreted in a manner consistent with the constitutional goal of promoting women's substantive equality.

41. It is submitted that an interpretative approach to the best interests of the child which reaffirms the decision to relocate as an incident of custodial responsibility, and which defers to the decision-making of the custodial parent, as set out in the most recent Court of Appeal decisions (*Levesque*

v. Lapointe, MacGyver v. Richards, and Lapointe v. Lapointe), more closely accords with the values enshrined in section 15 of the *Charter*.

42. As a result of the social and economic disadvantage experienced by custodial mothers and their children, they will need to move in order to:

- a) obtain employment or better employment to become as self-supporting as possible. Improved employment includes employment with sufficient flexibility to enable custodial mothers to meet their children's needs;
- b) obtain adequate and affordable child care so as to allow women to work and accommodate their child rearing responsibilities;
- c) obtain support or create distance if the post-separation relationship is abusive;
- d) seek or maintain support from family, friends or new family units so as to best meet their children's needs;
- e) obtain adequate and affordable housing; and,
- f) attend school or retraining, to improve their chances of finding a job.

These needs occur within a social context of a highly mobile society, especially in relation to work.

Bali Ram, Y. Edwards Shin, Michel Pouliot, *Canadians on the Move* (Statistics Canada and Prentice Hall Canada Inc., 1994), Cat. No. 96-309E, at 1, 3, 7, 16.

Korpesho v. Korpesho, supra at 451

43. It is submitted that deference to the relocation decisions of custodial parents is consistent with the modern philosophy of family breakdown, which aims at encouraging and facilitating the ability of former spouses to get on with their lives.

Korpesho v. Korpesho, supra at 451, 452.

44. It is submitted that in considering the best interests of the child with respect to issues of relocation, a large measure of deference should be accorded to the custodial mother's judgment.

This deference is based upon, and should be exercised to include recognition:

- a) that the custodial mother is in a better position to judge the child's best interests, relative to the court or the access parent;
- b) of the significant responsibilities involved in caring for a child as a custodial mother;
- c) of the social and economic disadvantage experienced by custodial mothers which limit their ability to meet their child care responsibilities and make it necessary for them to move;
- d) of the importance to the child of supporting the custodial mother in meeting her responsibilities; and,
- e) that caution should be exercised in second-guessing the custodial mother's judgment that a move is in the child's best interests.

45. It is submitted that, in interpreting sections 16 and 17 of the *Divorce Act*, a failure to recognize the substantive differences between custody and access in terms of the significance to the child's

well-being and in terms of the nature and extent of parental responsibilities, is inconsistent with the *Charter* guarantee of substantive equality for women and reflects a formal equality approach, which was rejected by this Court in *Andrews*.

Andrews v. Law Society of British Columbia, supra at 174.

46. When a court considers whether a relocation by a custodial mother is "necessary" (as in *Carter v. Brooks*), it exercises judgment and applies a standard to the custodial mother that it does not apply to an access parent making a similar decision. No court orders are made forcing access parents to move, to stay, or to exercise their access. Courts do not restrict the relocation of an access parent for the sake of the child's best interests, whether the motivation to relocate was benign, or whether the change in access was harmful to the child.

MacGyver v. Richards, supra at 447

47. A request to relocate ought not to be determined on the grounds of whether an access parent is exercising access, or has fulfilled his legal or moral obligations. By exercising access and paying support the access parent is doing what he is required to do. Courts should be wary of introducing an analysis that rewards access parents for visiting their children and paying support, to the detriment of the custodial parent.

James G. McLeod, annotation to *Wainio v. Gilmour* (1994), 2 R.F.L. (4th) 116, (Ont. C.A.) at 117-118.

48. The fact that a child will be affected by a relocation decision, like many other decisions of a custodial parent, does not mean that a court should interfere with or change that decision. On relocation, access can be restructured in accordance with the child's overall interests. An assumption that it cannot be restructured in this way, places too much significance on the status quo as to access, as;

a) there are situations where the distances involved and the economic circumstances of the parents require radical restructuring, and even limiting access. However, access is not restricted to in-person contact. Technology offers parents and children various opportunities for contact; and,

40 b) access options and arrangements that are in the child's best interests will continue to evolve as the circumstances of the child and the parents change.

MacGyver v. Richards, supra, at 445.

Lapointe v. Lapointe, supra at 18, 19.

In the marriage of I and I, supra at 164

Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody, supra* at 295.

James C. McLeod, annotation to *Axam v. Seguin, supra* at 187

49. It is submitted that to interpret sections 16 and 17 of the *Divorce Act* in a manner consistent with section 15 of the *Charter*, the court should apply the following test: where a parent with sole custody seeks to relocate, the move, in and of itself, is a material change in circumstances with respect to access only, but not with respect to custody. Accordingly, a sole custodial parent's decision to relocate is not subject to the court's review, as the relocation decision is an incident of custody. However, access may be restructured by the court.

E. JOINT CUSTODY

a. EVOLUTION OF THE LAW

50. Joint custody is a relatively new legal concept in Canada.

Baker v. Baker (1979), 8 R.F.L. (2d) 236 at 244.

Kruger v. Kruger (1979) 11. R.F.L. (2d) 52 at 78.

Julian Payne and Brenda Edwards "Co-operative Parenting after Divorce: A Canadian Perspective" (1989), 11 *Advocates' Quarterly* 1-30 at 1.

51. Section 16(4) of the *Divorce Act* allows the court to make an order granting custody or access "to any one or more persons". Although it does not use the words joint custody, this is referred to as the joint custody provision of the *Divorce Act*. Neither this section, the remainder of the *Divorce Act*, nor any other legislative provision contains a definition of joint custody.

52. Initially, joint custody was only ordered in the rare circumstance where both parties agreed. Courts are no longer as reluctant to impose joint custody on parents as they once were, and indeed, joint custody orders take many forms. The meaning of the phrase joint custody is indeterminate. At one end of the continuum is joint legal custody, with sole caregiving provided by one parent and minimal contact by the other parent. In the middle is joint legal custody, with primary caregiving provided by one parent and contact by the other parent that looks like "liberal access" described in sole custody and access circumstances. At the extreme other end of the continuum is joint legal custody, which also includes joint physical custody, where both parents provide equal caregiving of the child and make decisions about the child on a consensus basis. All of these arrangements are called "joint custody". As a result, it is impossible to determine the factual reality of a legal joint custody order without reference to the practical circumstances of the care for the child. Most joint custody orders include an award of "primary residence" or "primary care and control" to one parent, and fixed specified time for the other parent to see the child. Only occasionally do joint custody orders set out areas of joint decision-making. Orders for joint legal custody combined with joint physical custody are the exception.

Baker v. Baker, supra at 246.

Kruger v. Kruger, *supra* at 79, 80.

Hines v. Hines (1992), 40 R.F.L. (3d) 274 (N.S.S.C. - T.D.) at 289-290

Kaemhle v. Jewson (1993), 50 R.F.L. (3d) 70 (Ont. Gen. Div.) at 74-75.

Hussein v. Hussein (1994), 3 R.F.L. (4th) 375 (N.B.Q.D.) at 384-385.

Tweel v. Tweel (1994), 7 R.F.L. (4th) 204 (P.E.I.T.D.) at 216

Keown v. Keown, [1995] B.C.J. No. 26 (B.C.S.C., Master, 4 January 1995)

Radford v. Cassiano, [1995] O.J. No. 105 (Ont. Prov. Ct., 18 January, 1995)

10 *Woodland v. Ceeco*, [1995] B.C.J. No. 226 (B.C.S.C., 8 February 1995)

Julian Payne & Brenda Edwards, "Co-operative Parenting After Divorce", *supra*, at 5-7.

Frank Furstenberg, Jr. and Andrew J. Cherlin, *Divided Families: What Happens to Children When Parents Part*, *supra* at 74, 76.

Denise Donnelly and David Finkelhor, "Does Equality in Custody Arrangement Improve the Parent-Child Relationship?", *supra* at 837

20 Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody*, *supra* at 269.

b. JOINT CUSTODY AND RELOCATION

53. Most joint custody arrangements, whether by order or agreement, are in fact more akin to the traditional sole custody and access arrangements, regardless of legal attribution of rights and responsibilities. Further, women in joint custody arrangements usually have, in fact, the primary custodial responsibility. Even with joint physical custody, women still find themselves making most of the day-to-day decisions about the child, and assuming responsibility for most daily child related tasks. Accordingly, it is necessary to distinguish between the legal description of the arrangement and the factual reality of the arrangement.

Young v. Young, *supra* at 49-50.

Levesque v. Lapointe, *supra* at at 325.

Lapointe v. Lapointe, *supra* at 20.

In the marriage of I and I, *supra* at 161.

40 Statistics Canada, *Women in Canada: A Statistical Report*, *supra* at 18, 69, 70.

C. James Richardson, *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results*, *supra* at 35.

C. James Richardson, *Divorce and Family Mediation Research Study in Three Canadian Cities*, *supra* at 320.

Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody*, *supra* at 268, 269, 279.

E. Diane Pask and M. L. McCall (Marnie) McCall "K. (M.M.) v. K. (U.) and the

Primary Care Giver", *supra* at 427-428.

54. It is submitted that courts must analyze each situation to determine whether a joint custody arrangement, in law, is in fact true equal parenting, in roles and responsibilities, or one more akin to sole custody. In contrast to the situation where each parent has sole responsibility for the day-to-day management of the child's life while the child is living with that parent, for equal periods of time, the primary custodial parent is the person who has primary day-to-day experience of and contact with the child, and who has the most information available to determine issues regarding the child's well-being. The following are factors to determine who is a primary custodial parent:

- a) custodial responsibility involves not only arranging the child's life, but arranging one's life around the child;
- b) custodial responsibility is not necessarily a question of quantum of time spent with the child. Although quantum of time spent may be an indicator, it is an over simplification to look only at time spent;
- c) custodial responsibility is to be examined over the entire life of the child, not simply the period post-separation;
- d) custodial responsibility is about taking responsibility for ensuring the child's daily needs are met, not solely doing various tasks related to the child;
- e) custodial responsibility is about determining which parent tracks the child's movement during the day, and whom the child keeps informed of her whereabouts; and,
- f) custodial responsibility is about which parent has primary management of the child's daily life, and of the organization of the child's daily life.

Levesque v. Lapointe, supra at 328.

Lapointe v. Lapointe, supra at 20-21.

55. The primary custodial parent performs her child care responsibilities in the same social context and generally in the same manner as sole custodial parents, and the same principles regarding relocation should accordingly apply. It is submitted that where a joint custodial parent in fact, assumes the responsibilities of a sole custodial parent, a relocation is a material change in circumstances with regard to access only, but not with regard to custody and the test in paragraph 49 applies. It is submitted that a failure to interpret the best interests concept in this way is to put form over substance in a manner inconsistent with the equality values enshrined in the *Charter*.

56. If all the indicia of true equal parenting are met, a decision to relocate is a material change in circumstances with respect to custody, and the court must re-examine the custody arrangement itself, not whether one parent can move.

Levesque v. Lapointe, supra at 325.

Lapointe v. Lapointe, supra at 20-21.

F. SEPARATION AGREEMENTS AND COURT ORDERS WITH RELOCATION RESTRICTIONS

57. Where a separation agreement or court order contains a relocation restriction, it is submitted that the relocation of a parent with sole or primary custodial responsibility amounts to a material change in circumstances with regard to residence and access, but not with respect to custody. The relocation restriction, by virtue of the court order or agreement, is subject to the court's review. It is submitted in determining the best interests of the child, the onus should be on the access parent to establish that the move is contrary to the child's best interests, and the principles enunciated in paragraphs 34-39 should be applied on the review.

58. A relocation restriction in a separation agreement is not determinative of the child's best interests, and should be given little weight in that:

- a) a court is obliged to consider only the best interests of the child as it exists at the time of the application, both at first instance and on variation;
- b) while a relocation restriction may have been appropriate at the time the agreement was entered into, it may be inappropriate at a later date, on an analysis of the child's best interests;
- c) any analysis of the significance or validity of relocation restrictions in agreements must include an analysis of women's unequal bargaining power in post-separation negotiations, and why such a clause was entered into. The choices that women make post-separation are tied to the social context and the circumstances in which they find themselves before and after separation. A relocation restriction may not reflect any real consensus that a relocation would not be in the best interests of a child.

Divorce Act, ss. 16(8) and 17(5)

Richardson v. Richardson, [1987] 1 S.C.R. 857 at 869 - 870.

Willick v. Willick, *supra* at 686, 727 - 29

Levesque v. Lapointe, *supra* at 323.

Marcia Neave, *Resolving the Dilemma of Difference: A Critique of "The Role of Private Ordering in Family Law"* (1994), 44 *University of Toronto Law Journal* 90-131, at 110-131.

Donald Poirier and Michelle Boudreau, *"Formal Versus Real Equality in Separation Agreements in New Brunswick"* (1992), 10 *Canadian Journal of Family Law* 239-256, at 251-256.

G. CONCLUSION

59. It is submitted that the test to be applied in determining relocation applications is as follows:

a) Sole Custody:

Where a parent with sole custody seeks to relocate, the move, in and of itself, is a material change in circumstances with respect to access only, but not with respect to custody. Accordingly, a sole custodial parent's decision to relocate is not subject to the court's review, as the relocation decision is an incident of custody. However, access may

be restructured by the court.

b) **Legal Joint Custody with a Primary Custodial Parent:**

Where a parent with primary custodial responsibility, in a legal joint custody arrangement, seeks to relocate, the test for a parent with sole custody should be applied.

c) **Legal Joint Custody: True Equal Parenting:**

Where a parent with legal joint custody, in a true equal parenting situation, seeks to relocate, the move is a material change in circumstances with respect to custody, and the court must re-examine the custody arrangement itself, and not the decision to relocate.

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d) **Relocation Restrictions in Orders or Agreements:**

Where an order or agreement contains a relocation restriction, the decision of a parent with sole or primary custodial responsibility to relocate, is a material change in circumstances with respect to residence and access, but not with respect to custody. The relocation restriction, by virtue of the order or agreement, is subject to the court's review. In determining the best interests of the child, the onus is on the access parent to establish that the move is contrary to the child's best interests, and the principles set out in paragraphs 34-39 must be applied.

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PART IV: ORDER SOUGHT

60. Based on the principles of interpretation outlined above, LEAF submits that this appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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CAROLE CURTIS


DONNA WILSON

Solicitors for the Intervenor
The Women's Legal Education and Action Fund.

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PART V

LIST OF AUTHORITIES

A. CASES

	<u>Paragraph No.</u>
1. <i>Moge v. Moge</i> , [1992] 3 S.C.R. 813	3,4,6,11,21 22,23,36
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15. <i>Thomson v. Thomson</i> , [1994] 3 S.C.R. 551	35,38
16. <i>Korpesho v. Korpesho</i> (1982), 31 R.F.I. (2d) 449 (Man.C.A.)	37,42,43
17. <i>M. (B.P.) V.M. (B.L.D.E.)</i> (1992), 42 R.F.L. (3d) 349 (Ont.C.A.), leave to appeal to S.C.C. refused (1993), 48 R.F.L. (3d) 232	38
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20. <i>Kruger v. Kruger</i> (1979), 11 R.F.L. (2d) 52 (Ont.C.A.)	50,52
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28. <i>Richardson v. Richardson</i> , [1987] 1 S.C.R. 857	57

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2. Statistics Canada, <i>Women in Canada: A Statistical Report</i> , 3rd edition, Target Groups Project, Cat. No. 89-503E	3,6,8,9,13 16,17,53
3. L. Duxbury and C. Higgins, "Families in the Economy", chapter 3 in M. Baker M. ed., <i>Canada's Changing Families: Challenges to Public Policy</i> (Ottawa: The Vanier Institute of the Family, 1994)	4
4. Rosalie Abella, <i>Report of the Commission on Equality in Employment</i> , Royal Commission on Equality in Employment (1984)	4,5
5. N. Zukewich Ghalam, "Women in the Workplace", in <i>Canadian Social Trends: A Canadian Studies Reader</i> , Volume 2 (Toronto: Thompson Educational Publishing, 1994) 141	6
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7. Susan B. Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" (1990), <i>Canadian Journal of Family Law Quarterly</i>	6
8. Eleanor E. Maccoby and Robert H. Mnookin, <i>Dividing the Child: Social and Legal Dilemmas of Custody</i> (Cambridge, Mass.: Harvard University Press, 1992)	7,9,10,39,48 52,53
9. Janice Drakich, <i>In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood</i> (1989), 3 <i>Canadian Journal of Women and the Law</i>	7
10. Federal/Provincial/Territorial Family Law Committee, Department of Justice, Canada, <i>Custody and Access: Public Discussion Paper</i> (Ottawa: Minister of Supply and Services Canada, 1993)	8,9,29,39
11. C. James Richardson, <i>Divorce and Family Mediation Research Study in Three Canadian Cities</i> , (Minister of Supply and Services Canada, 1988)	8,9,39,53

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C. STATUTES

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