THE INFLUENCE OF THE SPOUSE'S CONDUCT ON THE CUSTODY OF THE CHILDREN

There was a time when there existed two categories of separated or divorced spouses: the innocent and the guilty. The innocent spouse was given the custody of the children, as a first prize for good behavior; whereas, the guilty one was deprived of this custody as a punishment(1). This perspective conformed to the spirit of an era when marriage-fault was a grave matter which contemporary morals regard in a different light. In Quebec, it appeared to have a juridical basis as well. According to the Civil Code, the consort guilty of conjugal fault, which was ground for separation, as a rule would be deprived of the custody of the children:

Art. 214 du Code civil:

"Les enfants sont confiés à l'époux qui a obtenu la séparation de corps, à moins que la cour, après avoir consulté le conseil de famille s'il(sic) le juge convenable, n'ordonne, pour le plus grand avantage des enfants, que tous ou quelques-uns d'eux soient confiés aux soins de l'autre époux, ou d'une tierce personne".

"The children are entrusted to the party who has obtained the separation, unless the court, after having, if it thinks proper, consulted a family council, orders, for the greater advantage of the children, that all or some of them be entrusted to the care of the other party, or of a third person".

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(1) F.S. Freedman, The Status Rights and Protection of the Child in Quebec, 1979 R. du B. 3, à la p. 13; M. Audette-Filion et F. Chrétien, Propos sur le sort de l'enfant dans la famille, (1976) 2 Revue juridique et politique Indépendance et Coopération, p. 7; J. Pineau et M. Ouellette, La protection de l'enfant dans le droit de la famille, (1978) 9 R.D.U.S. 76, à la p. 91.

The French Civil Code had an analogous disposition[2], and some authors have come to the conclusion that the guilty spouse was undergoing "a diminution of paternal authority by right of sanction"[3].

This was a false interpretation. Instead of considering the deprivation of the custody of the children as an exemplaray or dissuasive penalty, it should be seen as a simple presumption, (juris tantum), that the interest of the children was not served by leaving them with the parent whose conduct was a bad example to them[4]. This was the explanation given to the Tribunat and the Corps législatif in view of the adoption of the French Civil Code (Napoleonic Code). The following passage from a statement by State Councillor Treilhard is a clear indication of it:

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(2) Article 302 C.N.

(3) H. et L. Mazeaud, Leçons de droit civil, t. 1 no 1493 (3e éd. 1963) p. 1398.

(4) G. Trudel, dans le t. 2 du Traité de droit civil du Québec, (1942) p. 48; Langelier, Cours de droit civil, (1905) t. 1 p. 357: "S'il a manqué à ses obligations comme époux, on présume aussi qu'il manquera à ses devoirs comme père ou mère". Baudry-Lacantinerie, Traité de droit civil, Des personnes, t. 3 no 269, p. 171 (2e éd. 1902).

> "As for the children, the rule already established for their best advantage must be followed constantly; the plaintiff spouse who has been granted a divorce is assumed to be without fault; therefore, generally it is to that person that the custody of the children must be given; but the strict application of this rule could be, in many circumstances, a disadvantage to them. Therefore, the court should be free to grant them, when it assumes it is suitable, to one or the other spouse and even to a third person...(5).
>
> (translation)

The presumption of the unworthiness of the spouse responsible for the marriage breakdown does not appear in our Divorce Law. Thus, it has disappeared at least as a legal presumption. The law still requires that the judge take into consideration the conduct of the parties[6]; but it

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(5) Code civil des Français suivi de l'exposé des motifs, Paris AN XII (1804), t. 2,p. 337.

(6) S.R.C. 1970, c. D-8, art. 11(1):

En prononçant un jugement conditionnel de divorce, le tribunal peut, s'il l'estime juste et approprié, compte tenu de la conduite des parties ainsi que de l'état et des facultés de chacune d'elles et des autres circonstances dans lesquelles elles se trouvent, rendre une ou plusieurs des ordonnances suivantes:	"Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:
...	...
c) une ordonnance pourvoyant à la garde, à l'administration et à l'éducation des enfants du mariage".	c) an order providing for the custody, care and upbringing of the children of the marriage'

permits him, as well, to take into account several other factors without specifying, however, which one should be paramount, even though the factor "conduct of the parties" tops the list. But, whereas, the Civil Code mentioned "the greater advantage of the children", federal legislation does not speak of the interest of the children, assuming perhaps that this was obvious. But, in law, even when it is obvious, it should be stated explicitly. As it is, the jurisprudence took care of it.

Since the judgments of the Supreme Court of Canada in the MacDonald case and the Talsky case, the paramountcy of the child's welfare in considering to whom custody should be granted is indisputable[7].

The Divorce Law of 1968 does not include a presumption that it is in the best interest of the child that he remain in the custody of the innocent spouse. To this extent, it is in contradiction with the former Article 214 of the Civil Code. The following year, to correct this anomaly, the Quebec Legislature abrogated article 214, and inserted in the Code dispositions regarding the custody of the children similar to those to be found in the federal law[8].

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(7) MacDonald v. MacDonald, (1976) 2 S.C.R. 259, confirms the judgments of the Lower Courts;
Talsky v. Talsky, (1976) 2 S.C.R. 292 (Judges Spence and Beetz dissenting) annuls (1973) 3 O.R. 827 and re-establishes the decision of Judge Houlden.

(8) 1969, 18 El.II, c. 74, s. 14.

« **212.** Le tribunal peut, dans le cas de séparation de corps ou de divorce, ordonner à l'un des époux de verser pour l'entretien de l'autre époux et des enfants, les sommes qui sont jugées raisonnables. Ces sommes sont payées à l'autre époux ou à un administrateur, en un ou en plusieurs versements, selon que le décide le tribunal, et aux autres conditions qu'il juge appropriées.

Le tribunal peut aussi, aux conditions qu'il juge appropriées, statuer sur la garde, l'entretien et l'éducation des enfants.

Le tribunal tient compte, pour ces fins, de la conduite des parties, de l'état et des facultés de chacune d'elles ainsi que des autres circonstances dans lesquelles elles se trouvent.

"**212.** In the case of separation from bed and board or of divorce, the court may order one consort to pay such sums as are deemed reasonable for the maintenance of the other consort and of the children. Such sums are paid to the other consort or to an administrator in one or more instalments accordingly as the court decides and on such other conditions as it deems appropriate.

The court, on such conditions as it deems appropriate, may also decide as to the custody, maintenance and education of the children.

For such purposes, the court takes into account the conduct of the parties and the condition, means and other circumstances of each of them.

To conform more closely to the Divorce Law, the Civil Code removed from its text the statement "the greater advantage of the children".

Civilians (I use the term in its archaic sense of "one learned in the civil law") have a strong predilection for legislating legal principles which jurists in common law jurisdictions are content to find in court judgments. This is why the Quebec Legislature could not resist the temptation of reinstating in the Civil Code the formal rule of the primacy of the child's interest, In hopeful anticipation of a new distribution of legislative powers(9), it has adopted a new

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(9) The different sections of the new Civil Code will come into force on the dates fixed or to be fixed by government proclamations, and no proclamation will be made that would put into force a provision of this Code in a matter falling under the legislative jurisdiction of the Parliament of Canada (see article 80 of the law).

code, the "Code civil du Québec"[10], which includes dispositions on marriage and divorce, among which is the following article:

Art. 569 C.c.:

"Au moment où il prononce le divorce ou postérieurement, le tribunal statue sur la garde, l'entretien et l'éducation des enfants, dans l'intérêt de ceux-ci et le respect de leurs droits, en tenant compte, s'il y a lieu, des accords conclus entre les époux"(11).

"The Court, in granting the divorce or subsequently, decides as to the custody, maintenance and education of the children, in the interest and in the respect of their rights, taking into account the agreements made between the spouses, where such is the case"(11).

This article is only an application of the general rule applying to all children which has been added by the same law to the present Civil Code (Civil Code of Lower Canada):

Art. 30:

L'intérêt de l'enfant et le respect de ses droits doivent être les motifs déterminants des décisions prises à son sujet.

On peut prendre en considération, notamment, l'âge, le sexe, la religion, la langue, le caractère de l'enfant, son milieu familial et les autres circonstances dans lesquelles il se trouve".

"In every decision concerning a child, the child's interest and the respect of his rights must be the determining factors.

Consideration may be given in particular to the child's age, sex, religion, language, character and family surroundings, and the other circumstances in which he lives".

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(10) Bill No. 89 sanctioned on December 19, 1980: An Act to establish a new Civil Code and to reform family law.

(11) Compare : the Statutes of Newfoundland of 1964, c. 45, s. 47. Section 535 states that separation as to bed and board produces towards the children the same effects as divorce.

The variations of the new vocabulary are to be noticed. The courts, particularly the Supreme Court of Canada, have familiarized us with the expressions welfare of the child and paramount consideration. Some judges, and the Civil Code of Quebec, prefer to employ the expressions the interestof the child or the best interest of the child, and determining consideration or determining factor. They may not be perfect synonyms [(12)], but those who use them intend to express the same thing. When one procures for the child all that is in his best interest, the aim is to assure his welfare, a state of happy tranquillity achieved by fulfilling the needs of the body, the mind and the soul.

But we are getting away from our subject, the influence that a spouse's conduct has in determining the custody of the children. However, our procedure leads us to our goal, since the parent's conduct is only relevant in so much as it is favourable or unfavourable to the interest of the child. What kind of conduct is it? Conduct at what moment? Conduct towards whom? Conduct towards what?

Conduct at what moment?

Since the right of custody can be neither a reward nor a punishment for good or bad conduct, past conduct should be

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(12) Because of the present social context, the word welfare suggests more of a material comfort, while the word interest represents all of the things which matter to someone (interesse=matter). The French word prépondérant and the English word paramount both mean whatever is most important, whatever dominates: the first one by the weight (praeponderans) and the second one by the elevation (per ad montem).

an irrelevant consideration(13). This is true when the misconduct which has caused the marriage break-down is of a fleeting nature, which is unlikely to repeat itself. There was a time when an act of adultery, especially when committed by a woman, was an unforgiveable fault. Her forehead was branded to her eternal shame. How times have changed. When a mother is accused of an isolated act of adultery, the judge could cite to the court this well known passage from the Gospel: "He that is without sin among you, let him cast the first stone at her". But perhaps the audience would slink out of the court, and who knows if the judge himself would not feel obliged to leave the bench?

Moreover, custody is granted with the future in mind. It is not a question of deciding which of the two parents has been the more deserving, but rather of predicting which of them will conduct himself or herself in a way most beneficial for the child's welfare. It is not a question of judging the past, but of establishing a prognosis for the future.

However, the prognosis of future conduct may reasonably be made on the basis of past conduct. The promise of conversion, of rehabilitation after a life of prolonged debauchery will probably not be kept: "who has drunk, will drink". In doubtful cases, the judge will try to ensure that the parent breaks with his

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(13) A fortiori, the past fault does not justify the refusal of the right to visit the child and take him out: Hébert v. Landry, 1975 C.A. 108.

past by granting him the custody conditionally upon his not frequenting certain places, not seeing certain people[14], or staying with his parents[15]. If the father has refused in the past, without justification, to provide the essentials for his children's needs, one may entertain some doubts as to his ability to care for them[16].

Conduct towards whom?

The father's or mother's shortcomings as regards the child (bad treatment, indifference, etc.) justify the judge's refusal to grant the guilty parent its custody. But the fault committed towards the consort or a third person is, in principle, unrelated to the ability of the guilty party to care for the child. A consort who behaves insufferably towards the other may be the best parent for the child. The custody of the child is to be granted on the basis of anticipated future relationship between

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(14) Boyer v. Malenfant, Superior Court, Beauharnois, No 760-05-000183-78, judgment of October 17, 1978. In Bezaire v. Bezaire, (1979) 2 F.L.R. 51, p. 57, the judge imposed an unusual condition: "...it will be a condition of the custody order that no other person shall reside with Mrs.Bezaire without the approval of the Court". In Benisty v. Delouya, 1969 B.R. 720, the mother, who had been granted the custody of the child, had a tendency to return home too late. She was subjected to the surveillance of the Baron de Hirsh Institute.

(15) P. v. Dame P., 1969 S.C. 173.

(16) Is the failure to pay the obligatory alimony a reason to suppress the visiting right? In principle, no: Descoteaux v. Descoteaux, 1972 C.A. 279 (quashing the judgment of the Superior Court which had approved the agreement of the parties in this matter). But particular circumstances have caused the court to make the payment of alimony a condition to exercise the visiting right: Gensiuk v. Joblonowski, 1973 C.A. 998 (confirms the decision of Judge J. Nolan). See Margaret McDonald and Roman Komar, Access Rights to Children and Maintenance Obligations - A Quid Pro Quo, (1979) 2 Can. Fam. L. 299, [illegible] 303.

parent and child, not on the basis of past relationship between the spouses.

One conceives, however, that certain traits of character and faults are harmful erga omnes. The alcoholic or the drug addict is neither an ideal husband nor an ideal father. Moreover, the fault towards the consort might indirectly affect the child. Unjustified spells of anger, insults, and shabby treatment, which one of the spouses is a victim of, cannot but affect the child who witnesses them.

The courts may sometimes be disinclined to grant custody to the spouse whose conjugal misconduct has caused the rupture of the marriage, depriving, as it does, the children of the happiness of living with both father and mother. So, damage to the marriage bond affects the children, even if they were not the intended target. The more intentional and damaging this fault, the greater the right to question if the parent who caused the damage has the necessary ability to keep them and preserve their best interests[17].

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(17) MacDonald v. MacDonald, (1976) 2 S.C.R. 259; Nielsen v. Nielsen, (1971) 1 O.R. 541, p. 552; 16 D.L.R. (3d) 33 (j. Galligan, High Ct. of Justice); Re Pittman and Pittman, (1972) 1 O.R. 347, p. 356, (1971) 5 R.L.F. 376 (j. MacDonald, Surrogate Ct.); Bowyer v. Bowyer, (1977) 27 R.F.L. 131 (j. Estey, Sask. Queen's Bench).

But we must not attach undue importance to the conjugal fault which caused the rupture of the marriage and return unconsciously to the ancient rule of Article 214 of the Quebec Civil Code by favouring *a priori* the spouse who has been granted the separation or divorce. The fault committed towards the consort, even when it is not provoked by equally serious faults of the other party, does not necessarily denote an inability to acquit the duties of father or mother. The marriage-fault should only be a factor in deciding the question of the right of custody to the extent that it shows or gives reason to fear that it is not in the best interest of the child for the guilty spouse to be given its custody.

Some confusion arises from those decisions which have held that although the interest of the child is the paramount consideration for the choice of the child's guardian, it is not the only consideration. This is exemplified by the following statement of Lord Denning in a judgment of the Court of Appeal of England[18]:

> "Whilst a judge is right to give great weight to *the welfare of the children*, and indeed to make it, as the statute says, *the first and paramount consideration*, he must nevertheless remember that whilst it is the paramount consideration, *it is not the sole consideration*. In this case whilst no doubt

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(18) Re *L. (infants)* (1962) 3 All E.R. 1, p. 3,(1962) 1 W.L.R. 886.

> the mother is a good mother in one sense of the word, in that she looks after the children well, giving them love and, as far as she can, security, one must remember that to be a good mother involves not only looking after the children, but making and keeping a home for them with their father, bringing up the two children in the love and security of the home with both parents. In so far as she herself by her conduct broke up that home, she is not a good mother".
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> (emphasis added)

This opinion of Judge Denning has been cited often by Canadian Courts, including the Supreme Court of Canada[19].

Is it true that the child's welfare or "interest", although a paramount factor in granting the right of custody, is not the only factor that should be considered? Yes and no. Yes, if it means that in order to know where the interest of the child lies, we should consider among other factors, the conduct of each parent. No, if it means that the interest of the child and the conduct of the parents have to be placed on opposing sides of the same scale, and weighed against each other. The interest of the child and the conduct of the parents should not be considered at the same level, at the same stage. At the outset, the judge

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(19) Talsky v. Talsky, (1976) 2 S.C.R. 292, p. 302 (by Judge Dickson, dissenting with Judge Beetz, who shares the opinion of the Court of Appeal of Ontario in the same case: (1973) 3 O.R. 827, 831; Bowyer v. Bowyer, (1977) 27 R.F.L. 131 (j. Estey, Sask. Queen's Bench);
Sinclair v. Sinclair, (1975) 17 R.F.L. 202, 215 (j. Holland Ontario Supreme Court).

takes a multitude of factors into consideration, such as the conduct of each parent, their emotional maturity, their health, their age, their financial means, the security they are able to provide for the child, the physical and intellectual environment in which they live, their religion, their language and finally all the "other circumstances of each of them" (s. 11, of the Divorce Law). But weighing and balancing all these factors lead to one goal, the discovery of the interest of the child. Once this goal is attained, the problem is solved, the child will go wherever his interest lies.

The subordination of all the other considerations to the paramount consideration which is the interest of the child has been very aptly stated by the Court of Appeal of British Columbia in Befolchi v. Befolchi[20]:

> "... the conduct of the parties - of the father and the mother - can only be looked at with relation to, and with regard to, the welfare of the infant".

This idea was reiterated two years later by the Alberta Supreme Court (Appellate Division) in the case of O'Leary vs O'Leary:

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(20) (1920) 1 W.W.R. 248, Judge McPhillips, page 253.

> "The paramount consideration is the welfare of the children; subsidiary to this, as a means of arriving at the best answer to that question, are the conduct of the respective parents, the wishes of the mother as well as of the father, the ages and sexes of the children..."(21).

In my opinion, this reasoning is preferable to considering the marriage-fault independently of the interest of the child, as it could be opposed to it[22]. Moreover, the Court of Appeal of England, in recent judgments, has repudiated the judgment re L. (Infants):

> "Applying the law so stated (in J. v. C., 1970 A.C. 668) the Court of Appeal in S. v. S. (unreported) October 21, 1975, held that In re L. (Infants) (1962) 1 W.L.R. 886, where this Court appears to have balanced the welfare of the child against the wishes of an unimpeachable parent or the justice of the case as between the parties, was no longer to be regarded as good law"(23).

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(21) (1923) 1 D.L.R. 949, to p. 978, annulling (1922) 69 D.L.R. 53. See also Re: Moilliet (1965) 58 D.L.R. (2d) 152, 56 W.W.R. 458, confirming the decision of Judge Branca (1965) 54 W.W.R. 111; Francis v. Francis, (1973) 8 R.F.L. 209, 218 (Sask. Court of Appeal).

(22) One judgment seems to express the contrary:

"... in addition to consideration being given "to the welfare of the infant", consideration also must be given to "the conduct of the parents". And this is apart from and in addition to as well as involved in "the welfare of the infant" (Re: Pittman and Pittman 1972, 1 O.R. 347, à la p. 356).
See the observations of Professor L.R. Robinson on this subject Custody and Access, in Studies in Can. Family Law, Vol. 2 p. 576.

(23) In re K. (Minors), (1977) 2 W.L.R. 33, page 42, J. Stamp.

Let us now consider the second dictum of the judgment Re: L. (Infants) (supra note 18) which should not be taken as an absolute rule:

> "In so far as she herself by her conduct broke up that home, she is not a good mother".

This condemnation of the guilty spouse has an appearance of intransigence or strictness which our Supreme Court has corrected by observing that a spouse, who is almost insufferable , may nevertheless be a marvelous mother(24). Certainly, all insufferable spouses are not marvelous parents. There are some whose character makes them insufferable to the world at large.

Although the assertions of the Court of Appeal of England (by Lord Denning) and of the Supreme Court of Canada (by Mr. Justice deGrandpré) might seem contradictory, I venture to suggest that both Courts are guided by the same principle: the interest of the child is the paramount consideration in granting the right of custody. However, conjugal misconduct which has caused the break-up of the marriage, although first and foremost a fault against the other spouse, is also a fault against the family to which the children belong. As a oonsequence, the latter are unavoidably affected. When custody is granted to one or the other of the parents, it is appropriate to ask onself if the marriage-fault which was committed does not reveal a trait of character

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(24) Talsky v. Talsky, (1976) 2 S.C.R. 292, quashing (1973) 3 O.R. 827. The formula utilized is that of the judge of the first instance.

which raises serious doubts as to the fitness of the guilty party to care for the children. For example, one should ask onself if the mother, who has abandoned her husband and children to live with another man, has shown herself to have little interest for the children[25]. On the other hand, in certain circumstances, the interest of the children may require that they be placed in the custody of the mother, in spite of the irreparable harm she caused them by provoking the rupture of the marriage or by contracting an invalid marriage in bad faith[26]. The wrong is done, the marriage has foundered. It is not a question of punishing the person who torpedoed the ship, but of appointing the one who is best able to rescue the children from the wreck.

Conduct towards what?

In whatever domain, the misconduct of the father or mother can have a harmful effect on the child who has been placed under his or her custody because, owing to the force of circumstances, the right of custody is tied to the obligation of support and education. Consequently, the guardian's conduct and way of life should be attuned in every way to the child's

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(25) Gravel v. Gravel, 1975 C.A. 387;
Baillargeon v. Baillargeon, Quebec Court of Appeal (Owen, Lajoie and Bélanger), July 8th, 1976, No. 500-09-000173-75;
Veighey v. Veighey, (1978) 3 R.F.L. (2d) 148 (Ont. Supreme Court, Divisional Court);
Sinclair v. Sinclair, (1975) 17 R.F.L. 202, 215 (j. Holland, Ont. Supreme Court).

(26) Clint v. Vaillancourt, 1971 S.C. 205 (Judge E. Martel).

physical, moral and intellectual development. Therefore, the courts take into account the health of the parents[27], their alcoholism or drug addiction[28], their financial resources[29], their excessive permissiveness or lack of discipline in the education of the children[30], their attitude towards religion[31] and their moral behaviour[32].

Morality consists of rules of life of which sexual behaviour is only one aspect. As sexual behaviour is a frequent cause of divorce, it is often considered by judges in granting the right of custody.

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(27) Brisebois v. Brisebois, 1972 C.A. 8.

(28) K. v. K. (1976) 23 R.F.L. 58 (Judge Rowe, Alberta Provincial Court);
Latreille v. Joly-Latreille, 1974 S.C. 173 (Jusge R. Ouimet)

(29) Williams v. Williams, (1980) 15 R.F.L. 2(d) 378 (Judge Kinsman, Ontario District Court). See also the observations of Judge Dickson (dissenting) in Talskv v. Talsky, (1976) 2 S.C.R. 292, page 303.

(30) Latreille v. Joly-Latreille (supra note 28).

(31) Retzer v. Retzer, (1975) 2 S.C.R. 881;
Anderson v. Roper, (1967) B.R. 170;
Rochon v. Castonguay, 1961 B.R. 29;
Hayre v. Hayre, (1976) 21 R.F.L. 191 (B.C. C. of Appeal);
O'Leary v. O'Leary, (1923) 1 D.L.R. 949, 978 (Alta, S.C. _pp. Div.
Elbaz v. Elbaz, (1981) 114 D.L.R. (3d) 116, 127 (j. Pennel, Ont. Supreme C.);
C. Boisclair, Les droits et les besoins de l'enfant en matière de garde, (Sherbrooke 1978) p. 130.
L.R. Robinson, loc. cit. p. 577;
Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12,s.41;
Youth Protection Act, R.S.Q. 1977, c. P-34, s. 41.

(32) Youth Protection Act, R.S.Q. 1977, c. P-34, s. 32;
Pineau et Ouellette, La protection de l'enfant dans le droit de la famille, (1978) 9 R.D.U.S. 76-96.

The whole range of extra-marital relationships can be found in jurisprudence, from a simple affair with a lover or mistress, to concubinage, "commune life" and homosexuality. None of these activities is conducive to the guilty party obtaining the right of custody[33]; besides, the custody of the children is not favourable to these activities. In one case the judge found it unjust to grant custody to the unfaithful mother, because it would give her paramour the opportunity to "take the place of the father in the hearts of the children"[34]. Another judge expresses indignation because the child already calls his mother's common-law partner "daddy"[35]. These are considerations which perhaps deal less with the interest of the child, than with sympathy for the cuckolded husband.

However, no extra-marital relationship is considered an absolute bar, a total impediment of the granting of custody. Morals are easier today than in the past, and one author goes so far as to suggest that the courts have clothed concubinage with a

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(33) Gravel v. Gravel, 1975 C.A. 387; Nicholson v. Nicholson, (1952) O.W.N. 507 (j. Anger, Ont. High Court of Justice).

(34) Morency v. B., judgment reversed: B. v. Morency, 1970 C.A. 455.

(35) Nicholson v. Nicholson, (1952) O.W.N. pages 504-509 (j. Anger, Ont. High Court of Justice).

(36) F. Heleine, Le concubinage, institution à la merci des politiques législatives, 1980 R. du B. 624, 651.

garment of respectability"(36). There are diverse reasons which offset a mother's concubinage. It may be because the youth of the child generally makes him more dependent on his mother and renders him unaware of the scandal(37). The practice of placing a young child in its mother's custody is considered more as a rule of common sense than as a rule of law(38). In civil law terminology, it is a simple presumption of fact left to the consideration of the Court (C. c. art. 1238). If the child is older, the rule no longer obtains (39); on the other hand, the child's wish to remain with his unfaithful mother may weigh the balance in her favour(40). Another reason, which can serve to overcome the obstacle of a parent's concubinage, when custody rights are being considered, is the prospect of the common-law partners getting married once the

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(36) F. Heleine, Le concubinage, institution à la merci des politiques législatives, 1980 R. du B. 624, 651

(37) P. v. W., 1967 B.R. 462;
Peskett v. Peskett, (1980) 14 R.F.L. (2d) 134 (j. MacDonald B.C. Supreme C.);
Philpott v. Philpott, (1954) 3 D.L.R. 210 (Ont. Court of Appeal); 4 years old twins.

(38) Talsky v. Talsky,(1976) 2 S.C.R. pages 292,293: 3 & 6 years old children;
Veighey v. Veighey, (1978) 3 R.F.L. (2d) 148 (Ont. Supreme C.);
Beverly Prentice, Divorce, Children and Custody, (1979) 2 Can. J. Fam. L. 351, 352. Is it not a question of common practice more than of common sense?

(39) MacDonald v. MacDonald, (1976) 2 S.C.R. 259,263: 11 years old child.

(40) Villeneuve v. Adam, 1965 S.C. 738 (j. P. Lesage): 12 & 19 years old children;
Barkley v. Barkley, (1980) 108 D.L.R. (3d) 613, 614 (j. Nasmith, Ont. Provincial Court, Family Div.);
C. Boisclair, op. cit. p. 119: Le droit de l'enfant de faire un choix, also pp. 152 et 179;
L.R. Robinson, loc. cit., p. 600;
Monique Ouellette-Lauzon, Notion de l'intérêt de l'enfant, (1974) 9 R.J.T. 367, 371.

divorce has been granted[41]. It is a type of anticipated legitimation. The psychological traumatism that a transfer of custody would cause to the young children, who live with and are attached to their mother[42], is also invoked; continuity in the care and education of the child is undoubtedly an important factor[43].

One father has already argued that to allow the mother, who is living in concubinage, to retain custody of the children who are minors, would be equivalent to authorizing the perpetration of the offence specified in Section 168 of the Criminal Code:

> "Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and is liable to imprisonment for two years".

> "Est coupable d'un acte criminel et passible d'un emprisonnement de deux ans, quiconque, là où demeure un enfant, participe à un adultère ou à une immoralité sexuelle, ou se livre à une ivrognerie habituelle ou à toute autre forme de vice, et par là met en danger les moeurs de l'enfant ou rend la demeure impropre à la présence de l'enfant".

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(41) Allen v. Archibald, (1975) 19 R.F.L. 374 (Quebec Court of Appeal, affirming Judge Leduc): the custody is granted on the condition of a new marriage following the divorce;
Gravel v. Gravel, 1975 C.A. 387;
Jones v. Jones, 1978 S.C. 67 (j. A. Demers);
Hind v. Hind and Wilson, (1962) 31 D.L.R. (2d) 662 (j. Monroe, B.C. Supreme C.).

(42) Torresan v. Torresan,(1972) 6 R.F.L. 16 (j. MacDonald, B.C. Supreme Court);
Desjardins v. Ann King, C. of Appeal, Montreal, No 500-09-000506-73, February 27, 1974: 5 & 8 years old children (Judges Rinfret, Owen and Crête).

(43) Adams v. McLeod, (1978) 2 S.C.R. 621, 627;
C. Boisclair, op. cit. (supra note 31), p. 76: Les notions du temps et de la continuité chez l'enfant, (also p. 143).

In dismissing this argument the judge made the following observations: "It is not because a person lives with a person of a different sex that a cry of immorality should be raised"; and "the environment where the children will be with their mother will be the best available in the circumstances"(44) (translation).

Perhaps in reaction to the loneliness of family life which the frequency of divorce has aggravated, communes have been formed, where several couples live in intimacy under the same roof. The way of life of the inhabitants of these households, sharing the same home, is in such contrast to the privacy of the life of a married couple that it has not gained general approval. In the case of a wife who had abandoned her husband to enter or join a commune at Lake Saint-Jean, the judge granted cutody of the children to the father:

> "because the Respondent (the mother)at the present time is not in a position to provide material and emotional security for the child, since she is living a social experience still in the experimental stage"(45).
> (translation)

The prudence of the judge allows us to believe that in different circumstances, it could be in the interest of the

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(44) Villeneuve v. Adam, Superior C., Trois-Rivières, No 7676-D, August 4, 1975 (Judge Paul Lesage); Edwards v. Edwards, (1960) 23 D.L.R. (2d) 662 (C. of Appeal of Ontario). In the same sense, see F. Heleine, Les conflits entre mariage et concubinage, 1978 R. du B. pages 679,681.

(45) Boyer c. Malenfant, Superior Court for the district of Beauharnois, No 760-05-000183-78, Judge A. Leblanc, October 17, 1978.

child to share the mother's experience and remain with her.

Homosexuality, considered for a long time as a shameful perversion, is now tolerated. Not only do many of its adherents not try to hide it, but they openly vaunt it. The law itself imposes an obligation of tolerance towards them. The Charter of Human Rights and Freedoms of Quebec expressly condemns discrimination based on sexual orientation(46). The courts have certainly shown no discrimination against homosexual parents who claimed the custody of their children. In four of five judgements that I have read regarding this matter, the homosexual parent has been granted custody of his or her children(47). In the remaining case, where the request of a lesbian for the child's custody was refused, the Judge emphasized that lesbianism is not in itself a reason for refusing a mother custody of her children. But he gave the following as one of the reasons for his decision:

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(46) R.S.Q. 1977, c. C-12, s. 10.

(47) Barkley and Barkley, (1980) 108 D.L.R. (2d) 613 (j. Nasmith, Ont. Prov. Court, Family Division);
Bezaire v. Bezaire, (1979) 2 F.L.R. 51 (j. McMahon, Supreme Court of Ont.);
D. v. D., (1978) 20 O.R. (2d) 722, 88 D.L.R. (3d) 578, 3 R.F.L. (2d) 327 (j. Smith, County Court);
K. v. K., (1976) 23 R. F.L. 58, (Judge J. Rowe, Alberta Provincial Court).

> "I greatly fear that if these children are raised by the mother, they will be too much in contact with people of abnormal tastes and proclivities (48).

This instinctive apprehension of the judge has been tackled in other cases, by a witness, a woman expert in educational and psychological sciences, who asserts that a child's sexual orientation will not be affected simply because he lives in contact with a homosexual parent[49].

Another reason which may induce the judge not to give the custody of the child to the homosexual parent is this: should the sexual orientation of this parent become known, there is a probability that neighbours, friends and relatives will react unfavourably. Thus, public reprobation can affect all those living with the homosexual, including the child of whom he has custody. However, this inconvenience is also lessened by the increasing tolerance being shown towards homosexuals[50]. In spite of contrary reactions from certain groups or categories of people, this tolerance is noticeably more pronounced in urban centres. Does this nean that the outcome of the litigation may vary depending upon whether the homosexual lives in the country or in a city?

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(48) Case v. Case, (1975) 18 R.F.L. 132, p. 138 (Sask. Queen's Bench, j. MacPherson).

(49) Bezaire v. Bezaire, (1979) 2 F.L.R. pages 51,54 (j. McMahon, Supreme C. of Ont.).

Certainly, the moral or immoral nature of an act is not related to the density of population. But, it is certain that, within the same country, it provokes diverse reactions depending upon the environment in which it is performed or committed[51]. The question is not to judge homosexuality, but to judge the eventual reactions of others to homosexuality. Therefore it seems relevant to take into account the way in which the child's playmates, and the milieu in which he will be living, will react when they discover the homosexuality of the parent who has custody[52].

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(51) See the dissenting opinion of Judge Porter in Voghell v. Voghel, (1961) 27 D.L.R. (2d) pages 216,233 (Northwest Terr. Ct. of Appeal):
"While not wishing to condone adultery in ordinary cases, I may say that such informal arrangements as respondent has made are so common in the Territories that virtually no stigma attaches there to them".

See also the dissenting opinion of Judge Freedman, approved by the Supreme Court of Canada: "Something approaching a general average of community thinking and feeling has to be discovered" (on the subject of obscenity): Regina v. Dominion News & Gifts (1962) Ltd., (1963) 2 C.C.C. pages 103,116. In Supreme Court, (1964) S.C.R. 251.

(52) Contra: K. v. K., (1976) 23 R.F.L. 58 (Alberta Provincial Ct.); page 64 *in fine*:
"I considered also the fact that community standards in Mrs. K.'s town might be less sophisticated than that of Edmonton or Toronto with respect to homosexuality and am of the view that such differences, if they exist, are not material".

The Changes in habits are not restricted to morality. The division of duties between parents is no longer what it was. The woman does not devote herself exclusively to domestic chores. Like her husband, she often practises a profession, which keeps her away from the house a good part of the day. Her absence creates a void that day nurseries and the occasional babysitter do not always successfully fill. This may sometimes provoke conjugal conflicts. In a recent decision, the Master of the Supreme Court of Ontario granted the father custody of two young children (6 and 4 years old) principally because the mother had caused the rupture of the marriage by abandoning her traditional role of housewife to begin a business career when there was no financial need for her to do so. Financially, she was more successfull than her husband, as she earned $40 000 per annum whereas he only earned $27 000. Justice Pennell, of the Supreme Court of Ontario, in a well motivated decision[53], annulled the Master's order.

In spite of her outside occupation, the mother had continued to provide support and education for the two children. During the day, a nursery maid looked after the house and prepared the meals. So, it is not reprehensible for a mother to renounce the traditional role of a housewife, even if so doing

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(53) September 30, 1980: Tomlinson v. Tomlinson
The same judge had to settle the problem of custody of the children in another case where frequent absence of the mother necessitated by business trips, was the source of conjugal problems: Elbaz v. Elbaz, (1981) 114 D.L.R. (3d) 116.

she spends less time on household chores and the children's education. This new wifely behaviour corresponds to the traditional behaviour of the husband. Neither one of them can be faulted for it. In this particular case, the wife, an administrator of a prosperous company, even found the time to bathe the children, plan their medical and dental check-ups, attend parent-teacher meetings, prepare meals during the weekend, purchase the groceries, wash the laundry and maintain the house. It is clear that although she freed herself from many of the traditional chores of a wife, she remained able to care for the children and ensure their welfare.

To seek the best interests of the child, is to seek his happiness. But what brings happiness to one may not necessarily brings happiness to another. Even if one can successfully grasp the potential aptitudes and aspirations of the child, one still has to know and evaluate the environment in which he will be placed because happiness is the product of a harmonious relationship between an individual and his milieu.

The Roman poet Juvénal suggested the following maxim to enhance the overall happiness of a person: Mens sana in corpore sano. Nineteen centuries later, this maxim is still valid. It indicates the necessity of an equitable balance between intellectual and moral needs on the one hand and purely physical needs on the other. But where does this equitable balance lie in a particular case? Is it with the father or the mother that the

child will most nearly attain it? The response of the judge is based on prognostics. He must respond with a great deal of humility, conscious that he may err just as easily as the meteorologist who forecasts tomorrow's weather. The difficulty of his task has been remarked upon by a judge of the Court of Appeal of England in these words:

> "... I do not think that justice between parents in these cases is ever simple. On the contrary, it is a highly complex question which can very rarely be answered satisfactorily, and then only after exhaustive examination"(54).

Albert Mayrand,
Judge of the Quebec Court of Appeal

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(54) In re K. (Minors),(1977) 2 W.L.R. 32. Judge Ormrod, page 42.