Ministry of Attorney General
Justice Services Branch
Civil and Family Law Policy Office

Family Relations Act Review

Chapter 6

Parenting Apart

Discussion Paper

Prepared by the Civil and Family Law Policy Office

April 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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SETTING THE SCENE

When parents separate, they have to decide how they will continue to be parents to their children when they are living in separate households. Most parents are able to agree on these arrangements, often with the help of a lawyer or mediator. If they can't agree, they may go to court and ask a judge to make decisions about custody, access and guardianship. The *Family Relations Act*[1] allows judges to make these orders and sets out what they must take into account.

Some people feel that these words – "custody," "access," and "guardianship"—are not helpful to parents because they tend to foster notions of winning and losing. In its 2005 report, the Family Justice Reform Working Group criticized the *Family Relations Act* for framing parenting issues in language that tends to polarize parents.[2]

This discussion paper looks for ways that the *Family Relations Act* could promote child-focused decision-making that would help parents to meet their children's needs after separation. Programs and services do have an important role to play, but this paper focuses on what the *Family Relations Act* can do to help separating couples make decisions about how they will continue to fulfill their roles as parents. Chapter 5 discusses family justice programs and services.

This paper is divided into four sections. The first three discuss parents' roles and responsibilities, children's interests, and parenting arrangements. The final section asks you to tell us which issues you believe are the most important, and to identify any issues not covered in the paper that you feel should be discussed. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

Other papers cover related topics. Chapter 7 discusses ways for parents to deal with problems that come up in meeting access responsibilities or enforcing an access order or agreement. Chapter 8 discusses ways for children to participate in decisions that affect them when their parents separate. Chapter 9 discusses family violence.

If you wish to see any of the laws in this paper please refer to the following link to Legislation.

DISCUSSION

PART A –PARENTS' ROLES AND RESPONSIBILITIES

Discussion Point (1) – Describing Parents' Roles and Responsibilities

Definitions are unclear

The *Family Relations Act* uses the words "guardianship", "custody," and "access" to describe parents' roles and responsibilities. The *Divorce Act*[3] uses only "custody" and "access." But neither law offers much help to anyone who is trying to figure out what these words mean. The *Family Relations Act* does not define "custody" or "access" and its definition of guardianship relates back to old English law.[4] The *Divorce Act* does not define "access" and it provides a circular definition of "custody," saying that custody "includes care, upbringing and any other incident of custody."[5]

Over the years, judges have interpreted the law so that now "guardianship" consists of all the rights and responsibilities associated with raising a child, including responsibility for the child's physical custody and long-term well-being.[6]

Two types of guardians are described in the *Family Relations Act*: a guardian of the person (who is responsible for a child's long-term physical, emotional and psychological well-being); and a guardian of the estate (who is responsible for protecting a child's legal and financial interests). Usually the same person plays both roles.

The authority of a guardian of a child's estate is generally considered to be quite limited, but the *Family Relations Act* does not make this clear. A guardian of a child's estate is not automatically a trustee of the child's property. The responsibilities of a guardian of the estate involve identifying and protecting a child's legal and financial interests. This includes giving consent in relation to a child's legal or financial affairs, where consent is required by law; starting or defending legal claims involving the child; and settling legal claims on the child's behalf, subject to other laws that may apply. A guardian of a child's estate probably has authority to receive and act as custodian of money or property that belongs to the child, but the guardian cannot give a valid receipt on the child's behalf, unless a specific law allows it or a judge approves it. Nor can a guardian of the estate sell a child's property without a judge's approval.[7]

"Custody" was once interpreted narrowly to mean only physical custody or day-to-day care, but over the years it has taken on a much broader meaning—basically the same as guardianship of the person—and includes responsibility for making decisions affecting a child's general well-being, such as decisions about education, health care and religion, as well as physical custody.[8]

"Access" has come to mean temporary physical care of a child, including the authority to do what is needed to ensure the child's well-being at that time.

The overlap among these concepts, especially between guardianship and custody, can be confusing. Other provinces and territories have minimized this confusion by combining the concepts of both guardianship of the person and custody under the term, "custody;" and using "guardianship of property" (or similar wording) to cover what the *Family Relations Act* calls "guardianship of the estate." In Ontario and some other provinces, a "guardian of property" has broader powers than does a guardian of a child's estate in British Columbia, but in those places, parents are not automatically guardians of their child's estate as they are in B.C.: they must apply to court for that designation.

Several provinces and territories[9] have provisions similar to Ontario's, where:

- a person with custody has the rights and responsibilities of a parent in respect of the person of the child; and
- a guardian of the child's property has charge of and is responsible for the care and management of that property.[10]

Saskatchewan uses the term "legal custodian" to describe the person who has "personal guardianship of a child" including "care, upbringing and any other incident of custody having regard to the child's age and maturity." A guardian of a child's property in Saskatchewan is responsible for the care and management of that property, may give a valid receipt for money received on a child's behalf and may appear in court to pursue or defend any action affecting a child's property.[11]

While most provinces and territories use "custody" to refer to both "guardianship of the person" and custody, as used in the *Family Relations Act*, Alberta uses "guardianship." Alberta's *Family Law Act*, which came into effect in October 2005, has a detailed definition that describes a guardian's roles and responsibilities. They include:[12]

- nurturing the child's physical, emotional and psychological development;
- making sure the child has basic necessities, such as medical care, food, clothing, and shelter;
- making day-to-day decisions about the child's care and well-being;
- deciding where the child lives;
- making decisions about the child's education; and cultural, linguistic, and spiritual upbringing;

- consenting to medical treatment for the child;
- naming someone to act on the child's behalf in case of emergency; and
- settling legal claims related to the child.

Most other provinces and territories have general, rather than detailed definitions. Elsewhere, England and Australia define "parental responsibility" (akin to guardianship under the *Family Relations Act*) in a general way as the "duties, powers, responsibilities and authority" (and in England, "the rights") that a child's parent has by law.[13]

The British Columbia Law Reform Commission has described the *Family Relations Act*'s statement of a guardian's authority as "unhelpful" and recommended replacing it with a general statement of what a guardian's role is, rather than a detailed list of powers and responsibilities.[14] In 1987, the British Columbia Legislature passed an amendment based on this recommendation but the change was never brought into effect because of concerns raised about whether it accurately described the authority of a guardian of a child's estate. It described the roles and responsibilities of a guardian as follows:[15]

> (2) A guardian of the person of a child, who is not the parent of the child, has the same powers and duties in respect of the child as a parent having care and control of a child, except the power to appoint a guardian of the child.
>
> (3) Subject to the *Infants Act* and this *Act*, a guardian of the estate of a child has all the powers and duties the guardian would have if he or she were a trustee with respect to the property of a child, including
>
> > (a) the power to assume charge of and the duty of being responsible for the care and management of the property of the child, and
> >
> > (b) the power to deal with the property and apply the property or the income from the property, or both, for the maintenance and education of the child and for any other purpose for the benefit of the child.

Words can promote conflict

People have criticized the words "custody" and "access" for promoting the idea of parents as "winners" and "losers." The result, they say, is that parents focus on their "rights" rather than their responsibilities. The words themselves, many feel, undermine efforts to shift towards co-operative parenting arrangements.[16]

Other countries have moved away from the words "custody" and "access." England, Australia, and some American states use terms such as "parental responsibility," "parenting functions," "residence," and "parenting time" to describe parents' roles and responsibilities after separation.

The Canadian Special Joint Committee on Custody and Access, in its 1998 report, "For the Sake of the Children," recommended replacing the terms "custody" and "access" in the *Divorce Act* with "shared parenting."[17] This committee of senators and members of Parliament examined issues relating to parenting arrangements after separation and divorce and held public meetings across Canada, including in Vancouver.

Then a committee of government officials, the Family Law Committee,[18] examined different ways to describe parents' roles and responsibilities. In its 2002 report, the committee said it was unable to agree on the best words to use, but would not recommend using "shared parenting" for several reasons, including that the term seems to focus on parents' "rights" rather than children's interests and that its meaning and application are unclear, which could in itself promote conflict. [19]

The federal government did not accept the Special Joint Committee's recommendation of "shared parenting." Instead, it proposed different changes to the *Divorce Act* to shift the focus from parental rights to parental responsibilities. Bill C-22 (2002) would have removed the words "custody" and "access" and introduced:

- "parenting time" to describe the time a child spends in a parent's care;
- "contact" to describe the contact the child has with other people, such as grandparents; and
- "parental responsibility" to describe the decision-making responsibilities to be assigned to one or both parents, depending on what is best for their child.[20]

The bill died on the order paper when Parliament adjourned before the 2004 federal election.

The Alberta *Family Law Act* follows the approach proposed in Bill C-22. Since the changes to the *Divorce Act* included in Bill C-22 did not become law, this means that Alberta's provincial family law now describes parents' responsibilities and parenting arrangements differently than the *Divorce Act* does, but anecdotal evidence suggests that this has not caused problems.

At consultation workshops held in British Columbia in 2001 as part of the federal-provincial-territorial consultations on custody, access and child support in the *Divorce Act*, one of the questions participants discussed was whether using words other than "custody" and "access" would make a difference in the way parents make their arrangements after separation and divorce. Many of the participants felt that these words increase the tensions that occur after separation. The majority felt that "custody" and "access" should be replaced with something more neutral, but there was no consensus on what that should be.[21] Since the *Divorce Act* does not use "guardianship", changing that word was not part of the consultation.

QUESTIONS

1. Would changing the words used in the *Family Relations Act* to describe parenting roles and responsibilities help people resolve parenting disputes? Why or why not?
2. What terms should the *Family Relations Act* use to describe parents' roles and responsibilities:

- ☐ guardianship
- ☐ guardian
- ☐ guardian of the person
- ☐ guardian of the estate
- ☐ property guardian
- ☐ custody
- ☐ residence
- ☐ access
- ☐ contact
- ☐ a child's time with a parent
- ☐ parenting time
- ☐ shared parenting
- ☐ parenting functions
- ☐ parental responsibility
- ☐ other:_____

3. Do you have any views on what each term you selected in Question 2 should cover? This list may help you decide what you want to include:
   - the duties, powers, responsibilities and authority that a parent has by law
   - the person a child lives with
   - the time a child spends with another person
   - the communication a child has with another person
   - nurturing a child's physical, emotional and psychological development
   - making sure a child has basic necessities, such as medical care, food, clothing, and shelter
   - making day-to-day decisions about a child's care and well-being
   - making decisions about where a child lives
   - making decisions about changing where a child lives
   - making decisions about a child's education
   - making decisions about a child's cultural upbringing
   - making decisions about a child's linguistic upbringing
   - making decisions about a child's religious upbringing
   - making decisions about health care, including medical and dental treatment
   - appointing a successor guardian for a child
   - consenting to health treatment for a child
   - receiving and responding to any notice that a parent is entitled by law to receive in relation to a child's legal or financial affairs
   - granting or refusing consent, where consent of a parent is required by law
   - identifying all legal and financial interests of a child
   - protecting all legal and financial interests of a child
   - advancing all legal and financial interests of a child
   - commencing legal proceedings on a child's behalf, where a child has a viable legal claim
   - defending a child's legal interest, where a claim has been made against the child
   - settling legal claims related to a child
   - duty to exercise all responsibilities and powers in the best interests of a child
   - other: _____.
4. Do you think that detailed definitions in the *Family Relations Act* for words used to describe parenting roles and responsibilities would help people resolve parenting disputes? Why or why not?
5. Should the *Family Relations Act* replace the words "custody" and "access" with other terms, even if the *Divorce Act* continues to use them?
6. In describing parents' roles and responsibilities, are there other considerations that you think should be reflected in the *Family Relations Act*?

Discussion point (2) - Responsibility for a Child's Property

Appointing private trustees of children's property

One of the roles of British Columbia's Public Guardian and Trustee is to manage trust funds for children.[22] For example, if a child gets a personal injury settlement, the money is usually paid to the Public Guardian and Trustee who invests and manages it on the child's behalf until the child reaches age 19. (The law sets out the fees that the Public Guardian and Trustee may charge for this.) The law does not let the Public Guardian and Trustee decide to transfer trusteeship of a child's funds to the child's parent or guardian. Occasionally, a judge may appoint parents as trustees of their children's property,[23] but unlike some other provinces,[24] British Columbia does not have a comprehensive law for judges to use in these situations.

Alberta, Ontario and Nova Scotia all have laws that allow a judge to appoint a person–whether a parent or not—to manage the property of a child. These laws set out the factors that a judge must take into account when deciding whether to make an appointment, including:

- the person's ability to manage the child's property;
- the merits of the person's plan for managing the child's property;
- the benefits and risks of appointing that person compared to other alternatives (Alberta);
- the personal relationship between the person and the child (Ontario);
- the wishes of the child's parents (Ontario); and
- the views and preferences of the child (Ontario, Nova Scotia).

The laws allow judges to put conditions in an order, such as requiring the person to post security (e.g., a bond) for proper management of the child's property, or requiring the person to provide an accounting, that is, a report on how he or she is managing the child's property.

Managing small trust funds for children

In most other provinces and territories, the law allows parents to manage small trust funds for their children, without requiring authorization from a judge. In British Columbia, however, judicial authorization is required, even for small funds. The Public Guardian and Trustee has found that parents do not always understand that the funds must be used for the benefit of the child to whom they belong, not for the benefit of the whole family, and that parents do not always have the knowledge and skill in financial management needed to manage the trust funds wisely. At one time, the Insurance Corporation of British Columbia paid personal injury settlements for a child directly to the child's guardians—who were usually the parents—if the amount was less than $4,000. The Public Guardian and Trustee contacted many of these children when they turned 19 and found that in most cases the child's guardians had spent the settlement money, not necessarily for the benefit of the child to whom it belonged. Some of these young adults were not even aware that they had ever received a personal injury settlement.

Most other provinces and territories take a different approach. For example:

- In Ontario if a child does not have a property guardian, a person who owes the child up to $10,000 may pay it to a parent with whom the child lives, a person who has lawful custody of the child, or, if the child has a legal obligation to support another person, directly to the child.[25] Other provinces and territories have similar provisions.
- The Yukon,[26] Newfoundland and Labrador,[27] and the Northwest Territories[28] set the monetary limit at $2,000 in a year, or $5,000 in total.
- In Alberta, up to $5,000 may be paid to a child's guardian or, if the child has a legal obligation to support another person, directly to the child. The guardian must sign a form

stating the authority under which he or she became guardian (for example, by reason of being the child's parent) and acknowledging that the money will be used only for the child's benefit. The person who owes the money to the child has the option of paying it to the Public Trustee, if the Public Trustee is willing to accept it.[29]

- In Saskatchewan, if a person owes up to $10,000 to a child, the Public Guardian and Trustee may allow it to be paid to a responsible adult acting on the child's behalf. Also, the Public Guardian and Trustee may pay up to $10,000 to such an adult.[30]

QUESTIONS

7. Should British Columbia have a comprehensive law specifically authorizing a judge to appoint a parent or other person to be a trustee of a child's property?

8. If so, what should judges be required to take into account when deciding whether to appoint a person as a trustee? [check all that apply]

   ☐ the person's ability to manage the child's property

   ☐ the person's plan for managing the child's property

   ☐ the benefits and risks of appointing the person compared to other alternatives

   ☐ the person's financial circumstances

   ☐ the number of dependants for whom the person is responsible

   ☐ the personal relationship between the person and the child

   ☐ the wishes of the child's parents

   ☐ the child's views and preferences

   ☐ other: _____.

9. If you answered Yes to question 8, what else should the law do? [check all that apply]

   ☐ require the trustee to provide a bond or other security for proper performance of a trustee's responsibilities

   ☐ require the trustee to provide a regular accounting, that is, regular reports on how the child's property is being managed

   ☐ allow a judge to limit the trustee's appointment, for example, to a specific length of time or to management of specific property

   ☐ allow the trustee to be paid for acting as trustee

   ☐ other: _____.

10. Should the law in British Columbia be changed to add special provisions, like those in other provinces, to allow parents or other people to manage small trust funds for children?

11. If so,

11a. What should be the maximum value of property covered?

☐ $2,000 ☐ $5,000 ☐ $10,000 ☐ other

11b. Who should be allowed to receive the property on the child's behalf? [check all that apply]

☐ child's parent ☐ child's guardian ☐ other

11c. Should a person be required to sign a form acknowledging receipt of the property, as in Alberta?

11d. Should a person be required to sign a form accepting the responsibility to manage the property for the child's benefit, as in Alberta?

11e. Should the person receiving the property be required to account to the child, when the child turns 19, for how the property was managed?

11f. What role, if any, should the Public Guardian and Trustee play with respect to managing small trust funds for children?

PART B – CHILDREN'S BEST INTERESTS

Discussion point (3) – Determining Best Interests

Family laws in British Columbia and the rest of Canada are based on the "best interests of the child". The United Nations Convention on the Rights of the Child, which British Columbia signed in 1991, says that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."[31]

Best interests factors

Like the laws in other provinces and territories, British Columbia's *Family Relations Act* lists specific factors that a judge must take into account when making decisions about what is best for a child. Section 24 says that when making an order about custody, access, or guardianship, a judge must give paramount consideration to the child's best interests. In assessing those interests, the judge must consider the following factors and give emphasis to each according to the child's needs and circumstances:

(a) the child's health and emotional well being, including any special needs for care and treatment;

(b) if appropriate, the views of the child;

(c) the love, affection and similar ties that exist between the child and others;

(d) education and training for the child;

(e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

Section 24 goes on to say that if guardianship of the estate of the child is at issue, the judge must consider as an additional factor, the child's material well-being.

Other provinces and territories list up to 11 such factors to be considered in assessing best interests. The *Divorce Act* lists none, but Bill C- 22 (2002) would have added a list of 12 to that *Act*.[32] The factors listed in Alberta's *Family Law Act* are similar to the ones in the federal bill.[33]

New Zealand's family law says that one of the things that must be considered in determining what serves a child's best interests is "the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time."[34]

Family violence as a factor

Family violence can take many forms. It is especially harmful to children, whether they experience it directly, as victims of abuse, or indirectly, as witnesses to violence by a parent against another family member. Research shows that children who witness violence by one parent against the other are at greater risk of becoming victims or using violence themselves.

Judges are not precluded from taking family violence into account when deciding what is best for children, but family violence is not listed in s. 24 of the *Family Relations Act* as one of the specific factors that must be considered.

At the workshops held in British Columbia in 2001 as part of the federal-provincial-territorial consultations on custody, access, and child support in the *Divorce Act*, almost all participants agreed that physical violence and the continued threat of violence should be factors in decisions about children's best interests. They did not agree on what other forms of violence should also be considered.[35] The Family Justice Reform Working Group recommended, in its 2005 report, that family violence, including its impact on the safety of children and other family members, be included in the *Family Relations Act* as a factor to be considered in making decisions about what is best for children.[36]

The laws in Newfoundland and Labrador, the Northwest Territories, Nunavut and Ontario say that violence must be taken into account when determining a child's best interests (Northwest Territories and Nunavut) or determining a person's ability to act as a parent (Newfoundland and Labrador and Ontario).[37] The federal Bill C-22 (2002) proposed adding family violence as a factor to be taken into account in determining a child's best interests under the *Divorce Act*[38] and Alberta's *Family Law Act* followed that approach.[39] Violence is a factor in determining a child's best interests in other countries as well.[40] Chapter 9 has more discussion about family violence.

Ranking factors

The *Family Relations Act* does not rank the importance of each factor that a judge must consider in determining a child's best interests. In each case, it is up to the judge to decide the relative importance of each factor, based on the individual needs and situation of the child. Family laws in other provinces and territories do not rank the factors either. However, Alberta's law seems to give greater emphasis to protecting children's "physical, psychological and emotional safety" by listing these separately before all other factors.

Importance of best interests

Section 24 of the *Family Relations Act* says that the best interests of the child must be the *paramount* consideration when making decisions about child custody, access and guardianship. The *Divorce Act* and the laws in most other provinces and territories say that the best interests of the child must be the *only* consideration.[41] This difference in wording suggests that something other than the best interests of the child could be taken into account when making decisions about children under the *Family Relations Act*, but not under the *Divorce Act* or the family laws in most other provinces and territories.

Presumptions

Recently, Australia changed its family law to presume that it is in a child's best interests for parents to have equal shared parental responsibility. But the presumption does not apply if a parent (or a person living with the parent) has abused the child or another child in the family or has used violence against a family member. And there is no presumption in favour of equal time with each parent. However, a judge who orders equal shared parental responsibility must consider whether equal time with each parent would be in the child's best interests and practical and if so, must consider making such an order. If not, the judge must consider whether spending substantial and significant time with each parent would be in the child's best interests and practical.[42]

The Canadian Special Joint Committee in 1998 and then the federal government endorsed the principle that no one type of parenting arrangement is best for all children and rejected the idea of a legal presumption in favour of a particular parenting arrangement. The Special Joint Committee noted that some American states that had adopted such a presumption later removed it because the presumption had not had the desired effect.[43] The Family Law Committee also recommended against using presumptions.[44] It is too soon to know whether Australia's changes

will encourage parents to reach agreements on parenting arrangements without going to court, or will promote meaningful relationships between children and their separated parents.

Who must consider best interests

Section 24 of the *Family Relations Act* tells judges that they must consider children's best interests when making decisions about their care, but it says nothing to parents and others. While knowing what a judge must consider when making a decision may help parents agree on parenting arrangements without going to court, the *Family Relations Act* does not specifically require parents to consider children's best interests or any specific factors in reaching their decision. Laws in some other places do. For example, in New Zealand, the law says that in determining what is best for children, "a Court or a person must take into account" the principles set out in that law.[45]

QUESTIONS

12. When making decisions about parenting arrangements, should the best interests of the child be: [check one]

    ☐ the *paramount* consideration. (This is what the *Family Relations Act* says now.)

    ☐ the *only* consideration. (This is what the *Divorce Act* and family laws in most other provinces and territories say.)

    ☐ other: _____.

13. Should the *Family Relations Act* say that parents must take into account their children's best interests when making parenting arrangements after separation?

14. Should family violence be added to the factors listed in s. 24 of the *Family Relations Act*, that a judge must consider in assessing a child's best interests? Why or why not?

15. If you think that the list of factors for determining a child's best interests in s. 24 of the *Family Relations Act* should be changed, please use the table below to indicate what should be included, and add any comments you wish:

• child's health and emotional well-being including special needs (in s. 24 now)	☐ Include
• child's views (in s. 24 now)	☐ Include
• love, affection and similar ties between the child and others (in s. 24 now)	☐ Include
• child's education and training needs (in s. 24 now)	☐ Include
• capacity of a person who wants to exercise custody, access or guardianship to adequately do so (in s. 24 now)	☐ Include
• where guardianship of child's estate is concerned, the child's material well-being (in s. 24 now)	☐ Include
• history of care of the child	☐ Include
• child's cultural upbringing	☐ Include
• child's linguistic upbringing	☐ Include
• child's religious upbringing	☐ Include
• child's spiritual upbringing	☐ Include
• child's heritage	☐ Include
• family violence	☐ Include

• ability and willingness of each person who wants to exercise custody, access or guardianship to communicate and co-operate on issues affecting the child	☐ Include
• benefit to the child of developing and maintaining a relationship with each person who wants to exercise custody, access or guardianship	☐ Include
• any civil or criminal cases that are relevant to the child's safety or well-being	☐ Include
• any plans proposed for the child's care	☐ Include
• other:	

16. When it comes to deciding the importance of each factor in determining a child's best interests, how can the *Family Relations Act* best serve children's interests? [check one]

    ☐ by continuing to let judges decide the relative importance of each factor in each case, based on the individual needs of the child,

    ☐ by ranking some or all of the factors in order of importance, for every case. Describe which factors should be ranked and how, or

    ☐ other: _____.

17. Should the *Family Relations Act* require that decisions affecting children: [check all that apply]

    ☐ ensure the greatest possible protection of the child's physical, psychological and emotional safety

    ☐ be made and implemented within a time frame appropriate to the child's sense of time

    ☐ other: _____.

Please note: Chapter 8 has questions about receiving children's views and about ways for children to participate in decisions that affect them after their parents separate. Chapter 9 includes questions about adding a definition of violence to the *Family Relations Act* and about how the *Family Relations Act* could help keep children safe when a parent has been found to be violent.

PART C – ASSIGNING ROLES AND RESPONSIBILITIES: MAKING PARENTING ARRANGEMENTS

Discussion Point (4) - Parenting Arrangements without Agreement or Court Order

Family laws across Canada set out the roles and responsibilities parents have, unless an agreement or order says otherwise.

- Section 27 of the *Family Relations Act* says that as long as a child's parents live together—married or not—they are joint guardians of both the person and the estate of the child.
- If they separate, the parent who usually has "care and control" of the child is the sole guardian of the person of the child but the parents continue to be joint guardians of the child's estate.
- If parents live apart, and were not married during the child's life or 10 months before the child's birth, or never lived together during the child's life, the mother is the child's sole guardian.[46]

- Section 34 of the *Family Relations Act* says that as long as the child's parents live together, they have joint custody and if they live apart, the parent with whom the child usually lives has custody.

Other provinces and territories use different approaches. Broadly speaking, they can be described by three models:

1. Parents have joint guardianship. This does not change if they separate, unless a court order or agreement says differently.[47]
2. Parents have joint custody. ("Custody" in these provinces and territories describes what the *Family Relations Act* calls "guardianship of the person.") If they separate and the child lives with one parent with the other's consent, the other parent's right to exercise custody is suspended until there is a court order or agreement that says differently. This is the most common approach (Ontario, Prince Edward Island, Newfoundland and Labrador and all three territories). In all but the Yukon, parents are equally entitled to be appointed guardian of the child's property. In the Yukon, while parents live together they are guardians of the child's property but if they separate, the parent with "lawful care and custody" is sole guardian of the property, unless an order or agreement says differently.[48]
3. Parents have joint custody ("Custody" in these provinces describes what the *Family Relations Act* calls "guardianship of the person."), which continues after they separate unless a court order or agreement says differently. However, where the parents never lived together after the child's birth, the parent with whom the child lives has sole custody. (Manitoba and Saskatchewan) The parents are joint guardians of the child's estate unless changed by court order. (Saskatchewan)[49]

Alberta's approach is somewhat different. Unless a court order or agreement says differently, both parents are automatically guardians (of the person) if they

- were married when the child was born (or divorced less than 300 days before the child's birth),
- married each other after the child's birth,
- lived together for at least 12 months during which the child was born, or
- were living together in a relationship of some permanence when the child was born.

If the parents' relationship does not fall into one of these categories, they are both considered guardians at first: where the child usually lives will determine whether a parent continues to be a guardian. But, once a child has usually lived with a parent for a year, that parent is a guardian even if the child no longer lives with that parent.[50]

QUESTIONS

18. Should the rules in sections 27 and 34 of the *Family Relations Act* for determining parental guardianship and custody (where there is no agreement or court order that says differently) be changed? If so, how should they be changed?

Discussion Point (5) - Parenting Arrangements by Agreement

After separation, most parents are able to agree on how they will parent their children from separate households. They may have a separate parenting agreement, but usually these arrangements form part of a separation agreement that also includes agreements on other issues such as how they will divide their family assets. If parents cannot agree on parenting arrangements, they may ask a judge to make an order.

The *Family Relations Act* neither encourages nor requires parents to make parenting agreements. Nor does it suggest what they should include in a parenting agreement, if they decide to make one.

In its 1998 report, the Canadian Special Joint Committee on Custody and Access recommended encouraging parents to make a parenting plan, setting out the details of each parent's responsibilities for their children's residence, care and financial security and for decision-making relating to their children, as well as a process for resolving disputes and a requirement for parents to share with each other information about their children.[51]

Some other places use parenting plans to help promote parenting agreements and avoid disputes. For example, Washington State's law[52] requires separating and divorcing couples to create a parenting plan that sets out their child's residential schedule, allocates responsibilities for major decisions about the child's care, and describes how disputes about the plan will be resolved. The law requires a temporary parenting plan to cover children's living arrangements and allocate decision-making responsibility while the parents develop a permanent plan. If parents are not able to agree, a judge will make an order allocating decision-making responsibilities and spelling out the children's living arrangements in the form of a parenting plan. Parenting plans may be changed only if certain conditions are met.

Oregon also requires parents to make a parenting plan.[53] It may be general or detailed, but it must include the minimum amount of parenting time (access) a non-custodial parent is entitled to have. If parents cannot agree, a judge must make a detailed parenting plan for them.

Parenting plans are optional in Australia.[54] Provisions covering parenting plans were added to the law in 1995, but were rarely used. Problems included cumbersome registration requirements that were removed when the law was amended in 2003. More changes were made in 2006.

Australia's law sets out what may be covered in a parenting plan, including allocating parental responsibility, setting out with whom a child will live, the time a child will spend with others, and the process to be used for resolving disputes. The law also requires advisors, including lawyers and dispute resolution practitioners, to inform the parents they work with that they could consider making a parenting plan and to tell them where they can get help with it.

There is little evidence about whether parenting plans help avoid disputes. A Washington State study does underscore the importance of an easy-to-use process for developing parenting plans and appropriate services to help parents develop them, if these plans are to be a useful tool.[55]

An emerging trend in the United States is the use of parenting-time guidelines. Arizona, Colorado, Michigan and Oregon have guidelines or sample parenting plans that give general information about parenting arrangements in relation to a child's developmental stages.[56] Utah's law includes guidelines setting the minimum amount of parenting time based on a child's age, unless parents agree otherwise.[57] Appendix 1 of Meeting Access Responsibilities: Background Paper contains Oregon's parenting plan guide, with sample schedules, and Utah's guidelines.

QUESTIONS

19. Would parenting plans make it easier for parents to agree on parenting arrangements? Why or why not?
20. Would parenting plans result in arrangements that better meet children's needs? Why or why not?
21. Should the *Family Relations Act* include provisions about parenting plans?
22. If so, should parenting plans be mandatory or optional?

23. Should the *Family Relations Act* require certain items to be covered in a parenting plan? If so, what should be required?

    This list may help you decide what you want to include:

    - where their child will live
    - the time their child will spend with each parent and other people
    - each parent's responsibility for making decisions concerning their child
    - each parent's responsibility for their child's care
    - each parent's responsibility for their child's financial support
    - how parents will share information about their child
    - how parents will resolve disputes about the parenting plan
    - the process parents will use to change the parenting plan to take account of changing needs of their child or either parent
    - other [describe]

24. Do you think parenting-time guidelines would help parents in B.C.? Why or why not?

Discussion Point (6) - Parenting Arrangements by Court Order

Court orders

If parents are unable to agree on their parenting arrangements, section 30 of the *Family Relations Act* allows a judge to make an order appointing a guardian for their child. The judge must base the decision on the best interests of the child, taking into account the factors set out in s. 24. There are limits on what a judge can do: a guardian cannot be appointed for a child older than 12 without the child's consent, except in certain circumstances; and a person who is not a parent of the child generally cannot be appointed as guardian without the parents' consent. Section 35 allows a judge to make custody and access orders in favour of parents, grandparents, other relatives or people who are not related to the child, based on the child's best interests, taking into account the factors in s. 24.

Allocating parenting responsibilities

Section 35 says that a judge making a custody or access order may include any terms or conditions needed to serve the child's best interests, but does not specifically say that judges may allocate particular parenting responsibilities to one or both parents. However, it has become common in British Columbia to spell out in orders (and agreements) what is meant by joint guardianship or joint custody in the particular order (or agreement) and to identify those responsibilities that are to be shared and those that are to be the sole responsibility of one parent.

In some provinces and territories, including Saskatchewan, the law says that in a custody or access order, a judge may "determine any aspect of the incidents of the right to custody or access."[58] Saskatchewan's law also says that a judge may set out "the division and sharing of parental responsibilities" in a custody order.[59] Alberta's law says that a judge may include "an allocation, generally or specifically, of the powers, responsibilities and entitlements of guardianship among the guardians" in a parenting order.[60]

Explaining parents' responsibilities

Some disputes over parenting arrangements arise out of a lack of understanding by one or both parents, of what the order actually means. Family laws may reduce the number of disputes over parenting orders by requiring that parents be given an explanation of the order when it is made.

Mandatory explanations are (or are soon to be) a feature of family law in Australia, New Zealand, England and Oregon. In Canada, had Bill C-22 (2202) become law, it would have required lawyers to discuss with their clients the clients' obligation to comply with any order made under the *Divorce Act*.[61]

Australia's family law requires judges to include in every parenting order details of the responsibilities being imposed, and the consequences of not meeting them.[62] It also requires an explanation of "the availability of programs to help people understand their responsibilities under parenting orders."[63] If parents do not have lawyers, the judge must provide the explanation. If they have lawyers, the judge may ask the lawyers to explain.

New Zealand's family law also requires every parenting order to explain the obligations it creates; the potential consequences of not meeting those obligations; and any processes for monitoring, reviewing, or changing or canceling the order.[64] The explanations included in parenting orders must be accompanied by general information in a prescribed form.[65] As well, the law requires lawyers to explain the effect of the order to all their clients, including children.[66]

In England, changes to the *Children Act 1989*, which have not yet been brought into effect, will require judges, when making, changing or enforcing a contact order, to provide a warning notice describing the consequences of not meeting the obligations set out in the order.[67]

Oregon's law requires a parenting time order to include a statement explaining that the purpose of child support and parenting time (access) is to benefit children and not parents; setting out the penalties for non-compliance; and providing information about who to contact if a parent is not living up to the obligations set out in the order.[68]

Including a dispute resolution process

The *Family Relations Act* does not specifically say that a parenting order may set out the process parents are to use to resolve problems that may come up, but it is becoming more common to see provisions like this in family laws. For example, Alberta's law says that a parenting order may contain a process that the parents agree to for resolving future disputes about guardianship or parenting arrangements.[69] Bill C-22 (2002) would have made a similar change to the *Divorce Act*.[70] Australia's family law says that a parenting order may include the steps to be taken before applying to court to change the order, and the process to be used to resolve disputes about the order. The dispute resolution process may include consulting with a family dispute resolution practitioner.[71]

QUESTIONS

25. Should the *Family Relations Act* say specifically that judges may allocate aspects of parenting responsibilities between parents in a court order?

26. Should the *Family Relations Act* require that parents be given an explanation of the obligations created by a parenting order and the potential consequences of failing to meet those obligations, at the time an order is made?

27. If so, should the explanation be part of the order?

28. Should the *Family Relations Act* require other explanations to accompany parenting orders, such as an explanation of programs or services available to help if there is a problem in living up to the obligations set out in the order? If so, who should give the explanation?

29. Should the *Family Relations Act* include specific authority for judges to include in an order a process for resolving disputes about the order? If so, should judges be able to do this only if the parents agree to the process?

Discussion Point (7) - Giving Parenting Responsibilities to Non-Parents

Under the *Family Relations Act*, separated parents can agree that they are joint guardians, or that one of them is the sole guardian of their children. In a will, a parent who is a guardian may appoint another person—either the other parent or someone else—to act as guardian when the parent dies. However, if parents want someone else to act as guardian during the parents' lifetimes, they must go to court and ask a judge to appoint that person as guardian.

Testamentary guardianship: appointing a guardian by will

The *Family Relations Act* covers guardianship issues generally, but it is s. 50 of the *Infants Act* that authorizes a parent to appoint a person to be the guardian of a child, in the event of the parent's death (a "testamentary guardian"). In 2004, the British Columbia Law Institute recommended moving the testamentary guardianship provisions from the *Infants Act* to the *Family Relations Act*.[72]

Under the *Infants Act*, only a parent can appoint a testamentary guardian. In both Ontario and England, a non-parent guardian can appoint a testamentary guardian.[73] The Law Reform Commission of Saskatchewan and the Alberta Law Reform Institute have both recommended allowing a guardian who is not the child's parent to appoint a testamentary guardian.[74] The British Columbia Law Institute also looked at this in its 2004 report and concluded that "[t]here is no apparent reason to assume that a guardian's choice would be less sound than a parent's. The private appointment of testamentary guardians is an effective mechanism for minimising the possibility of a 'gap' in the guardianship of children."[75]

Standby Guardianship

Standby guardianship describes the appointment of a guardian to take effect when a specified event occurs in the future. Testamentary guardianship is one form of standby guardianship.

Another form of standby guardianship takes effect during the appointing guardian's lifetime. In cases where the death of the appointing guardian is expected, standby guardianship allows for a bridging period of shared guardianship while the appointing guardian is still alive. For example, if a parent with a terminal illness appoints a standby guardian, the standby guardian assumes joint guardianship with the parent when the parent becomes incapacitated, and continues as sole guardian after the parent's death.

This form of standby guardianship is widely available in the United States where it was developed as a response to the plight of "AIDS orphans." While medical treatment for HIV/AIDS has improved tremendously over the last 15 years, standby guardianship continues to be used by parents with terminal illnesses and could be used in other situations: for example, by grandparents caring for grandchildren, who worry about their ability to continue to act as primary caregivers.

In its 2004 report, the British Columbia Law Institute recommended amending the *Family Relations Act* to allow the appointment of standby guardians. It suggested restricting the use of standby guardianship to situations involving a sole appointing guardian, and allowing activation of standby guardianship only upon the death or mental or physical incapacity of the appointing guardian.[76]

Temporary Guardianship

The difference between temporary guardianship and standby guardianship is that a standby guardian eventually replaces the appointing guardian while a temporary guardian is a substitute who fills in while the appointing guardian is temporarily absent or incapacitated. British Columbia's *Representation Agreement Act* allows temporary guardianship in limited circumstances.[77]

Laws in Saskatchewan, Nova Scotia, the Northwest Territories, Nunavut and the Yukon allow a person with custody (guardianship of the person) to appoint another person to act temporarily as guardian of the person of the child during the appointing guardian's lifetime.[78] In Saskatchewan, parents may agree to authorize one of them to appoint another person as the child's legal custodian (akin to guardian of the person under the *Family Relations Act*) and guardian of the child's property for a specific period of time or until the child reaches the age of majority. In Nova Scotia, a person with "care and custody" of a child may appoint another person to be the guardian of the person of the child for any period during the appointer's lifetime. In the Northwest Territories and the Yukon, a person with custody may appoint another person to have any of the appointer's rights or responsibilities of custody during the appointer's lifetime, for the period of time that the appointer specifies.

In a 1998 report, the Alberta Law Reform Institute recommended that guardians be allowed to appoint someone to act in their place "in the event of the guardian's temporary absence or incapacity to act as a guardian."[79] In 2002, the Alberta Law Reform Project consulted widely on Alberta's family law and found support for having an easy way to transfer guardianship on a temporary basis.[80] However, in British Columbia judges have emphasized that decisions about changing guardianship from a parent to a non-parent must be based on what is best for the child and not merely on convenience.[81]

Section 21 (6) (k) of the Alberta *Family Law Act* may represent a middle ground. While not authorizing appointment of temporary guardians, it allows a guardian to name a person to act on behalf of the guardian if the guardian is temporarily absent because of illness or other reason.

The United States National Conference of Commissioners on Uniform State Laws has two model uniform acts that include temporary guardianship.[82] These provisions have been adopted by some states, but temporary guardianship has not been as widely adopted as standby guardianship.

Simple form for appointment

Testamentary guardians are generally appointed in a will. Parents and other guardians without significant property are less likely to prepare a will and, therefore, less likely to appoint a testamentary guardian. In England, the *Children Act 1989* allows a parent or other guardian to appoint a testamentary guardian in a signed and dated document.[83] The purpose of the rule is to make the private appointment of guardians easier, by relaxing the formal requirements.[84]

In its 2004 report, the British Columbia Law Institute proposed that the *Family Relations Act* allow for appointment of a standby or testamentary guardian through the form shown in Appendix A.[85]

QUESTIONS

30. Should the provisions relating to testamentary guardianship, now found in s. 50 of the *Infants Act*, be moved to the *Family Relations Act*?

31. Should a guardian who is not a parent be able to appoint a testamentary guardian (that is, a person who will become a child's guardian when the appointing guardian dies)?

32. Should the *Family Relations Act* allow a guardian to appoint a standby guardian who will assume joint guardianship during the appointing guardian's lifetime and continue as guardian after the appointing guardian's death? If so, what restrictions, if any, should there be on the situations in which a standby guardian may be appointed?

33. Should the *Family Relations Act* specifically authorize a guardian to appoint a temporary guardian? If so, what restrictions, if any, should there be on the situations in which a temporary guardian may be appointed?

34. Should a simple form be created for appointing a testamentary or standby guardian?

PART D – GENERAL FEEDBACK

35. In your opinion, what are the three most important issues relating to parents' roles and responsibilities and parenting arrangements?

36. What three measures do you think would be most effective in resolving those issues?

37. Are there issues related to parents' roles and responsibilities and parenting arrangements that are not covered in this paper, that you would like to raise?

38. It is widely recognized that a barrier to access to justice is excessive process and procedures. Can you think of anything with respect to parenting arrangements that could be done to streamline the resolution of issues?

Please provide your feedback

Please note: Chapter 7 discusses ways for parents to deal with problems that come up in meeting access responsibilities. Chapter 8 raises questions about ways for children to participate in decisions that affect them when their parents separate. Chapter 9 discusses family violence.

Appendix A – Form for Appointing a Guardian

The British Columbia Law Institute, "Report on Appointing a Guardian and Standby Guardianship" (March 2004)

Appointment of a Standby or Testamentary Guardian

Any person who is a guardian of a child may make an appointment using this form, but if at the date the appointment is to take effect, someone other than the person making this appointment, or the person appointed, is a joint or sole guardian of the child, this appointment is void.

This appointment is made on _____20_____(Date)

by_____(child's guardian)

of_____(guardian's address)

I appoint the following individual:

_____(name of standby or testamentary guardian)

of_____(address of standby or testamentary guardian)

to become the guardian of

_____

_____

_____ (name of child or children)

upon the occasion of my (check one or more):

☐ death

☐ inability to care for the child or children named, as certified by:

_____

_____

in accordance with the *Family Relations Act*, to have the same powers and responsibilities of guardianship that I currently have, subject to the following conditions and restrictions:

_____

cross out this line if there are no conditions or restrictions

_____

signature of child's guardian

_____

signature of witness

_____

signature of standby or testamentary guardian (optional)

Witness if guardian unable to sign document: (cross out this portion if not applicable)

I attest that _____ (child's guardian) has made the above appointment and is unable to sign this document.

_____

signature of witness 1

_____

address of witness 1

_____

signature of witness 2

_____

address of witness 2

_____

signature of standby or testamentary guardian (optional)

ENDNOTES

[1] *Family Relations Act*, R.S.B.C. 1996, c. 128.

[2] Family Justice Reform Working Group's report, presented to the B.C. Justice Review Task Force, "A New Justice System for Families and Children" (May 2005), at 78, online: B.C. Justice Review Task Force <http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf> (last accessed: February 28, 2007).

[3] *Divorce Act*, R.S.C. 1985, (2nd Supp.) c.3.

[4] .*Family Relations Act*, *supra* note 1. Section 1 defines a guardian as "a person who has all the powers and duties under s. 25 respecting a child". Section 25 defines these powers by referring to old English law, which gave a child's guardian responsibility for raising the child in a manner that suited the child's position in life, along with limited power over the child's property and finances. For more explanation, see The Law Reform Commission of British Columbia, "Report on the Authority of a Guardian" (January, 1985).

[5] *Divorce Act*, *supra* note 3, s. 2 (1).

[6] For more discussion on this point see, The Continuing Education Society of British Columbia, *Family Sourcebook for British Columbia*, Third Edition 2006 Update, Chapter 2 [Family Sourcebook].

[7] For a review of the law in British Columbia on the authority of parents and guardians to deal with a child's property, see Kristen Jenkins, "Dealing with Property Owned by Minors", *Estate Planning: Ten Timely Topics*, Continuing Legal Education Society, November 2002.

[8] Family Sourcebook, *supra* note 6.

[9] *Children's Law Act*, R.S.N.L. 1990, c. C-13, ss. 26 (2) and 56 (2) [Newfoundland and Labrador]; *Children's Law Act*, S.N.W.T. 1997, c. 14, ss. 18 (2) and 40 (2) [Northwest Territories]; *Children's Law Act (Nunavut)*, S.N.W.T. 1997, c. 14, ss. 18 (2) and 40 (2) [Nunavut]; *Children's Act*, R.S.Y. 2002, c. 31, ss. 31 (2) and 60 (1) [Yukon].

[10] *Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 20 (2) and 47 (2) [Ontario].

[11] *Children's Law Act*, 1997, S.S. 1997, c. C-8.2, ss. 2 (1) and 32 [Saskatchewan].

[12] *Family Law Act*, S.A. 2003, c. F-4.5, s. 21 [Alberta].

[13] *Children Act 1989*, Ch. 41, s. 3 [England]; *Family Law Act 1975*, CWLTH, s. 61B [Australia].

[14] The Law Reform Commission of British Columbia, *supra* note 4 at 6.

[15] *Family Relations Act*, R.S.B.C. 1996 (Supp.), c. 128, s. 4.

[16] See for example, The Honourable Landon Pearson and Roger Galloway, M.P., "For the Sake of the Children – Report of the Special Joint Committee on Child Custody and Access" (December 1998), Chapter 2 C 1. The Language of Divorce, online: Parliament of Canada House of Commons Committees <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=147&Lang=1&SourceId=36230> (last accessed: February 28, 2007).

[17] *Ibid.*, recommendation 5.

[18] The Family Law Committee was a long-standing committee of government officials familiar with family law, who represented each province and territory and the federal government. It is now part of the Co-ordinating Committee of Senior Officials (Family Justice).

[19] Federal-Provincial-Territorial Family Law Committee, "Final Federal-Provincial-Territorial Report on Custody and Access and Child Support – Putting Children First" (November 2002) at 29-30 online: Department of Justice Canada <http://justice.gc.ca/en/ps/pad/reports/flc2002.html> (last accessed: February 28, 2007).

[20] Bill C-22, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to amend other Acts in consequence*, cl. 10, online: Parliament of Canada LEGISinfo <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Session=11&query=3276&List=toc> (last accessed: February 28, 2007) [Bill C-22].

[21] Custody, Access and Child Support in Canada: Report on Federal-Provincial-Territorial Consultations, prepared by IER Planning, Research and Management Services (November 2001), Appendix C: Report on British Columbia Workshops at 136-138 [Report on Federal-Provincial-Territorial Consultations].

[22] See *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 75; *Insurance Act*, R.S.B.C. 1996, c. 226, s. 77 (1) (a); *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 32 (1); *Employment Standards Act Regulation*, B.C. Reg. 396/95, s. 45.14.

[23] Judges make these orders under s. 31 of the *Trustee Act*, R. S.B.C. 1996, c. 464 or under their *parens patriae* authority.

[24] For example, Alberta's *Minors' Property Act*, S.A. 2004, c. M-18.1 covers approval by a judge of a contract made by a child, a settlement of a child's claim made by a guardian and a disposition (e.g., sale) of a child's property; performance of obligations under a contract with a child, with special provisions if the value of the contract is $5,000 or less; and appointment by a judge of a trustee of children's property.

[25] Ontario, *supra* note 10, s. 51 (1).

[26] Yukon, *supra* note 9, s. 72 (2).

[27] Newfoundland and Labrador, *supra* note 9, s.59.

[28] Northwest Territories, s*upra* note 9, s. 50.

[29] *Minors' Property Act, supra* note 24, ss. 8 and 9.

[30] *Public Guardian and Trustee Act*, S.S. 1983, c. P-36.3, s. 16.

[31] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S., art. 3.

[32] *Supra* note 20.

[33] *Supra* note 12, s. 18 (2).

[34] *Care of Children Act 2004*, s. 4 (5) (a) [New Zealand].

[35] Report on Federal-Provincial-Territorial Consultations, *supra* note 21 at 139.

[36] *Supra* note 2, recommendation 26 at 81.

[37] Ontario, *supra* note 10, s. 24(4); Newfoundland and Labrador, *supra* note 9, s. 31; Northwest Territories, *supra* note 9, s. 17(3); Nunavut, *supra* note 9, s. 17(3).

[38] *Supra* note 20.

[39] *Supra* note 12, s. 18 (2).

[40] See, for example, Australia, *supra* note 13, ss.43, 68F &68K; New Zealand, *supra* note 34, ss. 51, 59 & 60; Arizona: *Marital and Domestic Relations*, A.R.S. s. 25-403.03; California: *Family Code* , s. 3011; Colorado: Domestic Matters/Dissolution of Marriage, C.S., s. 14-10-124, 1.5(a)(IX) & (X), Louisiana: *Revised Statutes of Louisiana*, Title 9: 364, Michigan: *Child Custody Act of 1970*, Act 91 of 1970, Statutes of Michigan, 722.23, Sec. 3(k).

[41] *Divorce Act*, *supra* note 3, s. 16 (8); Ontario, *supra* note 10, s. 24 (1); Newfoundland and Labrador, *supra* note 9, s. 31 (1); Northwest Territories, *supra* note 9, s. 17; Nunavut, *supra* note 9, s. 17; Saskatchewan, *supra* note 11, s. 8 (a); Alberta, *supra* note 12, s. 18 (1); New Brunswick: *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 129(2); Prince Edward Island: *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 15 [P.E.I.].

[42] Australia, *supra* note 13, ss. 61DA & 65DAA, in effect as of July 1, 2006.

[43] *Supra* note 16, Chapter 4 A 1. (i) No Presumptions.

[44] *Supra* note 19, recommendation 6. The recommendation reads, "It is recommended that legislation not establish any presumptive model of parenting after separation, nor contain any language that suggests a presumptive model of parenting. The fundamental and primary principle of determining parenting arrangements must continue to be the best interests of the child."

[45] New Zealand, *supra* note 34, s. 4 (5).

[46] *Family Relations Act*, *supra* note 1, ss. 27,28 & 30.

[47] *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s.18 (4) and *Guardianship Act*, S.N.S. 2002, c. 8, s. 3 (1).

[48] Ontario, *supra* note 10, ss. 20 and 48; Newfoundland and Labrador, *supra* note 9, ss. 26 and 57; Northwest Territories, *supra* note 9, ss. 18 and 41; Nunavut, *supra* note 9, ss. 18 and 41; Yukon, *supra* note 9, ss. 31 and 61; P.E.I., *supra* note 41, s. 3.

[49] Saskatchewan, *supra* note 11, ss. 3 and s. 30; *Family Maintenance Act*, C.C.S.M. c. F20, s. 39 (1).

[50] Alberta, *supra* note 12, s. 20.

[51] *Supra* note 16, recommendation 11.

[52] *Revised Code of Washington* Title 26 (*Domestic Relations*), ss. 26.09.181, 26.09.184, 26.09.187, 26.09.191, 26.09.194, 26.09.197, 26.09.210.

[53] *Oregon Revised Statutes*, Title 11 (Domestic Relations), Chapter 107.

[54] Australia, *supra* note 13, Part VII, Division 4.

[55] Diane N. Lye, "Washington State *Parenting Act* Study: Report to the Washington State Gender and Justice Commission and Domestic relations Commission, June 1999," online: <http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/parentingAct/index> (last accessed: February 28, 2007).

[56] Superior Court of Arizona in Maricopa County, Self Service Centre, "Parenting Time Guidelines," (March 21, 2005) at 5-10; Colorado Department of Labor & Employment, "Connecting With Your Kids: Important Information on Parenting Time in Colorado," 2nd ed. (2004) at 33-40 & 43-46; Michigan State Court Administrative Office, "Michigan Parenting Time Guideline," 7-9, 23-26; Oregon Judicial Department, *et al.*, "Basic Parenting Plan Guide for Parents, Version 7 (June 2003) at 12-21 & "Safety Focussed Parenting Plan Guide for Parents," Version 4 (June 2003), Options A, B & C.

[57] *Utah Code*, ss. 30-3-33, 35 & 35.5.

[58] Saskatchewan, *supra* note 11, s. 6 (1) (b). See also, Ontario, *supra* note 10, s. 28 (b) and Yukon, *supra* note 9, s. 33 (2) (b).

[59] Saskatchewan, *ibid.*, s. 6 (7).

[60] Alberta, *supra* note 12, s. 32 (2) (a).

[61] *Supra* note 20.

[62] Australia, *supra* note 13, s. 65DA.

[63] *Ibid.*, s. 65DA (3).

[64] New Zealand, *supra* note 34, s. 55 (1) (a).

[65] *Ibid.*, s. 55 (1) (b).

[66] *Ibid.*, ss. 55 (2) and (4). Children are provided with legal representation in contested cases unless the judge does not think it would be useful. See also ss. 7 ((1) and (2).

[67] See *Children and Adoption Act 2006, 2006*, c. 20, ss. 3 and 4 (received Royal Assent on June 21, 2006, but not yet in effect).

[68] *Oregon Revised Statutes*, 11-107.106 (1998).

[69] Alberta, *supra* note 12, s. 32 (2) (c).

[70] *Supra* note 20.

[71] Australia, *supra* note 13, s. 64B (2) (g) and (h) and (4A).

[72] The British Columbia Law Institute, "Report on Appointing a Guardian and Standby Guardianship" (March 2004), online: The British Columbia Law Institute < http://www.bcli.org> (last accessed: February 28, 2007).

[73] Ontario, *supra* note 10, s. 61; England, *supra* note 13, s. 5.

[74] Law Reform Commission of Saskatchewan, "Tentative Proposals Relating to Testamentary Custody and Guardianship of Children" (1984), at 21; Alberta Law Reform Institute, "Family Law Project: Child Guardianship, Custody and Access", *Report for Discussion No. 18.4* (October 1998) [ALRI].

[75] *Supra* note 72 at 4.

[76] *Ibid.,* at 8.

[77] *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 9(1) (f) allows a person to authorise a representative to make arrangements for the temporary care, education and financial support of the person's children who are under age 19.

[78] Northwest Territories, *supra* note 9, s. 19 (2) (a); Nunavut, *supra* note 9, s. 19(2) (a); Yukon, *supra* note 9, s. 32 (1); Saskatchewan, *supra* note 11, s. 3(3); Nova Scotia: *Guardianship Act*, S.N.S. 2002, c.8, s. 19 (1).

[79] ALRI, *supra* note 74 at 109.

[80] "Alberta Law Reform Consultation Stakeholder Report", Marcomm Works, 2002 at 15.

[81] See, for example, *Wong (Re)* [2000] B.C.J No. 2095.

[82] Section 105 of the *Uniform Guardianship and Protective Proceedings Act* and 5-105 of the *Uniform Probate Code* provide:

A parent or guardian of a minor or incapacitated person, by power of attorney, may delegate to another person, for a period not exceeding six months, any power regarding the care, custody, or property of the minor or ward, except the power to consent to marriage or adoption.

[83] England, *supra* note 13, s. 5 (3), (4) & (5).

[84] A. Bainham, "The Children Act 1989: Welfare and Non-Interventionism" [1990] *Fam. Law* 143.

[85] *Supra* note 72 at 9.