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MARITAL FAULT AND CUSTODY DISPOSITIONS

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There exists a certain tension amongst the three estates of our legal profession. The members of the Bench chastise the practitioners for their shortcomings before the bar, at the same time the Bar criticises the law teachers for their seeming inability to train effectively young persons for the practice of law while in turn the professors labour to point out illogicalities of the decisions and judgments rendered by the judiciary.

This writer is somewhat schizophrenic in stance being both a law teacher and a member of a law firm and so is neither certain who to attack or against whom to defend. But since compromise is the art of the solicitor I will settle for the position of describing the wisdom of the past and the received knowledge of today before suggesting what might be tomorrow's cogent approach to the awarding of custody.

Prefatory Statement

The essential problem in custodial dispositions lies in the fact that of all of the professional decisions facing the judicial officer and the practicing lawyer the least attractive are those involving the children of separating or divorced parents. This is because the consequences of an erroneous decision are unthinkable, the emotional content of the arena is high, the pettiness of the allegations are miserable and the ultimate decision has to be arrived at

with a remarkable absence of hard law. The plight of the judges is made no easier by the proper decision not to abdicate responsibilities to psychiatrists and social workers whose expertise has been accepted but whose capacities, in relation to their spheres of knowledge, place them in no better position than the Court in arriving at fair and reasoned decisions. Further the role of the judge has not been assisted by the espousal of such broad-based notions as the "best interests" of the child. Such an amorphous, rule-less idea has not only added to the discretionary authority of the judges but also it has increased their individual responsibilities. As a result, judging has become less an excercise in judicial learning and more of a projection of personality incorporating all of the values, biases and prejudices of an informed human being.(1)

Juristic Rules of the Past

The traditional suspicions of the legally trained professional for "palm tree" justice are instilled into all nascent lawyers. All of us prefer the support of legal rules to support our intuitive responses to problems. In this area principles were to be found in institutional statements embodied in the Common Law or in the discrete wisdom of some legislative provision on the statute Book.

So at an earlier time we believed that fathers prima

facie had the right to the heirs of their body which right recognised few limits.(2) Later the paternal preference was intruded upon by the "tender years" doctrine (3) which favoured mothers and after another century there evolved the notion of the paramountcy of the best interests of the child.(4) That last perception emphasised the moral, emotional, phsical and mental well-being of the child as the primary, but not the sole, criterion for decision-making.(5) Throughout the period the Courts also followed out a policy of rewarding the innocent spouse whereby the prize for marital constancy was the custody of the children.(6)

These primal notions consisting of the rights of fathers, the tender years and innocent spouse doctrines have never yielded totally to the "best interests" principle as a reading of the most recent case-law reveals.(7) Thus it would seem that fault in marriage breakdown is a relevant consideration to custody disposition even if marriage breakdown itself is now viewed as a disagreeable incident of modern living. That is to say, where the breakdown is attributable to one party then his or her failure as a spouse will often declare that person to be a potentially irresponsible parent. This point is underlined in recent decisions.

Today's Practice

Mr Justice Mayrand's recent paper (8) provides an admirable model. He proceeded by way of interrogatory which

example I would, with respect, like to adopt for my own purposes.

(a) Spousal Conduct: when and over what period of time ?

Obviously if we agree that custody is not to be a trophy for long-suffering constancy then past conduct should play no part in the custodial decision. Yet the cases show that this is true only if the conduct, such as physical violence, was fleeting or was in some way provoked and had not affected the children.(9) Yet all judges agree that evidence of prior behaviour as a parent is essential since the prognosis of the future conduct of the potential custodial parent must derive from this information. Thus adultery of a spouse may (10) or may not (11) be relevant while a high level of proof is required to convince the Court of the toper's conversion.(12)

(b) Conduct: directed towards whom ?

Clearly if the petitioning spouse's history reveals ill-treatment or indifference to the children then there is little difficulty for the presiding decision-maker. But more problematic is the "glance off" effect whereby the misconduct of one spouse directed toward the other adversely affects the well-being of the child(ren). Of course, the sourness of the relationship of the spouses should properly be held irrelevant yet where there are illustrated fixed habits or characteristics which are undeniably detrimental as against all persons then these traits will disqualify the petitioner and on a number of grounds. These disqualificatory

capacities encompass a host of marital sins.

Thus immaturity of personality (13), anti-social attitudes(14), the rashness of the unforced homebreaker(15), the zeal of the fanatic(16) and the undiscipline of the free spirit(17) are not winning characteristics in the family court. These proscribed forms of social and personal behaviour have convinced judges from Saint Johns to Victoria that where such a person fails as a spouse it is probable that he or she will fail in their responsibilities as a parent which is contrary to the best interests of the child.

(c) Conduct in relation to what ?

The key factor here is the impact, if any, of the life-style of the parent on the physical, moral or intellectual wellbeing of the child(ren). Their development may be influenced by such parentally-originated forces as the physical limitations of the parent(18), the mental health of a spouse(19),the restricted fiscal resources of a petitioner (20), the sexual preference of a parent (21) and the metaphysical beliefs of a mother or father (22). Of all of these phenomena it is the sexual orientation of petitioners which has attracted the attention of the law reporters and the academic commentators.(23).

I would like to digress briefly to offer some illustrations of changes of attitudes and changes in what judges have believed. A generation ago a sometime colleague

(24) collected examples of judicial reactions to evidence of inter-spousal masturbation, fellatio and sodomy. In the early 18th century judges believed that such an act of sodomy between husband and wife was "the greater offence, because it has greater aggravations, as there is no temptation nor solicitation from nature, and a woman to hand." (25) Thereafter members of the Bench expressed their discomfort in coping with public disclosure of private reality. (26) Of course attitudes have changed again since the publication of Dr Milner's article but his concluding questions remain relevant. What are the degrees of normality in sexual relations, what is permissible, what is permissible according to the family courts, and what is the relevance of bedroom conduct to the disposition of children on the breakdown of a marriage ?

Now to return to the issue of spousal conduct and petitions for custody. As Mr Justice Mayrand wrote (27), the judges see it all from evidence of simple affairs, through cohabitation to communal living and homosexual relationships. The judgments are consistent in that while admissions of certain activities are not necessarily fatal to the "guilty" petitioner's application usually indulgence in such conduct raises a negative presumption. Thus adultery per se can be viewed as having a detrimental effect on the children (28) both in terms of their response to the activity itself and also in regard to the example which such a life-style presents to them. (29)

Such is also true in relation to the homosexual preference of a parent. So while attitudes have certainly changed, as have provincial and federal laws in this regard, the courts remain concerned over the impact of overt homosexual conduct on growing children, the stability or otherwise of such relationships and the adverse responses of intolerant persons outside of the home to the childrens' individual homelife. (30)

Similarly irregular lifestyles such as residence in communes or in cult-like arrangements have not drawn the sympathy of the Courts. Accordingly some parents have been categorised as hypocritical and self-indulgent in their enthusiasm (31) and others have found that their novel accommodations have disqualified them from favourable consideration:

> "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 an experimental stage" (32)

derives from an attachment to some religious or quasi-religious shibboleth which is deemed to be inimical to the best interests of the child and which attachment was itself argued as the basis of the marital disruption. So "born again" Christians (33), members of the "exclusive Brethern" (34), Jehovah's Witnesses (35) and followers of the Subud movement (36) have discovered that their spiritual adherences have frustrated their more immediate temporal requests.

The concept of unsuitability of lifestyle as a ground of custodial decision-making is often more a statement of judicial disapproval of certain personality characteristics. Recent reports speak to adverse judicial reactions to the erratic spouse (37), the undisciplined mother (38), the anti-social parent (39) and the "good time girl" (40). Such traits may or may not be within the control of the

individual either to contain or to change and so are linked to the "diseases" suffered by the alcohol or chemically addicted parent.(41). These cases above underline that custody decisions, like divorce judgments, are often based on the conduct of spouses in which mens rea plays no part. Thus we are "punishing" facts not controlled behaviour and this realisation permits us to withold custody from parents afflicted with mental or physical handicaps. (42)

More troublesome though are those cases in which the best interests of the child ~~is~~ are determined by the fiscal

personal plans of a party (#4) or by the work-related duties of a parent (#5). That is, where the conduct of the party is determined by the nature of our national economy or by sociological patterns determined by sex then there is a risk that decisions based on such involuntary conduct will wreak discrimination upon women in our society.

That is to say, so long as women do not enjoy equality of economic opportunity with their male counterparts and so long as the remarriage rate for divorced men is considerably higher than that for divorced women and so long as there is a lingering intuition that women ought to remain at home to administer to their children which duty is not expected of men then decisions based on fiscal capacity, remarriage possibilities and the demands of a professional life are suspect. Therein lies the wisdom of Dean Lyman Robinson's observation of a decade ago:

> "... changes in prevailing social mores and advancement of the state of knowledge in the study of child development may decrease the value of older judicial decisions .." (#6)

In summary what has been suggested above is that while latching onto the relatively rule-less concept (#7) of the best interests of the child we have continued to rely on earlier notions of the rights of fathers, the tender years doctrine and the children as prize theory. By these means parents have been rewarded for good conduct, punished for aberrant behaviour and sometimes disqualified for their

The questions then devolve as to whether or not we are really serious about applying the best interests of the child principle and how best can we implement such a policy ? It seems to this writer that we should eschew the old ideas of the past and concentrate on the future relationship of the potential custodial parent and the child and to do this by asking pertinent and relevant questions, unconnected with the conduct and characteristics of the parents in relation to each other, but rather in regard to which of them had fostered the development of the child in the past and who wishes to complete the process to adulthood.

Such a focus of questioning should lead us away from the irrelevancies of income disparities between the spouses, their relative remarriage rates and discriminatory expectations of custodial arrangements. To assist the judiciary such a excercise should embody both specificity and certainty albeit avoiding the crassness of a checklist. Fortunately we can glean some support from a relatively recent decision of a superior court of the United States.(#8) The policy of the passage quoted below is that the parent who has performed as a parent should be given the best chance to continue as a parent. The measuring device is as follows and lists key factors in the excercise of parenthood:

"(1)preparing and planning meals;(2)bathing,

(44)

and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc,; and (10) teaching elementary skills, i.e. reading, writing and arithmetic." (49)

Such a detailed examination might reduce the rhetoric of many applications for custody and would centre the custody decision on a firm basis of the best interests of the child by requiring proof of who had done what for the child, how successfully and with what likelihood of success for the future ?

It is an attractive approach and I commend it to you for your careful consideration.

Footnotes:

(*). Professor Law, UNB, of Andrew F. Wood Associates, Fredericton NB.

1. Pearson & Ring, Judicial Decision-Making in Contested Custody Cases, (1983). 21 J.F.L. 703,722.

2. Ex parte Skinner, 9 Moore 278, 27 R. Rep. 710 (1824); Layton v. Layton (1973), 6 N.B.R. (2d) 68 (CA); but see Richards v. Richards (1978), 22 N.B.R.(2d) 107 (CA).

3. Justice Talfourds Act, 1839. 2 & 3 Vict., ch. 54.

4. Infants Act 1925 s.1.,".. the welfare of the minor is the first and paramount consideration,..". (U.K.).

5. Re F.(an infant)(1969), 2 Ch. 234,241 per Megarry J.; MacDonald v. MacDonald (1976), 2 S.C.R. 259; Talsky v. Talsky (1976), 2 S.C.R. 292.

6. "In so far as she herself by her conduct broke up the home, she is not a good mother.", Re L.(an infant) (1962) 3 All E.R. 1,3 (CA). Repudiated in Re K (Minors) (1977) 2 W.L.R. 33,42(CA).

7. Rights of Fathers: Bowyer v. Bowyer (1977), 27 R.F.L. 131 (Sask.).
   Tender Years: H. v. H. (1983), 55 N.B.R. (2d) 273(Q.B.); Wells v. Wells (1984), 38 R.F.L. (2d) 405 (Sask.).
   Innocent Spouse: Campbell v. Campbell (1983), 20 A.C.W.S. (2d) 353 (Sask.).

8. The Influence of Spousal Conduct on the Custody of Children, in Family Law: Dimensions of Justice (eds. Abella & L'Heureux-Dube), p.159.

9. Re Smart & Smart (1983), 19 A.C.W.S. (2d) 462 (Ont. Cty. Ct.).

10. Re Armstrong and Armstrong (1985), 30 A.C.W.S. (2d) 417 (Ont.).

11. Dukeshire v. Dukeshire (1984), 26 A.C.W.S. (2d) 344 (NB).

12. Kitchen v. Kitchen (1983), 21 A.C.W.S. (2d) 111 (Sask.).

13. Re Finden & Souther (1983), 21 A.C.w.S. (2d) 349 (Sask.); Re Gallop & Gallop (1984), 28 A.C.W.S. (2d) 440 (Man.).

14. Re May & May (1984), 27 A.C.W.S. (2d) 272 (N.S.).

15. Re Savard & Savard (1983), 20 A.C.W.S. (2d) 470

(Ont. Dist. Ct.);

16. Re Irwin & Irwin (1983), 21 A.C.W.S. (2d) 447 (Ont. Prov. Ct.).

17. Cote v. Cote (1983), 19 A.C.W.S. (2d) 480 (Sask.).

18. Brisebois v. Brisebois (1972) C.A. 8 (C.A.).

19. Dymer v. Dymer (1984), 23 A.C.W.S. (2d) 550 (Ont.).

20. Williams v. Williams (1980), 15 R.L.F. (2d) 378 (Ont.).

21. Elliot v. Elliot (1984), 25 A.C.W.S. (2d) 304 (B.C.).

22. Wingrove v. Wingrove (1984), 40 R.F.L. (2d) 428 (Ont.).

23. (1981) Q.L.J.

24. Milner, Sodomy as a Ground of Divorce (1960) 23 M.L.R 43.

25. R. v. Wiseman (1717) Fort. (K.B.) 91.

26. N. v. N. (1826) 3 Sw. & Tr. 234,236: "Some questions of a very disagreeable nature, and I would well have wished to be relieved of the necessity of discussing them." (sodomy)
D.B. v. W.B. (1935) P. 80,82: "the most filthy sexual practices in connection with her.". (sodomy)
Statham v. Statham (1929) P. 131, 145-146: "She must have known it was wrong, improper and unnatural, and she does not venture to say that she did not." (sodomy)
Bampton v. Bampton (1959) 2 All E.R. 766,767: "Some disgusting sexual perversions", & at p. 768 "still other disgusting activities which took place between these two people." (fellatio).

27. Op. cit. p. 168.

28. Re Armstrong & Armstrong (1985), 30 A.C.W.S. (2d) 417 (Ont.).

29. Re Corbett (1977), 17 Nfld. & P.E.I.R. 307 (Nfld.); Stewart v. Green (1983), 26 Sask.L.R. 80 (UFC).

30. K. v. K. (1976), 2 W.W.R. 462 (Alta.Prov. Ct.); Re Barkley & Barkely (1980), 28 O.R. (2d) 136 (Prov. Ct.); Bezaire v. Bezaire (1980), 20 R.F.L. (2d) 358 (Ont. C.A.); Elliot v. Elliot (1984), 25 A.C.W.S. (2d) 304 (B.C.).

31. Re Irwin & Irwin (1983), 21 A.C.W.S. (2d) 447 (Ont.).

32. Boyer v. Malenfant, 17th Oct. 1978, Beauharnois, No.

760-05-000183-78, Mayrand op.cit. p. 170.

33. Geransky v. Geransky (1980), 16 R.F.L. (2d) 193 (Sask.)

34. Brown v. Brown (1983), 39 R.F.L. (2d) 396 (Sask. CA).

35. Irmert v. Irmert (1983), 36 R.F.L. (2d) 260 (Alta.).

36. Wingrove v. Wingrove (1984), 40 R.F.L. (2d) 428 (Ont.).

37. Smith v. Smith (1980), 23 B.C.L.R. 29 (B.C.).

38. Garro v. Garro (1982), 16 Man. R. (2d) 15 (Q.B.).

39. Re May & May (1984), 27 A.C.W.S. (2d) 272 (N.S.); Baranieski v. Kulai (1984), 25 A.C.W.S. (2d) 363 (B.C.)

40. Kitchen v. Kitchen (1983), 21 A.C.W.S. (2d) 111 (Sask.).

41. Ferguson v. Ferguson (1980), 16 R.F.L. (2d) 207 (P.E.I.). Simpson v. Simpson (1984), 25 A.C.W.S. (2d) 477 (B.C.).

42. Brisebois v. Brisebois (1972) C.A. 8 (Que.); Turner v. Turner (1982), 30 R.F.L. (2d) 412) (B.C.). Of course age is the ultimate affliction: Robbins v. Harvey (1983), 19 A.C.W.S. (2d) 355 (Alta.Q.B.) - husband 74 and wife 52.

43. Williams v. Williams (1980), 15 R.F.L. (2d) 378 (Ont.).

44. C.f. Dukeshire v. Dukeshire (1984), 26 A.C.W.S. (2d) 344 (N.B.Fam. Ct.); Chesko v. Chesko (1985), 30 A.C.W.S. (2d) 188 (Sask. C.A.).

45. Kitchen v. Kitchen (1983), 21 A.C.W.S. (2d) 111 (Sask.); See also Nancy D. Pollikoff, "Why Mothers Are Losing ", (1982), 7 W.R.L.R. 235.

46. Robinson, "Custody and Access" in Mendes da Costa (ed), Studies in Canadian Family Law, vol. 2. (1972), 545.

47. Garska v. McCoy 278 S.E. 2d. 357 (W. Va. 1981).

48. Ibid. p. 363.