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Equality and the Law of Custody and Access

The *Canadian Charter of Rights and Freedoms*[1] has had a significant impact on the direction of family law reform in this country. "Illegitimacy" has been rejected as a relevant legal concept.[2] Same-sex couples are free to enter into civil marriages in Ontario, British Columbia and Quebec.[3] The Law Reform Commission of Canada recently recommended that the distribution of benefits recognize non-conjugal relationships. In both our judicial and legislative responses to changing families and our jurisprudence in the area of substantive equality, Canada has been applauded as a world leader.

Despite Canada's international achievements, in day to day work in the trenches of family law, practitioners often wonder whether *Charter* principles are really very meaningful in family law cases. Direct challenges questioning the constitutionality of legislation gain national and international legal attention. But what of the simple requirement that we view all of our cases "through the lens" of equality jurisprudence?[4] Does the principle of equal benefit of the law have any meaning for a mother with a disability on social assistance who is fighting for custody of her children? While the *Charter* applies to government action and does not directly affect purely private litigation, judges' decisions are always to be guided by *Charter* principles.[5] Are the tenets of family law developing in accordance with our notions of substantive equality?

This paper is a brief survey of the impact of equality principles in custody and access cases. If "justice is blind,"[6] should the skin colour of a mother matter? Do mothers with disabilities face discrimination in claiming custody of their children? Fathers' rights groups claim bias in favour of women and lobby for a presumption of shared parenting, arguing that differential outcomes in custody litigation are a sign of discriminatory thinking by judges. How should gender influence the best interests of the child test?

This discussion is divided by issues of sexual orientation, gender, disability, class, race. Life, of course, is more complicated. This segmented approach is necessarily an artificial one which threatens to conceal that categories of privilege and oppression are experienced simultaneously, as interrelated and overlapping. A South Asian middle-class able-bodied lesbian, for example, will experience sexism, racism and sexual orientation discrimination, as well as her class and able-bodied privilege, in a complex and integrated manner. As many academics have discussed, the ways in which forms of oppression interact in the life of any individual is not additive in nature—a woman of colour will not experience the same sex discrimination as a white woman *plus* the racism experienced by a man of colour. At the same time as there is danger in oversimplifying the experiences of oppression and privilege, it is necessary to make more basic generalizations in order to identify and target discrimination.

This paper is by no means a comprehensive review of caselaw attempting to document systemic discrimination in Canadian courts. Rather, it is written from an anti-oppression framework which recognizes that sexism, racism, ableism, classism, homophobia and heterosexism are systemic problems in Canadian society which shape legal discourse. It is to be expected that our constitutional ideals of equality will not always inspire family law decision-making, but this is a failure of justice.

Charter principles of equality should inform custody and access decisions. This is not an abstract requirement but an imperative absolutely crucial to protect and advance the best interests of the child. While the best interests test is "the *only* test" in child-related matters,[7] best interests cannot be divorced from the spirit and values of the *Charter*.

We must constantly work at developing family law in line with substantive equality principles. This means decision-making without recourse to "common sense" stereotypes or discriminatory ideas. It means considering the full social, political, and historical context of the case, with an eye to the realities of historic discrimination and disadvantage. Substantive equality requires that we attune ourselves to the perspectives of those traditionally silenced in legal discourse. Family law will only serve all families well when we take the time to be guided by the principles of substantive equality.

Substantive equality

Andrews v. *Law Society of British Columbia*[8] was the first case decided by the Supreme Court of Canada under the equality guarantee of the *Charter*. The court adopted a notion of equality that is not strictly individualistic, but instead requires consideration of the broader social and political context to ascertain group disadvantage. Discrimination means more than differential treatment between similarly situated groups. A substantive approach to equality seeks to remedy historical disadvantage. The central concern is to ensure that the law respects the human dignity of all persons.

An equality rights claimant has the onus to show that the impugned

provision is discriminatory. Discrimination was defined by Justice Iacobucci for a unanimous Court in *Law*, as follows:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping and historical disadvantage?[9]

The question of whether discrimination has occurred in a substantive sense must be viewed from the perspective of the person claiming a *Charter* violation. The central focus is the *effect* of the impugned provision on the disadvantaged group. This can be seen only by examining the larger social, political, legal and economic context and looking at the impact of the law on the lives of the individuals it touches.[10] This effects-based approach has allowed the Supreme Court to recognize that discrimination exists where society has been structured on the assumption that everyone shares the characteristic of a dominant group and where facially neutral legislation has an adverse effect on a historically disadvantaged group.

Charter principles and the "best interests of the child" test

In *Young v. Young*,[11] the Supreme Court of Canada described the best interests standard as consonant with *Charter* values, stating that "it aims to protect a vulnerable segment of society by ensuring that the interests and needs of the child take precedence over any competing considerations in custody and access decisions."[12] Again in *P.(D.) v. S.(C.)*[13] the Supreme Court held that the best interest test is consistent with the underlying values of the *Charter*. While valid custody and access orders made under the best interests test are immune from review under the *Charter*,[14] the best interests of the child test should be applied in a manner which is sensitive to *Charter* principles.

As McLachlin J. wrote in *Young v. Young*:

> It has been left to the judge to decide what is in the "best interests of the child," by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation

> and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. *Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must do not what he or she wants to do but what he or she ought to do.* [emphasis added][15]

The application of the best interests test in light of substantive equality principles has two facets: judges and counsel must be attuned to the fact that discriminatory thinking is pervasive and will affect their own "common sense" and second, there must be a recognition of the importance and value of political identities associated with discrimination. A true understanding of the condition, needs, means and circumstances of the child requires full comprehension of the larger social and political context of the custody litigation.

A substantive equality approach to custody and access decision-making also requires that adults challenge ourselves to respect the autonomy, psychological integrity and dignity of children, without discrimination based on age. Children's equality interests have received limited attention in the development of equality jurisprudence. Indeed, the Supreme Court still considers it legitimate that children lack equal protection from assault.[16] Still, this is likely to be an emerging area in the development of substantive equality in family law requiring, for example, increased voice to children's wishes.

Gay and lesbian custody issues

In one of our recent cases, a judge stated in open court that he had no problem with our client's parenting: it was her "lifestyle" that he had a problem with. Interim custody was awarded to the father, not our client—a devoted stay-at-home mother who had come out as a lesbian. This type of clearly discriminatory judicial reasoning is abhorrent and has no place in our system of justice. However, it still occurs with alarming frequency.

An equality-minded approach was adopted in the Ontario case of *Re K.*[17] In that 1995 same-sex adoption decision, Judge Nevins expertly summarizes an array of social science evidence and provides answers to common homophobic stereotypes about gay and lesbian parenting. There is now a wealth of sociological and psychological evidence demonstrating that same-sex parenting has no adverse impact on, and may in fact be a benefit to, children.[18] Two American sociologists, Professors Judith Stacey and Timothy J. Biblarz, recently released a comprehensive review of the studies, "(How) Does the Sexual Orientation of Parents Matter?"[19] It is an extremely useful and accessible piece of academic literature. The authors find suggestive superior benefits of lesbian parenting and no detrimental differences between same-sex and heterosexual parenting. The "no-harm" conclusion is unsurprising, since there is no credible theory that would reasonably lead scholars to predict harms to children parented by self-identified lesbians or gay men.

After decades of research, there is every reason to believe that children parented by same-sex couples are at least as well parented, and their development is at least as successful, as children with heterosexual parents. This is the case even though same-sex parents currently confront disadvantages deriving from the non-legal status of their relationship, the frequent invisibility of the second parent's relationship and the social stigma with which both they and their children must contend. Stacey and Biblarz therefore conclude that there must be compensatory processes in gay and lesbian parenting that enable those children to develop as well as they consistently have been shown to develop.

In the past, most cases with issues of sexual orientation involved a straight parent against a gay or lesbian parent who had come out after the birth of the children. Now, we increasingly see disputes between (usually) lesbian parents whose children were born into the relationship itself. In these cases, judges seem all too eager to be "equality-minded" by awarding equal time and joint custody regardless of the facts of the case.

On a recent first attendance, for example, the judge insisted that temporary joint custody and shared time ought to be awarded after the breakdown of the lesbian relationship. There was no evidence from either parent before the court, since the former partner had just launched her application. The judge openly challenged us to appeal, not caring that the birth mother had been denied an opportunity to make her case, because he was so entranced with the idea of two equal mothers. While his decision was reversed, it is trite law that substantive equality does not require identical treatment. We must instead consider the lived circumstances of the parties, the larger social and political context, and the effect of the decision on the lives of the children. In this case, when she had an opportunity to give evidence, the birth mother stated that, while she had a spousal relationship with her partner, they had not parented together. The pregnancy was her own decision, and all care giving had been performed by her alone.

When I discuss this case with American attorneys, they are typically shocked and horrified that I take the position that the birth mother's account might be accurate, and if so, that joint custody and equal time would be inappropriate. In jurisdictions where non-biological mothers are denied any legal recognition, like most American states, their emphasis is understandably, and rightly, on recognizing and respecting non-biological parenting. There is no question that in many cases parenting is shared almost equally, and joint custody is a good option if the parties are able to communicate. Still, justice requires individual determination. It is entirely possible that a birth mother with a male or female spouse could parent almost single-handedly, and her special history of care giving should, in my view, be recognized post-separation. In particular, with very young children, I have no hesitation in arguing that we must appreciate a birth mother's period of pregnancy and breast-feeding as creating a history of attachment, whether in the lesbian or heterosexual context.

Trans parents

Having a non-heterosexual sexual identity was regarded as a mental disorder until 1973. Today, a gay or lesbian identity is regarded as non-pathological. Transsexual/ transgendered people,[20] in contrast, are classed as mentally disordered under the diagnostic manual of the American Psychiatric Association, the DSM IV. Gender identity disorder (GID or GIDC in children) was introduced as a diagnosis in the 1980 edition of the DSM (DSM-IIIR). Since the 1994 DSM-IV, the criteria for the diagnosis have expanded.

Adults who seek sex reassignment surgery and/or hormonal treatments rely on this classification in order to obtain insurance coverage for their treatments. At the same time, trans people rightly object to the characterization of their personal identity as pathology: a GID diagnosis stigmatizes trans people, fostering discrimination in all aspects of life. Particularly disturbing is the diagnosis of GIDC to "treat" children who do not conform to stereotype ie. girls who enjoy playing with trucks rather than dolls are classed as psychiatrically disordered. Treatment protocols for children diagnosed with GIDC include coercive therapy, behavior modification, forced institutionalization, and drugs.

In *Forrester* v. *Saliba,*[21] our client was a lesbian male-to-female transsexual father.[22] The mother alleged that the gender transition of the father constituted a material change in circumstances such that the parties' shared parenting arrangement was no longer in the child's best interests. She also argued that a change of custody was warranted as a result of the father's depression and gender dysphoria at the time of the transition. The mother also unilaterally took the child for "testing" for GID and was permitted to continue doing so by interim order, despite our client's objection. Our client was worried the testing would create an issue around gender where there had been none. In the end, the "experts" pronounced that the little girl was suitably feminine.

At trial, Judge Wolder held that the father's gender transition was irrelevant to a determination of the child's best interests. He also recognized that the father's period of depression, now in remission, could not constitute a material change, justifying a new order. In this manner, the court rejected the traditional stigma of mental illness and confirmed that transsexuality is not a negative factor in custody determination. Rather than branding the father as flawed because of a period of depression, the court understood depression as an illness from which a person may experience successful recovery.

Custody and the parent with a disability

Dominant social discourses label persons with disabilities as deviant, dangerous and incompetent. Ableism - the idea that persons with disabilities are less worthy than able-bodied people - is deeply entrenched and reinforced by the social, medical and legal discourses of our culture. When a judge considers the best interests of a child, how do mothers with physical or mental disabilities fare?

Given the larger social context of ableism, it is no surprise that mothers with disabilities experience discrimination in maintaining and fostering relationships with their children. Our country has a shameful history of forcibly sterilizing people with disabilities.[23] Today, people with disabilities face discriminatory scrutiny by child protection agencies, prejudice in custody and access decision-making and a denial of access to justice due to systemic barriers.

Our office recently acted for a mother who is deaf in a child protection case. The mother had contacted the Children's Aid Society during her pregnancy on the mistaken assumption that the Society would provide her with some assistance in obtaining a crib and other necessities in anticipation of her child's birth. The Society opened an investigation and assessed her as an "intermediate risk" solely on the basis that she is deaf. The Children's Aid Society then took the child into custody on the basis that she was allegedly ignoring the child's crying. Although the mother was breast-feeding, the child was removed by the Society, without any sign-language interpretation, seriously damaging early bonding and establishment of the breast-feeding relationship.

Parents suffering from "psychiatric illness" are regarded as particularly suspect by courts. But there are progressive, equality-minded decisions, inspired by section 15 of the *Charter*. Once a mental illness is in remission or is otherwise under control, it should not affect a custody determination since it does not impact on the child.

In the case of *Henley v. Jamieson*,[24] the father was applying for sole custody on the basis that the mother's depression made her being unable to provide consistent positive parenting for their daughter. In granting the mother's request for joint custody, Dunn J. held:

> Individuals with mental disabilities are to be afforded equal protection and equal benefit of the law....
>
> Only when it is shown, on a factual basis, that some harm might come to the child as a result of symptoms or manifestations of the mental disability, can restrictions arise in terms of parental custodial rights....
>
> There is no cogent evidence before me that would lead me to believe that there is any likelihood the respondent will have a sudden and immediate relapse or that such a relapse might cause [the child] harm....

Similarly, in *D.M.* v. *L.M.*,[25] the father attempted to vary the conditions of a consent order granting the mother custody. The father was seeking sole custody while the mother was prepared to accept joint custody. The mother had on many occasions conducted herself in very irrational manner as a result of a mental illness. Expert evidence established that her mental health had improved and the condition was under control. Her doctor gave evidence that,

although there was no cure for the condition, it could be controlled by medication. The Court ordered joint custody and stated:

> Had the mother continued in her previous conduct there would be no question about the applicant's claim for custody, as she would not have been in a position to have assumed a role as a custodial or joint custodial parent in a significant way without serious implications for the child. If, in the future, her medical condition deteriorates and she is unable to continue to control her conduct, then that would be a material change in circumstances that would warrant a review by this court of the custody and access arrangements. Under her current regime of medical treatment, I find that she is an acceptable joint custodial parent.[26]

In *MacArthur v. MacArthur*,[27] the parents of two children had an agreement by which the mother had day to day care and control, and the father liberal access. The father then sought sole custody. He alleged that the mother, although generally a good parent, suffered from depression, had assaulted the father twice, and had attempted or threatened suicide three times over the past two years. Experts testified that she did not pose a risk to her children. In ordering joint custody, Martin J. stated that the "Court is in no better position than the psychiatrists who have been caring for the mother and are familiar with her condition." In light of the experts' opinions, there was no reason to award custody to the father.

As noted, most of these cases revolve around the assessment of a parent by mental health experts. While expert opinion is accorded significant respect in dominant legal discourse, the categorization and definition of "disability" is highly political. The notion of disability itself is a contested concept. Women are labeled with higher rates of depression and other forms of mental illness. In the U.S., nearly twice as many women as men are diagnosed with a depressive disorder each year.[28] This must be understood as part of the long history of characterizing women as hysterical, emotionally unstable, mentally ill.[29] It is also important to recognize cultural causes of depression: for example, women have the stress of multiple work and family responsibilities and greater frequency of sexual and physical abuse, sexual discrimination, and poverty. The accusation that a mother is depressed or otherwise "crazy" is frequently made in custody and access litigation. Mental illness is particularly stigmatized in our culture and the labeling, pathologization and "syndromization" of women is consistent with dominant sexist discourses.

One example is "parental alienation." Another variation of mother-blaming, women are routinely criticized when children are resistant to access. Dr. Janet Johnston and many other noted researchers remind us that conflicted access cases should be evaluated from the child's perspective. The child's age, cognitive capacities and the ongoing experience of the conflict contribute

significantly to the problem. The answer is not wild, blaming litigation or demands for custody changes; in fact, litigation is ill-advised in cases of real conflict around access, since the court process is unable to "assert control" over a child or "solve" this problem. As with all cases involving legitimate concerns about a child's mental and social development, a therapeutic approach is best.

Men's claims to formal equality in custody decision-making

The frequent allegations of "parental alienation" are closely related to the rise of the fathers' rights movement. A vocal minority of divorced fathers has been setting the agenda of family law reform since 1997 when, in order to secure passage of the *Guidelines*, the federal government agreed to strike the Special Joint Senate-Commons Committee on Custody and Access.[30] Since the Committee report[31] advocating a presumption of shared parenting, men have experienced success in claiming that they are not treated equally in custody decision-making. They increasingly rely on the "friendly parent rule" to attack women who claim sole custody.

Fathers' rights activists argue that "...the fact that men receive sole custody of their children far less often than women, even against the backdrop of a gender-neutral legal standard, suggests 'judicial bias'."[32] In order to rectify what they perceive to be a bias in the system, they argue that formal equality demands a joint custody presumption in child custody law. In support of their claims to joint custody, fathers also argue that mothers and fathers each bring unique, complementary qualities to parenting; any mother who fails to accept this is an access-withholding evildoer.

Although the government has not formally amended the *Divorce Act*, it seems that judges frequently rule as though there is a shared parenting presumption in custody cases. There is an Ontario Court of Appeal decision that joint custody is an exceptional order that should only be imposed where both parents agree to shared parenting.[33] It has been overruled in practice. Women, still charged with primary responsibility for the work of parenting, are expected to do whatever it takes to accommodate men's access to their children. Courts will now order joint custody even where there is adamant opposition,[34] and many separated women now find themselves held hostage in the jurisdiction, unable to move because of the father's "right to access."[35]

The claim for equal treatment of fathers and mothers in custody cases relies on a misguided formal equality argument, an approach rightly rejected in our *Charter* jurisprudence. Substantive equality requires an examination of the full social and political context of the claim and focuses on the impact of a law in the lives of the affected individuals. Looking at the current context of parenting disputes through the lens of substantive equality, a presumption of shared parenting is revealed as both inappropriate and dangerous.

> "[G]ender neutral" analysis ignores or obscures the inequalities and power relations that exist between men and women. The current

> "gender neutral" analysis, which treats unequals as if they were equals, does not lead to equality and "justice" but more deeply entrenches inequality and power imbalances.[36]

The reality of the current social context is that women are generally primarily responsible for the care of children. Still, men succeed in almost half of the contested custody cases.[37] Any differential legal outcomes in favour of women are not a tell-tale sign that men are discriminated against in custody disputes, but rather are a natural consequence of the lived realities of a gender division in care giving.[38] Continuity of care is important to children.

A father frequently develops a sudden interest in the child's life or indicates a desire to become more involved after separation. Promises of future behaviour are not the same as a history of daily care giving. Time at hockey practice is not the same as organizing your daily life and all of your choices around the children. On the other hand, once a gendered pattern of care giving is no longer possible as a result of separation, a parent may sincerely be interested in changing his priorities. It may be difficult to determine the sincerity of such wishes, however, in light of child support legislation.

In all too many cases, the onset of a father's new interest in the children is inspired by his seeking to reach the 40 percent threshold of time that permits deviation from the child support tables. This provision of the *Federal Child Support Guidelines* has very negatively impacted custody and access litigation. Any connection between financial issues and access must be reconsidered. One method of evaluating claims for joint custody or equal time in negotiation—albeit an obvious and not always reliable one—is to ask the father directly if he would be willing to pay the table amount of child support even if he was awarded equal time.

Some men are interested in shared parenting because they want control of decision-making. Unfortunately, as many academics have noted, custody litigation is often a means to continue contact and control of the former spouse and children, rather than building a relationship with the children.[39]

The trend toward a presumption of shared parenting is often furthered by reference to the "friendly parent rule." Section 16 (10) of the *Divorce Act* provides:

> In making an order under this section, the court shall give effect to the principle that the child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such conduct.

This section has been transformed into a "maximum contact principle," losing sight of the plain language of the provision and the ultimate standard of the best interests of the child. For example, in *Hildinger v. Carroll*,[40] a father

residing in New York City who had never lived with his one year old child was awarded joint custody and generous access, including visits of up to one week at a time. Although his case was decided under the *Children's Law Reform Act*, and therefore the court did not specifically aver to the maximum contact—or "friendly parent"—provision of the *Divorce Act*, the court mentioned several times that the child would "profit from growing up knowing both her parents."[41]

In *Hess v. Hess*, the mother was criticized for not encouraging (as opposed to facilitating), the father-child relationship:[42] "There is a significant difference between facilitating such a relationship and actually encouraging it... I remain concerned about the ability of the wife to encourage actively the kind of relationship the children deserve to have...." (Notwithstanding that s.16 (10) of the *Divorce Act* explicitly uses the word "facilitate" and Epstein J. found that there was no doubt that Mrs. Hess did "facilitate" the relationship.)

The reality and seriousness of male abuse of women is another issue frequently disregarded by the courts.[43] Part of the reality of our current social context is that the abuse of women by male partners is widespread. A shared parenting presumption invites continued control of women by abusive men. Continuing conflict and perpetuation of abuse is not in children's best interests. A shared parenting presumption would enhance the use of litigation as an extension of the abuse.

Already, as a result of the new focus on joint custody, abused women "choose" not to leave their relationships for fear of losing their children or being locked into continuing struggles with the children's father. There are increasing numbers of women deciding to stay in abusive situations "for the sake of the children." As Justice L'Heureux-Dube has written, "to deny the existence of the equality component in family law is to trivialize the very inequalities suffered largely by women and children."[44]

Section 16(9) of the *Divorce Act* is also used to condone male violence against women. Section 16(9) of the Act prevents a court from considering any past conduct unless it is relevant to the ability of that person to act as a parent of a child. It provides:

> In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of the child.

Judges need to recognize that violence against a spouse is relevant to parenting ability, rather than dismiss abusive past conduct as irrelevant. The "friendly parent rule" exacerbates the dangers of failing to recognize the seriousness of abuse. It is not reasonable to require a custodial parent to facilitate contact regardless of past violence. While they are facially-neutral, ss. 16(9) and (10) have serious consequences for women and children.

In *Sherry v. Sherry*, the father was awarded unsupervised access despite the

mother's claims that he physically abused both her and the children.[45] The father deposed that he did punish the children by spanking them but never "struck the children with intent to injure them." Two assessors conducting assessments on two separate occasions recommended supervised access. The trial judge, purporting to follow the majority judgment of the Supreme Court in *Young v. Young*, framed the issue as a balancing exercise between risk of harm to the child versus the benefits of a free and open relationship with the access parent "as he or she is." He placed the onus on the custodial parent to prove not only that there is a risk of harm to the children, but that the risk was substantial.

In *Beck v. Balsillie*, a father with a history of violence and alcohol abuse was awarded unsupervised access against the wishes of the mother.[46] The father had six criminal convictions, five of which were for assault. Despite evidence of the assault convictions, the trial judge claimed that he had to decide the case solely on untested affidavit evidence. The conditions of the unsupervised access were that the father abstain from alcohol during the visits and that his new wife be in town, although not necessarily present, at the time.

Barriers of class and custody

Although child abuse is equally prevalent across lines of race and class, poor families and non-white families are more likely to be subject to the scrutiny of child protection agencies.[47] This is a result of prejudice and stereotype, and the greater availability for inspection and supervision of those who are poor. Only the wealthy can afford privacy.

In custody and access cases, too, class has a serious influence on the results. If a mother is employed in a professional career or is self-employed, she is portrayed as a "bad mother" who has abandoned her mothering responsibilities; she is likely to be characterized as obsessed with her work and as deficient in her parenting. A father is not subject to similar negative judgments if he is dedicated to his career.

The bias against working mothers is illustrated by *Roebuck v. Roebuck*.[48] The father was a farmer, and his mother, who lived with him, was available to help with housekeeping and babysitting. The mother, by contrast, was employed. If she had been awarded custody, the child would have to have been placed in daycare. The father won custody.

At the same time, if a mother is *not* working in paid employment or is poor, she may be deemed unable to provide financially for the children. Very few women obtain support awards and many of those support orders are unpaid. In the year following separation, only 35 per cent of women with children receive support (child and spousal) payments.[49] As Julien Payne suggests, the issue of economic support post-separation requires a more systemic approach. Privatized obligations will never address the endemic poverty of women and children. More comprehensive socio-political changes are required.[50]

Economic inequality also jeopardizes claims to custody and access of children because lower income persons simply cannot afford to litigate. In *New*

Brunswick (Minister of Health and Community Services) v. *G.(J.) [J.G.]*,[51] the Supreme Court of Canada held that a mother's section 7 rights were infringed by the denial of legal aid services for a child protection hearing. The Court held that section 7 does not provide "... an absolute right to state-funded counsel at all hearings where an individual's life, liberty and security is at stake, and the individual cannot afford a lawyer."[52] The considerations are: the seriousness of the issues at stake, the complexity of the proceedings and the capacities of the litigant.[53] Funded counsel must be ordered when a fair hearing would not take place otherwise. The majority judgment of Lamer J. considered such cases to be unusual.[54] The concurring judgment of L'Heureux-Dube J. recognized that such situations would not necessarily be rare.[55] Relying on *J.G.*, as well as principles of equality and best interests of the child, it is possible to assert a constitutional claim to state paid counsel in family law disputes more broadly.[56]

Economics also impacts on custody determinations because men re-partner more quickly than women post-divorce. Men are more likely to be able to afford to support the new partner as a stay-at-home parent.

> [A] second wife or paternal grandmother may be held superior as a primary caregiver to mothers who have to, or choose to, work in order to support their children, or disadvantaged women in low paying jobs, who are on social assistance .... Thus, if the mother is poor, she may be deemed unable to provide financially; if she is employed in a professional career, she may be deemed to have abandoned her mothering responsibilities.[57]

The Supreme Court of Canada has recently commented on this issue in *Van de Perre v. Edwards*.[58] Although known more for its determination of the impact of race in custody disputes and the scope of appellate review, the class implications of the decision are also important.

In *Van de Perre*, the trial judge granted custody to the mother, who had been the child's primary caregiver since his birth. The appeal court reversed, not only on an appreciation of the importance of race, but seemingly influenced by classist ideology.

The father was a black professional basketball player who was married with two children. Due to his wealth, his wife was available to stay home to look after the children full-time. She was characterized as a strong black woman who held her family together, despite her husband's infidelities.

In contrast, the mother was described as follows in Mr. Edwards' factum:

> From 1996 to trial in 1998, the Appellant continued to have multiple sexual partners, pursue basketball players, other professional athletes and celebrities, frequent clubs and go on trips leaving Elijah with multiple caregivers. She has little education or interest in obtaining more, a very poor work record, and a history of taking, not giving to

> the community and others. Her promiscuity, partying, pursuit of athletes and interest in a "profit pregnancy"... are not dealt with by the trial judge....[59]

Essentially, the Court of Appeal adopted this view - the mother being portrayed as an unmarried, uneducated, unemployed woman motivated by dreams of a huge child support award—as sexually promiscuous so-called "white trash."

The Court of Appeal invited the father's wife to apply for joint custody and reversed the trial decision. Custody was awarded to the father and his wife, who had not been a party at the trial level. The appellate court held that the trial judge failed to consider all relevant factors in considering the best interests of the child. In particular, "he set aside the obvious superiority of the E.'s family situation...."[60] The Court held that the trial judge's decision should have taken account the presence of the father's wife, rather than comparing the father against the mother.

The Court of Appeal reasoned that the father and his wife could provide Elijah with a more stable environment than could Ms. Van de Perre alone: "Although both parents demonstrate above adequate parenting capacities, it is my opinion that the E.'s are more able to provide for [the child's] best interest."[61] The Court of Appeal complained that the trial judge ignored "the fact that [Ms K.V.] does not have her grade 12 education...."

Overruling the Court of Appeal decision, the Supreme Court of Canada restored the trial judge's decision to grant custody to the mother. The Supreme Court held that a parent's support network was relevant but "the objective in every case is to determine the parenting abilities of the specific person who will ultimately receive custody."[62] The addition of the father's wife as a party on the appeal court's own motion was an error. For a unanimous court, Justice Bastarache wrote:

> A trial judge cannot give custody to a father merely because his wife is a good mother. Her presence is a factor but, overall, the court must consider if the applicant would make a good father in her absence. Even if the family were stable, this would not be determinative... Here, it is Mr. Edwards' personal capacity to exercise custody that must be considered, and the support provided by his wife is but a factor to be weighed in assessing these parental abilities.[63]

The Supreme Court's decision on this point aligns with substantive equality principles. Hopefully, this reasoning will be helpful in protecting the interests of lower income working mothers.

Classism should not influence custody and access determinations. The reality is, however, that as long as poor and low income Canadians are denied access to legal representation, there will be no substantive equality in family law.

Race and custody

Prior to the Supreme Court of Canada decision in *Edwards v. Van de Perre*,[64] there were few cases on the impact of race in determining the best interests of the child. Some decisions emphasized the risk of harm to children of colour if raised outside their own race and culture. Others minimized the impact of race on children's welfare. A brief survey of the case law follows.

In *Hayre v. Hayre*,[65] a non-Sikh mother was denied custody of her Sikh child. While framed as a religion issue, the court's reasoning actually turned on culture, language and race of the child. McIntyre J. stated:

> This boy is a Sikh. He will always be regarded as a Sikh in this country. It will be well for him to be brought up a Sikh, to preserve his existing knowledge of the Punjabi language, to be schooled in the religion and traditions of the people with whom he will always be associated. It will, in my view, be possible for him to find a secure personal identity only in the Sikh community. It is the only identity our society will permit him. Let him, then, be a Sikh and be proud of the tradition and accomplishments of a proud and worthy race. No matter how much she loves him, his mother cannot accomplish this. I direct that custody of the boy be given to his father.

In *Camba v. Sparks*,[66] custody of a "very fair" mixed-race child was awarded to an English-speaking African Canadian mother, who encouraged French-language speaking in the home. The white French-Canadian father, who was less sensitive to the child's multi-linguistic and bi-racial identity, was granted access. The court expressly stated that the issue in a race and custody case is not the skin colour of the mixed race child. Rather, it is a determination of "which parent was most likely to support and encourage the mixed racial and multi-cultural background of the child."

Similarly, a white mother was awarded custody in *Ffrench v. Ffrench*,[67] because she was found to be more likely to promote access to the other parent, who was black. By contrast, the father was found to be more likely to concentrate only on the child's black heritage. The court said that the best interests test included a recognition that children who will likely be perceived as Black have an opportunity to develop their self-esteem by continued contact with their racial minority background.

Race was minimized as a factor in determining custody of a bi-racial child in *Hoskins v. Boyd*.[68] The British Columbia Court of Appeal upheld a custody order in favour of a non-Aboriginal father in Oregon on the grounds that "[t]he force and urgency of the [Aboriginal mother's] opinions based on race are much diminished by the child's mixed parentage."[69]

In *Singh v. Singh*,[70] an expert psychologist testified that "these boys look like Sikhs, they will be seen as Sikhs and most importantly they see themselves as Sikhs." He testified that without exposure to the Sikh religion from their

father, the boys would "grow up with a relatively insecure basis for their identity." The judge nevertheless awarded custody to the boy's white mother. The court relied on evidence showing that the children were "exceedingly unhappy" without their mother, who was their primary parent. Other relevant considerations were the fact that the mother claimed to remain an adherent to Sikh religion and intended to continue education of her sons in that religion and the Punjabi language.

The Supreme Court of Canada has now provided additional guidance on the role of race in custody cases, holding that race is relevant but not determinative of child custody decisions.[71] After much publicity and discussion, the decision is in one sense totally unremarkable. Of course, race is a relevant factor. Of course, race is not determinative. The test, as always, is the best interests of the child. There are interesting insights in the various judgments, however, which speak to the recognition of racism and the promotion of substantive equality in law.

The trial judge had only briefly commented on the issue of race in his reasons. He held it was important for the child to be exposed to his black heritage and culture, but stated "there is also the need of the child to be exposed to the heritage and culture as the son of a Caucasian Canadian."[72]

The Court of Appeal, in contrast, treated the child's racial identity as a central issue. Harking back to McIntyre J.'s analysis in *Hayre v. Hayre*,[73] the appeal judgment noted that:

> If it is correct that E. will be seen by the world at large as "being black," it would obviously be in his interests to live with a parent or family who can nurture his identity as a person of colour and who can appreciate and understand the day-to-day realities that black people face in North American society - including discrimination and racism in various forms... The Supreme Court of Canada has found that there is "systemic discrimination against black and aboriginal people" in Canada.[74]

The Court of Appeal found that it was important for the child to live with a family who could nurture his identity as a person of colour. The Court relied on the testimony of the father's black spouse, who said that the child's white mother "couldn't teach him what it's going to be like to be black, and how he is going to be seen in the world as being black.... And reading books won't help."[75]

The court also considered the social science evidence, which suggests that a child's sense of self, the child's well-being and the future of our society are "inextricably related to the colour of his or her skin."[76] The court concluded that the race factor weighed in favour of assigning physical custody to the father but noted that issues of "culture, race and racial prejudice" are "not determinative."[77]

Newbury J.A. observed that the trial judge "reached no resolution [on the

race issue] because of what he regarded as the evenly balanced competing claims in this regard."[78] She noted that while issues arising from a child's race or ethnicity are not specifically adverted to in the Act, they are clearly subsumed under the best interests standard, in particular the consideration of a child's health and emotional well-being. She added: "With respect, I am not sure there is a 'Caucasian Canadian' culture...."[79] For these reasons, the Court of Appeal found that the trial judge erred in not giving proper weight to the issue of race.

The Supreme Court of Canada granted the mother leave to appeal. The mother submitted that there were five problems with the Court of Appeal's analysis of race.[80] First, there was no evidence before the court regarding the child's appearance, and therefore the court ought not to have engaged in an analysis of how the child "looked." Second, "given the infinite variety with which various racial characteristics may be expressed in human beings, it is impossible to contemplate how such an analytical requirement would be implemented in any meaningful way at the trial level." Third, mixed-race children cannot be pigeon-holed as belonging to either one race or another—they belong to both. Fourth, the court's observation that there is no such thing as a "Caucasian-Canadian" culture is unsupportable, "not least because there was no evidence before the court." Finally, race and ethnicity was not an issue that was argued at trial, nor were written submissions provided in the appeal.

The respondent father argued that, with regard to the issue of race, intervention by the Court of Appeal had been required. He argued that the trial judge applied a stereotypic view of the father as a black man, in particular a black NBA American athlete. This constituted an error of law which violated Elijah's rights under s.15 of the *Charter* to equal consideration of his custodial options.[81] The respondent observed that the purpose of the s.15(1) equality guarantee is to protect and promote human dignity: "[O]ne of the principal mechanisms by which the *Charter*'s quality guarantee achieves that purpose is by barring the use of stereotypes."[82]

The respondent argued that the child was entitled to have the parenting capacity of all the parties treated equally. Instead: "The trial judge found evidence that fit the stereotype, made errors of fact, misapprehended other evidence in order to conform to the stereotype, and ignored evidence of Mr. Edwards as a person and parent that did not fit the stereotype."[83] The respondent goes on:

> The historic stereotype of black men offends human dignity. It is of a lesser being: a feckless father, uncommitted to his family, irresponsible, full of ungoverned emotions. Black men in particular were to know and stay in their place, and not presume entitlement to wealth or social status. Fear of the sexual prowess of black men and protection of white women lays at the heart of racism; fear of miscegenation.[84]

The respondent also argued that Elijah would be identified as a black child

and man. The father was better positioned to assist the child in developing positive self-esteem, stating that "exposure to the Edwards' Afro-American culture can only benefit Elijah, and that culture does not exist in Vancouver."

The African Canadian Legal Clinic, the Association of Black Social Workers and the Jamaican Canadian Association were granted status as an intervener to make submissions on the role race should play in decisions regarding custody of mixed-race children. The intervener argued that from both the perspective of family and constitutional law, race is a "major" factor which "must be given explicit consideration and considerable weight in custody and access disputes."[85] To ignore or minimize race as an important factor in custody and access disputes "is to discriminate against racialized children."[86] The intervener invited courts to rely on judicial notice of race-related issues.

Bastarache J., for a unanimous court, found no indication that the trial judge was biased against black men generally or against black basketball players in particular. He noted that in a custody case, the child will continue to have exposure to both parents and therefore have contact with both parents' cultural and racial backgrounds.

Bastarache J. added that, while some notice may be taken of racial facts, evidence will usually be important. General public information may not be sufficient to inform the trial judge on, for example, race relations in the relevant communities or the ability of the parents to address the issue of racial identity.

In *Van de Perre*, no evidence had been adduced at trial to indicate that race was an important consideration. Instead, the Supreme Court found that the issue of race "was given disproportionate emphasis at the initiative of the Court of Appeal." The trial judge had considered the issue. His limited findings simply reflected the limited weight accorded to the issue by the parties at trial. Bastarache J. emphasized that race was just one factor, and "other factors are more directly related to primary needs and must be considered in priority." The Court held:

> It is important that the custodial parent recognize the child's need of cultural identity and foster its development accordingly. I would therefore agree that evidence regarding the so-called "cultural dilemma" of biracial children ... is relevant and should always be accepted. But the significance of evidence relating to race in any given custody case must be carefully considered by the trial judge. Although general public information is useful, it appears to be often contradictory..., and may not be sufficient to inform the judge about the current status of race relations in a particular community or the ability of either applicant to deal with these issues.[87]

In summary, the Supreme Court in *Van de Perre* held that the importance of race as a factor varies from case to case. Expert evidence is likely required as to the race relations in various communities, the importance of race as a

consideration in the circumstances, and the ability of the parents to meet the child's need to develop skills to deal with racism and to have pride in her heritage and identity.

By its emphasis on the need for individual consideration of race and the need for evidence in each case, the Court may be creating barriers to a meaningful discussion of race in custody and access cases. It is unquestionably true that race should not determinative; custody cases absolutely require individual determination. The concern is that the Court placed less emphasis on another unquestionable truth: racism is endemic to Canadian society and children of mixed race parents are "racialized" individuals who need skills to cope with discrimination. As an aspect of its individualized approach to questions of race, the Court problematically suggests that race may be a relatively minor factor that does not always matter.

An individualized approach must not obscure the necessary identification of the realities of racism. Race is not a relatively minor issue in our society. It does matter. It should not be necessary to adduce evidence in every case to prove this basic premise. The analysis of systems of oppression like sexism and racism depends on an examination of the full social and political context to discern generalized patterns of power and privilege. Focusing exclusively on individuals, refusing to look at the common experience, may obfuscate systemic problems.

If it is necessary to adduce evidence with respect to race in each case, the cost and time barriers to developing the record may be prohibitive to a proper exploration of the issue. It is interesting to contrast the reflections of L'Heureux-Dube J. in *Moge*. In that case, the Court accepted that courts must take judicial notice of the economic impact of divorce on women. The Court recognized that litigants would likely not be able to afford the cost of expert evidence of the economic consequences of marriage breakdown.[88] L'Heureux-Dube J. wrote:

> Based upon the studies which I have cited earlier in these reasons, the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice. ...[J]udicial notice should be taken of such studies, subject to other expert evidence which may bear on them, as background information at the very least.

In all events, whether judicial notice of the circumstances generally encountered by spouses at the dissolution of a marriage is to be a formal part of the trial process or whether such circumstances merely provide the necessary background information, it is important that judges be aware of the social reality in which support decisions are experienced when engaging in the examination of the objectives of the Act.[89]

In *Van de Perre*, Bastarache J. notes that courts have taken judicial notice of racism,[90] but less emphasis is placed on the judge's need to recognize this

social reality. Instead, the Court focuses on the requirement to examine individual cases to assess whether race is an issue. This may imply that racism is not an issue in some circumstances—the idea being that racism is a large scale problem obviated in individual contexts by well-intentioned equality-minded white people.

Regardless of our positive and progressive intentions, the reality is that all of us, whether we experience oppression or privilege in relation to an aspect of our identity, have been thoroughly schooled by discourses of discrimination.

Conclusion

Family law is vitally important to the individual families it serves. It is also very much a dialogue about power in contemporary social relations. The discourses of family law work to define, prescribe and control our most intimate lives, in subtle and dramatic ways. And family law reflects and reinforces, sometimes challenges, dominant discourse in our pressing social struggles around discrimination.

A substantive approach to equality rejects the formalistic notion that "likes should be treated alike," and so requires the rejection of simplistic demands for a one-size-fits-all presumption of "equal parenting" post-separation. Yes, there may be two parents, but that tells us almost nothing about actual relationships with the children.

Substantive equality requires us to look at individual circumstances, with an eye to the larger social and political context of the claim. It therefore reminds us that our lives and thinking are necessarily marked by systemic sexism/ racism/ classism/ ableism/ heterosexism/ transphobia. It should not be necessary to introduce expert evidence of the importance of race to a mixed race child.

Our ideal of substantive equality challenges us to abandon a "common sense" shaped by majoritarian ideals. We are instead required to give voice to those traditionally silenced and valorize the political identities associated with discrimination. So, while our trans client was repeatedly told by early settlement conference judges it was "obvious" she would fail, she achieved justice after a full trial. She had a chance to speak and be heard.

All mothers, all fathers, all children, all families, deserve to be treated with dignity and respect in family law. Substantive equality principles developed under the *Charter* help us achieve this ideal.

With gratitude to Martha McCarthy for her gracious expert assistance. Thanks also to my spouse, Maretta Miranda, and our newborn son, Cameron Avery Miranda-Radbord, for showing me all that is good and beautiful.

[1] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

[2] Every constitutional challenge to the differential treatment of "illegitimate

children" (eleven in total) has been successful. See e.g. *Christante* v. *Schmitz* (1990), 83 Sask. R. 60 (Q.B.).

[3]*Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3rd) 161 (C.A.); *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 13 B.C.L.R. (4th) 1 (C.A.); *La Ligue catholique pour les droits de l'homme c. Hendricks et al.*, [2004] (No. 500-09-012719-027) (Que. C.A.) (March 19, 2004).

[4]*Hills v. Canada*, [1988] 1 S.C.R. 513 at 558.

[5]*Dolphin Delivery v. RWDSU*, [1986] 2 S.C.R. 573at 603; *Canadian Broadcasting Corp. v. Dagenais*, [1994] 3 S.C.R. 835; and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

[6]Please excuse the ableist expression, but as long as it is problematized, I thought it was useful in the context of this paper.

[7]*Young v. Young*, [1993] 4 S.C.R. 3 at 117

[8][1989] 1 S.C.R. 143.

[9]*Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 524 (para. 39).

[10]*Miron v. Trudel*, [1995] 2 S.C.R. 418; *Egan v. Canada*, [1995] 2 S.C.R. 513 at 603-604; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 165, 152.

[11]*Young v. Young*, [1993] 4 S.C.R. 3 at 117

[12]*Ibid.* at 71, per L'Heureux-Dube J.

[13]*Droit de la famille - 1150*, [1993] 4 S.C.R. 141 (sub nom. *P.(D.) v. S.(C.)*).

[14]Although Sopinka J. agreed that the Act was constitutional, he disagreed that the *Charter* should be read down in the face of the best interests test. Rather, the test has to be reconciled with the *Charter*.

[15]*Young v. Young*, [1993] 4 S.C.R. 3 at 117

[16]*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.R. 4.

[17](1995), 15 R.F.L. (4th) 129 (Ont. Ct. Prov. Div.)

[18]See for example, *Gay and Lesbian Parents*, F.W. Bozett, ed. (Westport: Praeger Publishers, 1987); *Homosexuality: Research Implications for Public Policy*, J.C. Gonsiorek and J.D. Weinrich, eds. (Newbury Part: Sage Publications, 1991); C.J. Patterson, "Children of Gay and Lesbian Parents" (1992) 63 *Child Development* 1025-1042; S. Golombok and F. Tasker, "Children in Lesbian and Gay Families: Theories and Evidence" in *Lesbians Raising Sons*, Jess Wells (ed.) (Los Angeles: Alyson Books, 1997) 158; R. Green, J.B. Mandel, M.E. Hotvedt, J. Gray, and L. Smith, "Lesbian Mothers and their Children: A Comparison with Sole Parent Heterosexual Mothers and their Children" (1986) 15 *Archives of Sexual Behaviour* 167-184; C.J. Patterson, "Children of the Lesbian Baby Boom: Behavioural Adjustment, Self Concepts and Sex Role Identity" in *Lesbian and Gay Psychology: Theory Research and Clinical Applications*, B. Greene and G.M. Herek (eds.) Newbury Park, California: Sage) 156-175.

[19](April 2001) 66: 2 *American Sociological Review* 159.

[20]Transgender persons are persons who identify themselves as belonging to a sex and/or gender different from that assigned to them at birth.
[21](2000) 10 R.F.L. (5th) 34
[22]While our client identified as a woman, she also identified as a father because that is how her child had known her almost her whole life.
[23]See for example, *Sexual Sterilization Act*, S.A. 1928, c.37.
[24]*Henley v. Jamieson* (1996), Nfld. & P.E.I.R. 69 at para. 26, 32, 35 and 41 (Nfld. S.C. U.F.C.).
[25]*McNichols v. McNichols* (1993), 42 A.C.W.S. (3d) 699, [1993] W.D.F.L. 1406, [1993] O.J. No. 1973 (Ont. Prov. Div.) [*sub nom D.M. v. L.M.*]
[26]*Ibid* at para. 6
[27][1998] A.J. No. 1338 at para.21 (Alb. Q.B.).
[28]Regier DA, Narrow WE, Rae DS, et al. The de facto mental and addictive disorders service system. Epidemiologic Catchment Area prospective 1-year prevalence rates of disorders and services. Archives of General Psychiatry, 1993; 50(2): 85-94.
[29]Astbury, J. *Crazy for You: The Making of Women's Madness* (Melbourne, Australia: Oxford University Press, 1996); Chesler, P. *Women and Madness* (New York: Harcourt Brace Jovanovich, 1989); Ussher, J. *Women's Madness: Misogyny or Mental Illness?* (Amherst, MA: University of Massachusetts Press, 1991).
[30]For a critical evaluation of these developments, see for example: M. Laing, "For the Sake of the Children: Preventing Reckless New Laws" (1999) 16 Can. J. Fam. L. 229-282; S. Boyd, "W(h)ither feminism? The Department of Justice Public Discussion Paper on Custody and Access" (1995) 12 Can. J. Fam. L. 331-365; A.H. Young, "Joint Custody as Norm: Solomon Revisited" (1994) 32 Osgoode Hall L.J. 785-816; K. Munro, "The Inapplicability of Rights Analysis in Post-Divorce Child Custody Decision Making" (1992) 30 Alta. L. Rev. (No. 3) 852; J. Cohen and N. Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" 19 C.F.L.Q.121.
[31]Special Joint Committee on Child Custody and Access, For the Sake of the Children, Final Report (Ottawa: Public Works and Government Services Canada, 1998).
[32]J. Cohen and N. Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" 19 C.F.L.Q.121 at 125-26.
[33]*Kruger v. Kruger et al* (1979), 11 R.F.L. (2d) 52 (C.A.).
[34]See for example, *McDonald v. McDonald* (2000), 13 R.F.L. (5th) 143 (S.C.J.).
[35]In a recent trial, the mother was denied permission to move with the children from Toronto to North Bay because the father's access would be compromised, even though the judge found that the mother acted as "primary parent" to the children. *Tumino v. Tumino* (June 24, 2002, Ont. Sup. Ct. J., Ct. file: 01-FP-270673)
[36]M. Laing, "For the Sake of the Children: Preventing Reckless New Laws" (1999) 16 Can. J. Fam. L. 229-282 at para. 24.

[37]*Ibid.* In the 1980's, fathers who petitioned for custody were successful 43% of the time. By the 1990s researchers estimate challenging fathers succeed in 50-60% of cases. See, Canada, Department of Justice (1990). Evaluation of the Divorce Act. Phase II: Monitoring and Evaluation. Ottawa: Bureau of Review. Wertzman determined that two thirds of fathers who petitioned for custody obtained it through negotiation with the mother. See, Susan Boyd, "Investigating Gender Bias in Canadian Custody Law: Reflections on Questions" (Feminism and Law Workshop Series no. WS. 92-93(2) (Toronto: University of Toronto, Faculty of Law, 1992) at 30; L. Armstrong, "The Home Front: Notes from the Family War Zone" (New York: McGraw-Hill, 1986) at 50-51 reports that in the United States, in 63% of contested cases, custody is awarded to the father; and P. Chesler, "Mothers on Trial: The Battle for Children and Custody" (Seattle: Seal, 1986) at 64ff finds that two thirds of fathers petitioning for custody received it.

[38]See, C. Smart, "The Legal and Moral Ordering of Child Custody," *Journal of Law and Society*, (1991): 485.

[39]C. Bertoia and J. Drakich, "The Fathers' Rights Movement: Contradictions in Rhetoric and Practice," Journal of Family Issues, 14, 4 (1993): 592-615.

[40][1998] O.J. No. 2898 (Q.L.) (Gen. Div.).

[41]*Ibid.* at 8.

[42](1994), 2 R.F.L. (4th) 22 (Ont.Gen.Div.) at paras. 15 and 22.

[43]M. Rosnes, "The Invisibility of Male Violence in Canadian Child Custody and Access Decision-making" (1997) 14 Can. J. Fam. L. 31-60

[44]L'Heureux-Dube J, "Making Equality Work in Family Law" (1997) 14 C.J.F.L. 103.

[45](1993), 1 R.F.L. (4th) 146 at 154 (P.E.I.T.D.).

[46](1994), 2 R.F.L. (4th) 91 (N.W.T.S.C.).

[47]See S. Boyd, "W(h)ither feminism? The Department of Justice Public Discussion Paper on Custody and Access" (1995) 12 Can. J. Fam. L. 331 at ftnt. 3.

[48](1983), 45 A.R. 180, 34 R.F.L.

[49]See D. Galarneau and J. Sturrock, "Family Income after Separation,"(1997) 9(2) Perspectives on Labour and Income 18 at 21-22; D. Galarneau, "Income after Separation — People without Children,"(1998) 10(2) Perspectives on Labour and Income 32 at Table 4.

[50]J. D. Payne, "Family Law in Canada" in Canada's Changing Families: Challenges to Public Policy (Maureen Baker, Ed.) Vanier Institute of the Family, 1994; Ch. 2, pp. 13-28

[51][1999] 3 S.C.R. 46.

[52]*Ibid* at para. 107

[53]*Ibid* at para. 75

[54]*Ibid* at para. 83

[55]*Ibid* at para. 125

[56]See M. J. Mossman and C. L. Baldassi, "A Constitutional Right to Civil

Legal Aid in Canada?" Ontario Bar Association (May 6, 2002 - Toronto)
[57]M. Laing, "For the Sake of the Children: Preventing Reckless New Laws,"(1999) 16 Can. J. of Fam. L. 229 at 260-61; see also, S. Boyd, "Child Custody, Ideologies and Employment" (1989) 3 Can. J. Women & Law 111.
[58]*Van de Perre v. Edwards,* [2001] 2 S.C.R. 1014
[59]Respondent's factum. at para. 85.
[60]*Van de Perre v. Edwards* (2000), 4 R.F.L. (5th) 436 para. 8.
[61]*Van de Perre v. Edwards* (2000), 4 R.F.L. (5th) 436 at para. 33.
[62]*Van de Perre v. Edwards,* [2001] 2 S.C.R. 1014 at para 26, see also para 25
[63]*Van de Perre v. Edwards,* [2001] 2 S.C.R. 1014 at para. 30
[64]*Van de Perre v. Edwards,* [2001] 2 S.C.R. 1014
[65](1973), 11 R.F.L. 188 (B.C.S.C.), aff'g (1975), 21 R.F.L 191 (B.C.C.A.).
[66](1993), 124 N.S.R. (2d) 321 (N.S.F.C.).
[67][2001] N.S.J. No.82
[68]*Hoskins v. Boyd,* (1997), B.C.A.C. 111 at para. 13 (QL).
[69]*Hoskins v. Boyd,* (1997), B.C.A.C. 111 at para. 13 (QL).
[70](1981), 26 R.F.L. (2d) 75 (Alta C.A.).
[71]*Van de Perre v. Edwards,* [2001] 2 S.C.R. 1014.
[72]*Van de Perre v. Edwards,* [1999] B.C.J. No. 434 at para. 80.
[73](1973), 11 R.F.L. 188 (B.C.S.C.), aff'g (1975), 21 R.F.L 191 (B.C.C.A.).
[74](2000) 4 R.F.L. (5th) 436 at para. 50.
[75]*Ibid.* at para. 48.
[76]*Ibid.* at para. 49.
[77]*Ibid.,* at para. 52
[78]*Ibid.* at para. 48.
[79]*Ibid,* at para. 38.
[80]Appellant's factum at para. 122.
[81]Respondent's factum at paras. 64-87.
[82]*Ibid.* at para. 74.
[83]*Ibid.* at para. 77.
[84]*Ibid.* at para. 78.
[85]Intervener's Factum at para. 3.
[86]*Ibid.* at para. 8.
[87]*Van der Perre v. Edwards,* [2001] 2 S.C.R. 1014 at para. 40.
[88][1992] 3 S.C.R. 813 at 871–872
[89]*Ibid.*
[90][2001] 2 S.C.R. 1014 at para 38 citing *R. v. Williams,* [1998] 1 S.C.R. 1128