THE VARIATION OF CUSTODY ORDERS

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CONTENTS

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1. Introduction

This short paper is confined to an analysis of the statutory framework and some of the leading cases which deal with applications to vary existing custody orders. The topic appears, at first glance, to be simple and rather narrow. It struck me that way until I began to do some research. In fact, the area is a gold mine for those who wish to explore evidence, constitutional law, conflicts, the interpretation of legislation and procedure.

I have limited my presentation to what one might call the substantive and procedural laws of variation which, to my surprise, have received little attention and appear to be in a state of some confusion. I have not ventured into the thicket of the jurisdictional and constitutional problems one finds in the consideration of conflicts between federal and provincial law in custody matters. These issues have

* I wish to acknowledge the contribution of my research assistant, Sheridan Scott, B.A. (Hons.) McGill, LL.B. (Hons.) Victoria.

received excellent coverage elsewhere(1) and, in any event, they do not fall nicely within the scope of this afternoon's discussion of joint custody, access and variation. The paper is incomplete in several respects. It does not purport to be a comprehensive analysis of all the cases and all the issues. Rather it seeks to illustrate some of the problems which seem to occur frequently. I have stopped short of producing a list of policy issues - these I shall present during my remarks at the conference. Finally, the paper remains incomplete without the benefit of the discussion of the participants.

2. The Statutory Framework

2.1 Federal Legislation

The relevant provisions of the Divorce Act(2) are:

s.2. "children of the marriage" means each child of a husband and wife who at the material time is

(a) under the age of sixteen years, or

(b) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life;

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(1) See: P.W. Hogg, Constitutional Law of Canada, Carswell (1977), at pp. 372-382; E. Colvin, Custody Orders Under the Constitution (1978) 56 Can. Bar Rev. 1; C. Davies, Interprovincial Custody (1978) 56 Can. Bar Rev. 17; O. Stone, Jurisdiction over Guardianship and Custody of Children in Canada and in England (1979) 17 Alta. L. Rev. 532.

(2) R.S.C., 1970 c. D-8, as amended.

s.10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just

(b) for the maintenance of and the custody, care and upbrining of the children of the marriage pending the hearing and determination of the petition;

s.11.(1) 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) an order providing for the custody, care and upbringing of the children of the marriage.

12. Where a court makes an order pursuant to section 10 or 11, it may

(b) impose such terms, conditions or restrictions as the court thinks fit and just.

Parliament has jurisdiction to legislate with respect to the custody of children as a matter ancillary to divorce. Only when the divorce is granted does the jurisdiction arise to deal with custody.(3)

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(3) Zacks v. Zacks, (1973), 10 R.F.L. 53 (S.C.C.), Skjonsby v. Skjonsby, (1975), 18 R.F.L. 95 (Alta. App. Div.).

2.2 Provincial Legislation

Each province has enacted legislation concerning the custody of children.(4) Within the legislation provision is made for the variation of custody orders. An examination of some of the statutes illustrates the various approaches that have been adopted.(5)

a. Who May Apply to Vary A Custody Order

In most provinces only the father or mother is given the right to apply to vary a custody order although a court might invoke its inherent jurisdiction to entertain an application from an interested third party. In Saskatchewan,(6) there is provision for a parent or "other person having, in the opinion of the court, a sufficient interest" to apply. "Persons" includes any school or institution. A broad definition also has been adopted in British Columbia.

b. In What Circumstances May the Court Vary the Order

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(4) For example, Infants' Custody Act, R.S.N.S. 1967, c.145 as amended.

(5) The inherent right of the Supreme Court as a court of chancery to vary custody orders has been invoked frequently. Welsh v. Welsh and Nicholson (1968) 12 D.L.R. (2d) 258 (B.C.S.C.)

(6) Infants Act, R.S.S. 1978, c. I-9 as amended.

There is little legislative direction on the circumstances in which a court may vary a custody order. It appears to be left to the courts to determine on a case by case basis what amounts to a change in circumstances sufficient to warrant the consideration of a revised order for custody or access. The route to determining the best interests of the child is uncharted although in all jurisdictions it is recognized that the best interests of the child is the paramount factor. In Nova Scotia, a judge, in determining an application to vary, "shall have regard to the welfare of the infant, and to the conduct or circumstances of the parents" as well as to their wishes.

The most explicit direction may be found in Saskatchewan where an application to vary may be granted where there has been a material change in the circumstances since the making of the custody order. Although it is not without argument, it appears that the court, in an application to vary, must deal with the merits by reference to the same factors as it would in an initial custody application. Section 3 provides:

(3) In making an order under subsection (1), the court shall have regard only for the welfare of the infant and, for that purpose, the court shall consider the physical, psychological, social and economic needs of the infant and in doing so shall take into account:

(a) the quality of the relationships that the infant has with the persons to whom custody, care and upbringing might be entrusted and with any other persons, such as brothers and sisters of the infant, who may have a close connection with the question of the infant's custody, care and upbringing;

(b) the personality and character and the emotional needs of the infant;

(c) the capacity to be a parent of any person to whom the custody, care and upbrining of the infant might be entrusted, the home environment to be provided for the infant and the plans that person has for the future of the infant; and

(d) the preference of the infant, to the extent the court considers appropriate, having regard to the age and maturity of the infant.

(8) The court may, on application, alter, vary or discharge any order made under this section, where there has been a material charge of circumstances since the making of the order.

3. The Case Law

A Change in Circumstances

Although the Divorce Act contains no specific direction as to the test to be applied in custody matters, the courts have no difficulty in concluding that the best interests of the child is the paramount factor.

In considering an application to vary under s.11(2) what is the duty of the court? There is considerable discretion. What is "fit and just"? What conduct of the parties is relevant? What is a "change" in the condition, means or circumstances of a party? Must a change be linked directly to the welfare of the child? Is the court to re-hear the custody application? If not, where must the line be drawn with respect to evidence on which the first custody order was based?

A review of some of the leading decisions leads to the conclusion that the courts are struggling with these questions and their resolution is not complete.

There is some indictation that the application to vary actually involves a two-step process. The applicant must persuade the court that "circumstances" or "conditions" have changed, probably in a "material" sense, to an extent where a review of the initial custody decision is required.

Mr. Justice Hart in Wesson v. Wesson(7)

> "In my opinion the evidence to be adduced in support of such an application should be limited to the changed circumstances of the parties subsequent to the latest order of the court. This is not to say that cross-examination should be limited to recent events if reference to earlier facts is necessary to determine the credibility of any of the witnesses, but it must be assumed that the order of the court was validly made in accordance with the law if it has not been previously set aside.
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> Once the evidence of changed circumstances has been received, however, the court must be guided in making its decision by the well-established principles of law relating to custody applications."

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(7) (1973), 10 R.F.L. 193 at 194-195.

In other words, there is a threshold question for determination before one reaches a reconsideration of the custody issue. But, the difficulty seems to be how to answer the first question without embarking upon a full re-examination of the second. Many judgments simply solve the problem by ignoring the two-step process. The judges seem to roll the issues into one and glide swiftly over the change in circumstances to reconsider the custody question.

Occasionally, a judge will confront the first issue, decide that circumstances have not changed, and refuse to hear further evidence relating to custody.

The problem may be stated another way. Generally speaking, the courts have held that in considering a request for variation, they sould not sit as an appeal court and should not substitute their own judgment unless there has been an error in the original order. Instead, they should take the original order as the starting point and consider to what extent the circumstances have changed.(8)

There is an additional concern. In deciding whether or not to vary the original order, the court will have to consider the welfare of the child. The cases do not clearly reveal whether this is done without regard to the change in circumstances, or whether there must first be a change. There appears to be some authority for the proposition that there must first be a change in circumstances; otherwise, the court in considering variation may simply

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(8) Breau v. Breau (1973), 10 R.F.L. 391 (Ont. S.C.)

end up substituting its own views on which arrangements would have been or would be in the best interests of the child.

In Blanchette v. Blanchette(9) Moir, J.A., in dealing with the interpretation of s.11(2), stated:

> "It is clear that it was not intended that the question of custody could be litigated over and over again. Subsection 2 of s.11 of the Divorce Act limits the jurisidiction of the court to those cases where, since the making of the initial award, there has been a change in the conduct, condition, means or other circumstances of the parties or either of them. It does not confer upon the Trial Judge the right to re-hear and re-determine the issues of custody."

Reference was made earlier in the paper to some of the provisions in provincial legislation concerning custody. With few exceptions, Saskatchewan being one, there is little in the way of specific legislative direction as to when an order to vary may issue and what factors a court should consider in such applications.

In Millett v. Millett,(10) the Appeal Division of the Nova Scotia Supreme Court considered the meaning of a section of the Infants' Custody Act which permits a judge to vary a custody order but does not specifically require that the circumstances must have changed since the original order. The court held that in practice the courts have required proof of changed circumstances.

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(9) (1977) 1 A.R. 75 at 78.

(10) (1975) 9 N.S.R. (2d) 306 (App. Div.)

MacKeigan, C.J.N.S. said:

> "I respectfully accept the principle that in custody cases a review by way of re-hearing should take place only if there is some material change in the facts presented. I think this is a matter entirely for the discretion of the trial judge..."(11)

The Chief Justice noted that while custody matters could never be determined with finality, the requirement of material change was necessary to prevent a petitioner from shopping around for a compliant judge.

Therefore, the courts appear to apply the same test in dealing with applications to vary whether the application is made under federal or provincial legislation.

In MacCallum v. MacCallum,(12) McQuaid, J., reviewed the authorities and concluded that the following principles apply:

1. The trial judge hearing an application to vary may not go back of the initial order, nor attempt to review its propriety;

2. The function of the trial judge is to determine whether or not since the making of the order, there has been any change in the condition, means or circumstances of the parties;

3. The trial judge must determine whether such change, if so found, is material to the degree that had such circumstances existed at the time of the making of the initial order, the judge in the first instance

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(11) Ibid, at p. 309

(12) (1978), 30 O.F.L. 32 (P.E.I.S.C.)

might have ordered otherwise;

4. The power to vary is discretionary;

5. The power should be exercised cautiously.

In Ashpole v. Ashpole,(13) Mr. Justice Moshansky dealt with an application to vary the terms of a decree nisi concerning custody of the infant children. Rather than directing himself to an interpretation of s.11(2) of the Divorce Act, the judge referred to the provincial legislation, the Domestic Relations Act,(14) where provision is made for a court to vary an order but no mention is made specifically of a change in circumstances as a prerequisite to the exercise of jurisdiction. Mr. Justice Moshansky's decision seems to ignore the threshold question and, although he rejects the application, he deals with the custody issue ab initio, in the end relying upon maintenance of the status quo as the determining factor.

The remarriage of one of the parents was considered a change of circumstance sufficient to permit the court to reconsider the custody issue although in the end it did not vary the order.(15) The age of the children and changes in the financial ability of the parent in caring for the children are also factors which have persuaded the courts to find a sufficient change in circumstances (16)

(13) (1978) 7 A.R. 322 (S.C.T.D.)

(14) R.S.A. 1970, c.113

(15) Supra, fn. 7.

(16) Servant v. Vigneault, (1977), 28 R.F.L. 382 (Que. C.A.) and Martin v. Martin (1978), 15 Nfld. & P.E.I.R. 317 (Nfld. S.C.T.D.)

In Tocco v. Tocco(17) the Ontario Court of Appeal permitted broader terms of access where the evidence disclosed that the father, who sought the order, had given up drinking and lived a respectable life since the divorce decree two years earlier.

In Charlton v. Charlton(18) Gansner, L.J.S.C., varied the access provisions of a decree nisi and, rather than awarding joint custody under the Divorce Act, made the parents joint guardians under the provincial Family Relations Act.

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(17) (1978), 4 R.F.L. (2d) 174 (Ont. C.A.)

(18) (1980), 15 R.F.L. (2d) 220 (B.C.S.C.)

To Vary or Not to Vary

Once the hurdle of a "change in circumstances" is cleared, the courts then apply the normal principles of custody law in dealing with the variation application. Therefore, the courts must determine the best interests of the child by reference to the usual factors, some of which are considered in the following cases.

Maintenance of the Status Quo

If one assumes that the initial order with respect to custody was correct, it might be argued that the courts should lean against disturbing the status quo, particularly if the application to vary is taken within a few months of the initial custody hearing. The best interests of the child would probably not be served by another move unless the changed circumstances were of such a substantial nature as to be a very significant benefit or detriment to the child.

The application to vary should not be used to establish or encourage a ping-pong situation. This was the determining factor in Ashpole and seemed to be explicit in the reasoning of Mr. Justice Hart in Wesson.

In Elias v. Elias(19) the court rejected an application to vary a custody order where the child, aged eight, had spent most of his life with the parents of his de facto father in Trinidad. Although the mother had remarried and established a relatively stable life the best interests of the child would not be served by a move to Canada.

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(19) (1980), 14 R.F.L. (2d) 228 (Man. Q.B.)

Wishes of the Child

In Martin v. Martin(20) Mr. Justice Mahoney accepted the wishes of the children as the deciding factor in a case where the considerations were otherwise evenly balanced.

The wishes of the child are accepted by most courts as one of the many factors which determine the child's best interests. It is arguable that extreme caution should be exercised in placing weight upon such wishes in an application to vary, particularly where a few months earlier, one assumes, such wishes were also considered.

Economic Opportunities of the Parent

In McGowan v. McGowan,(21) the mother applied to vary custody arrangements which included the removal of the child from the jurisdiction without the written consent of the other parent. The application was made only five months after the decree nisi. The applicant was about to complete post-graduate work and had been offered a teaching position in another province. The new position would offer a substantial increase in position and in remuneration. In granting the application, which the father had opposed, Winter, L.J.S.C., stated:

> "An improvement in the situation, financial and otherwise, of the custodial parent must be considered a benefit for the child and as the circumstances of the custodial parent improve there is, in my view, a benefit for the child."

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(20) Supra, fn. 16.

(21) (1980), 11 R.F.L. (2d) 281 (Ont. H.C.)

The judge recognized that the access arrangements would have to be altered but concluded that these could be revised to permit a continuing relationship between father and child.

The court also noted that the mother's proposed relocation was bona fide and was not an attempt to deprive the father of access.

The decision does not refer to the evidence upon which the original custody order was made. The application to vary does not seek to change custody but to adjust the access provisions. The court seems to place considerable weight upon the economic benefits which will flow to the mother and, one assumes, to the child.

Would the court be responsive to argument that a positive, substantial change in the economic situation of one party, the non-custodial parent, would justify a change in custody, or, at the least, an increase in access? Would similar weight be placed upon a negative change in economic conditions of a party? By what means should a court determine the benefit to the child of increased economic opportunities of a parent?

The Provision of Medical Care

Another decision(22) of Winter, L.J.S.C., indicates the potential to be found in the application to vary. A seventeen year-old boy in the custody of his mother under the terms of a decree nisi, required emergency medical care for injuries resulting from a car accident. His doctors recommended a blood transfusion to

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(22) Pentland v. Pentland and Rombough (1979), 5 R.F.L. (2d) 65 (Ont. H.C.)

preserve his life but his mother and her new husband refused to consent because of their religious faith. The boy's father had given his consent and applied, with the hospital corporation, for an order to vary. In granting the application, Winter, L.J.S.C., awarded custody to the grandmother who had indicated that she would give her consent to the medical treatment. The court was unable to invoke the provisions of the provincial Child Welfare Act because the boy was beyond the jurisdictional age of that legislation. The court accepted the serious medical condition as a change in circumstance sufficient to permit further consideration of the best interests of the child which, according to the judge, included the right to life, and therefore, justified the decision.

Implicit in the decision is the assumption that a child may be found to be in need of protection and his custody changed in spite of an existing decree nisi in which custody has been dealt with.

Conduct of the Parties

In Bernhardt v. Bernhardt,(23) the father petitioned to vary the decree nisi to give him custody of his daughter, aged eight years at the time of the application. The husband had lost an appeal of the original custody order. Mr. Justice Hamilton had made the original decision concerning custody and it was to him that the application to vary was made. On the application to vary, a home study and psychiatric report were requested and

(23) (1979), 10 R.F.L. (2d) 32 (Man. Q.B.)

received although it is difficult to understand why these were not available at the original hearing, given the few months between applications.

The court stated:

> "In determining the question of where a child should reside, it is certainly the interests of the child that must dictate the result and it will be the circumstances at the time of the application that are the most relevant. I will, therefore, consider the present situation of each party, their current mode of life and conduct. It will as well be necessary to re-examine, in light of the subsequent evidence, the evidence given at the first hearing and the conclusions I reached based upon that evidence. I recognize that I should not consider the present application for variation as merely an extension of the original contest with respect to custody but, on the other hand, if I must consider the welfare of the child, I must consider all available information to determine the fitness of each party. The consideration of earlier evidence is particularly important in this case as concerns I initially expressed with respect to the conduct of each party have to some extent been clarified by subsequent evidence and reports."(24)

The court varied the decree to award custody to the father in spite of the child's wish to remain with her mother. Evidence of the mother's lesbian relationship, heavy drinking, unemployed status, and tendency toward profanity and violence persuaded the court that her conduct was sufficient to warrant a change in custody. Although the father was no saint, his common law relationship appeared to be stable and he had satisfactory plans for bringing up the child.

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(24) Ibid., at p. 35.

It was the effect of the parent's conduct upon the child which was relevant. The atmosphere of and attidues within the home were not in the best interests of the child.

In Haynes v. Haynes,(25) Mr. Justice Goodridge granted an application to vary where the custodial parent, the father, was unable to cope with the behavioural problems of his son. The child had been beaten by the father and had become a temporary ward of the Director of Child Welfare. The father had also denied the mother all access to the child. The court found that the mother's condition had changed since the divorce, the father's conduct was intolerable, and the child's best interests would be met by placing him in the custody of the mother with no access to the father.

Mr. Justice Goodridge did not have to deal directly with the question of whether a custody order in these circumstances would preclude an order being made in the Family Court for wardship of the child. This complex constitutional issue has been faced most recently by Niedermayer, Fam. Ct. J., who has held that "the exclusive jurisdiction of provincially constituted courts in child welfare matters remains intact and has not been supplanted by powers given to federally constituted courts under the Divorce Act".(26)

The Carrot and the Stick

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(25) (1979), 21 Nfld. & P.E.I.R. 187 (Nfld. S.C.T.D.)

(26) C.A.S. of Halifax v. McIlveen (1981), 20 R.F.L. (2d) 302.

In Woodburn v. Woodburn,(27) the court suggests that a parent who denies access to the other parent, in the face of a court order, runs the risk of being cited for contempt and of losing custody of the child. No mention is made of the child's best interests. Reference was made to Jones v. Jones,(28) where Aylesworth, J.A., in obiter said:

> "It cannot be made too plain to the father that continued conduct of this sort [interfering with the access rights of the mother] puts in grave jeopardy his continued custody of the child."

The assumption seems to be that failure to comply with access arrangements automatically has a negative impact upon the best interests of the child.

The other side of the coin is found in MacCallum v. MacCallum.(29) The petitioner initiated the application to vary and coincidental with that proceeding the petitioner ceased making payments which had been ordered for the support of the son whose custody he sought. The respondent argued that the petitioner was in contempt and should not be heard.

McQuaid, J., quoted Bayda, J., as he then was, in Whitehead v. Ziegler (Whitehead):

> "But, does a finding of contempt or a finding of disobedience ipso facto take away a judge's discretion to allow the disobedient party to be heard on an application (initiated by him) to vary a custody order? I

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(27) (1976), 21 R.F.L. 179 (N.S.S.C.)

(28) (1971), 1 R.F.L. 295 (Ont. C.A.). See also, Parkinson v. Parkinson (1973), 11 R.F.L. 128 (Ont. C.A.) where the court refused to hear the appeal from a refusal to vary access, until all arrears of maintenance had been paid.

(29) Supra, fn. 12.

> think not. The discretion persists despite the contempt or disobedience, and its exercise depends upon a consideration of such matters as whether: (1) the contempt or disobedience is contumacious (see Wessels v. Wessels, [1941] 3 W.W.R. 500, 55 B.C.R. 476 [1941] 1 D.L.R. 606 (C.A.)), (2) a refusal by the court to hear the party would do violence to the principle that the paramount consideration must be the interests of the children, and, (3) the contempt or disobedience so long as it continues, impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make: see Hadkinson v. Hadkinson, [1952] P. 285, [1952] 2 All E.R. 567, per Denning L.J. at p.298."

McQuaid, J., stated the question this way:

> "On an application to vary, the issue before the court is the welfare and best interest of the child, and that alone. On the question of contempt, the issue is the disregard of or disobedience to, a court order, and that alone. The latter should be interjected into the former only to the extent that it may be a material factor in assisting the court to determine the bona fides of a defaulting applicant with regard to his real interest in the welfare of the child whose custody he seeks."

A recent Ontario case illustrates another aspect of the problem. In Cillis v. Cillis,(30) Mr. Justice Montgomery dealt with an application to vary the terms of a decree nisi. The wife sought to prohibit access to the husband and to increase his maintenance payments for the children. The husband sought an order committing the wife to jail for constantly refusing him access to the children.

The Report of the Official Guardian indicated to the judge that the children were "captives of the mother." They remained at home where they were taught. Their association with the out-

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(30) (1981), 20 R.F.L. (2d) 208 (Ont. H.C.)

side world was almost nil. The Official Guardian recommended that an assessment of the parents and children be conducted by a team of experts. The husband agreed. The mother refused.

The court directed that the Official Guardian become guardian ad litem for the children and that the proceedings be stayed until the assessment took place, although the court concluded it had no power to order an assessment. However, the court found the wife to be in contempt for her refusal to permit access. It ordered that her contempt would be purged if the assessment were completed within one month.

4. Summary

To succeed in an application to vary the terms of a custody order, it is necessary to show that there has been a material change in circumstances. Once this has been established, the court will re-open the issue of custody and will apply the general principles of law concerning custody applications. The court seeks to determine whether a variation would be in the best interests of the child. Several recent decisions indicate that this must be the paramount consideration of the court and any factors, such as the conduct of the parent(s), will be relevant only if it would affect the child's welfare. This position is in keeping with the recommendations of law reform commissions.(31)

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(31) See, for example, Tentative Proposals for Custody Law Reform, Law Reform Commission of Saskatchewan, 1979.

The cases indicate confusion and widely differing approaches in the application of these principles. Some courts apply the above tests; others ignore the jurisdictional question and go directly to what amounts to a re-hearing of the custody issue. Existing legislation is of little assistance.

There is a divergence of opinion on whether a court should use the threat of variation to enforce or punish a party who has failed to provide maintenance or permit access.

The courts have not yet clearly stated whether the principles of custody law (or, perhaps more accurately, the factors which must be considered in determining the best interests of a child) should be applied differently in variation as opposed to initial custody hearings. In addition, one might ask whether there are different considerations which apply to the variation of access provisions?

These and other issues of policy I shall refer to in my remarks at the conference.