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No Presumptions! Joint Custody in the British Columbia Court of Appeal

Susan B. Boyd

Allard School of Law at the University of British Columbia, boyd@allard.ubc.ca

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Citation Details

Susan B Boyd, "No Presumptions! Joint Custody in the British Columbia Court of Appeal" in Sanjeev Anand, ed, *Children and the Law: Essays in Honour of Professor Nicholas Bala* (Toronto: Irwin Law, 2011) 267-290.

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No Presumptions! Joint Custody in the British Columbia Court of Appeal¹

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Descriptions of Canadian family law trends are disproportionately influenced by developments in Ontario, simply because that province produces a large amount of both family law and commentary on family law. For example, most Canadian family law books are written by Ontario lawyers and law professors, such as Nicholas Bala.² Much of this work is excellent, and it is certainly relied on in other jurisdictions. It can, however, generate a skewed view of developments in other provinces. Accordingly, this chapter offers a study of joint custody trends in the British Columbia Court of Appeal compared to those in Ontario.

In 2007, Professor Martha Shaffer published two excellent articles on joint custody.³ Her review of Ontario case law focused on contested joint custody after the important 2005 Ontario

¹ This project was funded by the Foundation for Legal Research. Cynthia Poblador, Eiad el Fateh and Bree Makohn provided excellent research assistance. Former Justice Donna Martinson of the B.C. Supreme Court, recently retired, kindly commented on a draft, as did Vancouver family law practitioner John-Paul Boyd. All errors remain my own!

² Citing examples of books alone, one finds Nicholas Bala et al. eds. *Canadian Child Welfare Law: Children, Families, and the State, Second Edition* (Toronto: Thompson, 2004); Berend Hovius, *Family Law: Cases, Notes and Materials*, 6th student ed. (Scarborough: Thomson Carswell, 2005); Mary Jane Mossman, *Families and the Law in Canada: Cases and Commentary* (Toronto: Emond Montgomery Publications Ltd., 2004); Julien Payne and Marilyn Payne, *Canadian Family Law*, 2nd ed. (Toronto: Irwin Law, 2006). If one were to cite articles, Nicholas Bala's name would, of course, feature prominently.

³ Martha Shaffer, "Joint Custody Since *Kaplanis and Ladisa* – A Review of Recent Ontario Case Law" (2007) 26 C.F.L.Q. 315. ["Joint Custody Since *Kaplanis*"]; Martha Shaffer, "Joint Custody, Parental Conflict and Children's Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us" (2007) 26 C.F.L.Q. 286. ["Joint Custody, Parental Conflict"]

Court of Appeal decision in *Kaplanis v. Kaplanis*,⁴ which reiterated that court's cautious approach to ordering joint custody in contested cases (taken earlier in *Baker v. Baker*⁵ and *Kruger v. Kruger*⁶). Specifically, it held that joint custody should not be ordered in such cases unless there is clear evidence that the parents are able to communicate effectively with one another, despite animosity and personal differences. One parent's opposition to joint custody would not, without more, suffice to block such an award.⁷ However, the message to Ontario judges was clear: that joint custody will seldom be in a child's best interests if the parents are not capable of effective communication, as they will not be able to act jointly in their children's best interests. Although Shaffer identified some problems in post-*Kaplanis* case law, she found that, overall, Ontario courts take a cautious approach to joint custody in contested cases and make such orders sparingly.

Shaffer's article made me wonder to what extent trends were similar in British Columbia and whether the cautionary approach in *Kaplanis* is followed by B.C. judges, especially given that anecdotal evidence indicates that joint custody is now the *de facto* starting point at custody hearings. Although a 1994 decision of the B.C. Court of Appeal in *Stewart v. Stewart*⁸ adopted a very cautious approach to joint custody in the face of communication difficulties, stating that such awards should be made rarely and only under circumstances where the parties are totally in

⁴ *Kaplanis v. Kaplanis*, (2005) 10 R.F.L. (6th) 373. A November 2009 review of Ontario Court of Appeal cases on joint custody reveals no significant departure from the rulings in *Kaplanis* and its sister case *Ladisa v. Ladisa*, (2005) 11 R.F.L. (6th) 50.

⁵ *Baker v. Baker*, (1979) 8 R.F.L. (2d) 236 (Ont. C.A.).

⁶ *Kruger v. Kruger*, (1979) 11 R.F.L. (2d) 52. (Ont. C.A.).

⁷ *Ladisa*, *supra* note 4, released the same day as *Kaplanis*, made this clear. The Court of Appeal upheld a joint custody order despite the mother's opposition and the fact that high level conflict existed between the parents. Evidence established that the parents could, nevertheless, communicate effectively and put the children's interests ahead of their own.

⁸ *Stewart v. Stewart*, (1994) 2 R.F.L. (4th) 53 (B.C.C.A.).

agreement and for all intents and purposes do not need the assistance of the court, a later decision in *Robinson v. Filyk*⁹ came out strongly against the use of presumptions in custody decisions, negating the force of *Stewart*.

In 2008, I undertook a review of judicial decisions dealing with joint custody in the B.C. Court of Appeal.¹⁰ A search for “joint custody” cases using LexisNexis Quicklaw yielded 99 cases falling between December 11, 1996, when the B.C. Court of Appeal decided *Robinson v. Filyk*, and spring 2008. Forty-five of these cases dealt with custody as a significant issue on appeal, and these cases were studied for the purposes of this chapter.¹¹ Although I will offer some figures, this analysis is of course not statistically significant nor does it give an accurate picture of all custody cases that go to court; it simply gives a sense of trends within the B.C. Court of Appeal over a little more than a decade, based on cases that involved a claim for joint custody at some point. My overall conclusion is that the Ontario and British Columbia courts may not depart radically from one another, but the jurisprudence of B.C.’s appellate court reveals some significant differences in emphasis that may be of concern.

No Presumptions: *Robinson v. Filyk* (1996)

⁹ *Robinson v. Filyk*, (1996) 84 B.C.A.C. 290, [1996] B.C.J. No. 2519.

¹⁰ This study differs from Shaffer’s “Joint Custody Since *Kaplanis*”, *supra* note 3, because it is both broader (hers focused on *Kaplanis* and on joint custody in close proximity to communication, co-operation or conflict) and narrower (because it focuses only on appellate level decisions). I have also conducted a review of B.C. trial decisions on joint custody for the years 2000 and 2007, in an effort to gauge any shift in approach over time. The results of that review will be published separately.

¹¹ A further 54 BCCA cases turned up based on a search for “joint custody” in BCCA cases falling between December 11, 1996 and spring 2008. The vast majority involved a joint custody award that was not questioned on appeal; instead the issue on appeal was child or spousal support or matrimonial property, a jurisdictional issue, contempt of court, child protection or criminal law.

In December 1996, the B.C. Court of Appeal rendered an important judgement in *Robinson v. Filyk*.¹² On appeal, a non-custodial mother sought an order of joint guardianship or joint custody, having been denied sole custody at trial. The trial judge had found little to choose between the parents, who had made consensual shared parenting arrangements until each moved away from B.C., the father to London, Ontario, and the mother to Calgary, Alberta. The father was a university professor who had re-married. The mother was a medical student in Calgary, who was living with her mother in the maternal family home. Each parent originally sought joint or sole custody and primary residence. The trial judge found it inappropriate to grant joint physical custody, because that was the point on which the parents had been unable to agree. He went on to conclude, reluctantly, that, given the geographical separation, a joint order of custody and guardianship was unworkable, citing the cautious approach of the Ontario Court of Appeal in *Baker v. Baker*,¹³ suggesting that joint custody is an exceptional disposition appropriate only where two parties will be able to co-operate. He awarded the mother only reasonable and generous access, but expressed the “hope and expectation” that Mr. Robinson will consult with Ms. Filyk on all major decisions concerning the development of Pascale”.¹⁴ When the father moved to Norway, the mother appealed, asking for joint guardianship and joint custody. The father did not disagree that joint guardianship would be in the daughter’s best interests.

The Court of Appeal followed the Supreme Court of Canada decisions in *Young v. Young*¹⁵ and *Gordon v. Goertz*¹⁶ in making a strong statement that the only consideration in custody cases is the best interests of the child and that there is no legal presumption in favour of

¹² *Robinson, supra* note 9 at para. 8.

¹³ *Baker, supra* note 5.

¹⁴ *Robinson, supra* note 9 at para. 8.

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

¹⁶ *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

either sole or joint custody. Importantly, Huddart J.A. distanced herself from her earlier opinion (when a County Court judge) in *Anson v. Anson* that a joint custody and joint guardianship order would be appropriate “where both parents are excellent parents, there is a history of cooperation with respect to parenting of the child and there is no valid reason to exclude a parent from having significant input into the raising of the child”.¹⁷ She now saw such an opinion as being as much of a legal or factual presumption as had been seen in the early Ontario Court of Appeal decisions in *Baker* and *Kruger*.¹⁸ Huddart J.A. also stated that the “essence of [the mother’s] argument is that the trial judge in effect applied a presumption in favour of sole custody...when he adopted the cautious approach to joint custody taken ...by the Ontario Court of Appeal in *Baker v. Baker* ... and *Kruger v. Kruger* ..., approved by this court in *Stewart v. Stewart* ..., rather than making the enquiry into Pascale’s particular circumstances...”.¹⁹ She then made a key statement:

It is now clear that legal and factual presumptions have no place in an enquiry into the best interests of a child, however much predictive value they may have. The Supreme Court of Canada has stated absolutely clearly that such presumptions detract from the individual justice to which every child is entitled.²⁰

In other words, any indication in a judgement of a presumption in favour of (or against) either joint or sole custody is inappropriate. Instead, the only issue is a child’s best interests, to be “found within the practical context of the reality of the parents’ lives and circumstances”.²¹

Although Huddart J.A. affirmed the principle that appellate courts should interfere with trial decisions only rarely,²² she added:

¹⁷ *Anson v. Anson*, (1987) 10 B.C.L.R. (2d) 357 (B.C. County Court) at 370.

¹⁸ *Baker; Kruger*, *supra* note 5 and 6.

¹⁹ *Robinson*, *supra* note 9 at para. 20.

²⁰ *Ibid.* at para. 22.

²¹ *Ibid.* at para. 29, quoting from *Gordon*, *supra* note 16 at para. 59.

²² *Ibid.* at para. 16.

If the reasons [of a trial judge] reveal a mindset with a pre-ordained default position, then the decision must be reviewed as if that mindset were not there. The trial judge who brings presumptions to the enquiry is not considering the best interests of the particular child in the particular circumstances and will have erred.²³

In the case at hand, Huddart J.A. did not interfere with the award of sole custody to the father, even though she said that the trial judge could be read as having endorsed the cautious approach of Ontario courts, which suggests a threshold test before joint custody would be ordered.²⁴ The reason for her deference to the trial decision was that joint decision-making would not be workable because the geographic separation would continue to exacerbate the communication difficulties that had emerged after the parents' respective relocations.

Somewhat contradictorily, however, Huddart J.A. did vary the order to provide for joint guardianship, in order to ensure that (a) the mother would have decision-making authority when the child was with her and (b) should the father die, guardianship would pass directly to the mother without a court order being necessary.²⁵ In addition, she noted that the *Family Relations Act* contains a provision permitting a joint guardian to ask for directions on various issues rather than applying for a change of custody,²⁶ and that this enquiry “would remove some of the threat implicit in the more adversarial application for a change of custody”.²⁷ She added that:

Geographical separation may make a joint custody order unworkable, but it makes a joint guardianship order desirable when a child spends considerable periods of time with the non-custodial parent and that parent is the obvious person to assume the care-giving of the child upon the death or incapacity of the custodial parent.²⁸

²³ *Ibid.* at para. 30.

²⁴ *Ibid.* at para. 32.

²⁵ *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 29.

²⁶ *Ibid.*, s. 32.

²⁷ *Robinson*, *supra* note 9 at para. 14.

²⁸ *Ibid.* at para. 16.

This award raises the thorny question somewhat peculiar to B.C. as to what the difference is between joint custody, which Huddart J.A. refused to order, and joint guardianship, which she did order.

Terminology: The B.C. Difference

Terminology is generally a problem in the custody field, as Shaffer notes: some courts use the term “joint custody” to connote arrangements giving both parents shared decision-making authority over significant child-rearing issues, and others use it to mean shared physical care.²⁹

When “shared parenting” is used by the B.C. Court of Appeal, it is usually in relation to physical care of the child or to describe access arrangements, e.g. where the child lives with each parent alternately.³⁰ “Shared custody” is used occasionally, generally to connote roughly equal shared time with a child and sometimes where joint custody is already in place, implying that the terms may mean something different.³¹

Terminology is further complicated in British Columbia, in a way that it is not in Ontario, by the concept of “guardianship”, which co-exists, not always peacefully, with the concept of custody. Under section 27 of the *Family Relations Act*, married parents and parents who cohabit are joint guardians of the child. If they separate, they remain joint guardians of the child’s estate but the parent who has the usual care and control of the child is the sole guardian of the child, *unless otherwise agreed or ordered*.³² Section 34 then outlines who may exercise custody over a

²⁹ Shaffer, “Joint Custody Since *Kaplanis*”, *supra* note 3 at page 321.

³⁰ E.g. *Nunweiler v. Nunweiler*, 2000 BCCA 300, [2000] B.C.J. No. 935.

³¹ E.g. *Parker v. Parker*, 2002 BCCA 299. The father wanted one week on, one week off, but the court found insufficient evidence to warrant increased contact. The parents already had joint custody and guardianship.

³² *Family Relations Act*, *supra* note 25, ss. 27- 28. [my emphasis].

child in terms that are generally parallel to those in section 27. These sections do not assist very much in defining the ambit of guardianship and custody or the relationship between them. Indeed, in 1990 the Court of Appeal stated in *Lennox v. Frender* that the terms “guardianship”, “custody” and “care and control” are “often used without precision” but “may, in some circumstances, have different meanings from each other.”³³ The Court added that these terms may have different meanings for the purposes of the *Divorce Act* than for the *Family Relations Act*, and suggested that it would be better if parties and/or courts spelled out what is intended, for instance, in minutes of settlement, rather than relying on legal jargon. It reviewed earlier B.C. Supreme Court cases³⁴ indicating that joint guardianship normally meant that each parent would have a full and active role in providing a sound moral, social, economic and educational environment for the children, and that they should consult with one another in planning the religious upbringing, educational programs, athletic and recreational activities, health care (excluding emergency), and significant changes in the social environment. Neither party should exercise this power and authority to frustrate or unduly affect the life of the other, and each should exert best efforts to co-operate in future plans consistent with the children’s best interests.

The Court of Appeal went on in *Lennox* to review definitions of joint custody in the Ontario cases *Baker* and *Kruger*, indicating that joint custody gave equal parental control over, and equal ultimate parental responsibility for, the care, upbringing and education of the child, but that the child might nevertheless be ordered to reside with one parent who had immediate direction and guidance, while the other parent enjoyed access. The Court “accept[ed] these descriptions of joint custody when it is not distinguished from guardianship” as saying

³³ *Lennox v. Frender*, (1990) 27 R.F.L. (3d) 181. (B.C.C.A.).

³⁴ Quoting especially from Gansner, L.J.S.C. in *Charlton v. Charlton*, (1980), 19 B.C.L.R. 42 (B.C.S.C.) at 45.

essentially the same thing: “That is, that parents with joint custody continue to act as parents and continue to have the right to share in the making of important decisions respecting the child.” For instance, in *Lennox* the mother, who had care and control of the child, but shared joint custody with the father, did not have the authority to decide unilaterally to send the child to private school.³⁵

Anson v. Anson, an oft-cited 1987 decision by Judge Huddart when she sat on the B.C. County Court, defined the “ancient” concept of “guardianship” as the full bundle of rights and duties assumed by an adult in respect of a child and stated that under both federal and B.C. legislation, “custody” has come to hold a similar wide meaning, going beyond a narrower conception of physical care and control.³⁶ As a result, an award of custody would give a full bundle of rights and responsibilities to the custodial parent, apart from those reserved to a guardian. *Anson v. Anson* also stated that a joint custody order should not be viewed as a finite disposition, but a broad range of post-separation custodial arrangements, the details of which are to be worked out. The key is where the residual authority lies. In *Anson*, Huddart Co. Ct. J. stated that “[j]oint guardianship and joint custody orders grant both divorced or separated parents an equal voice in the upbringing of their children.” Neither is given final decision-making authority and normally, the parties must consult with each other and decide what is best for the child. If

³⁵ See the later case *J.B.R. v. A.M.R.*, 2003 BCCA 135, where the BCCA remanded a case back to the BCSC. The trial court had awarded joint custody and joint guardianship with primary residence to the father, but also allowed the father to determine the children’s schooling and terms of the mother’s access. The question was whether these terms were consistent with a joint custody and joint guardianship award.

³⁶ *Anson*, *supra* note 17.

they cannot agree, either guardian can consult a professional third party or seek directions from the Court under the *Family Relations Act*.³⁷

As it was discussed in *Lennox* and *Anson*, joint guardianship seems strikingly similar to what scholars would typically call “joint legal custody” and what many courts refer to as simply “joint custody”. Shaffer similarly uses “joint custody” to refer to “arrangements in which parents share the authority to make significant decisions over their children’s lives – that is, on matters relating to their children’s education, health care and religious upbringing.”³⁸ Yet *Robinson v. Filyk* indicates that a joint guardianship order might be made in circumstances where joint decision-making is not workable, for reasons to do with the passing of guardianship after death of the custodial parent and exercise of authority while the child is with the non-custodial parent. It appears that pragmatic reasons led Huddart J.A. to distinguish between joint custody and joint guardianship in *Robinson v. Filyk*. She also signalled that an award of joint guardianship might avert adversarial proceedings in the future. As the B.C. Court of Appeal indicates in *Falvai v. Falvai*, an award of joint guardianship can ameliorate the broad concept of custody, which normally entails the full bundle of rights relating to both physical care and control and decision-making authority.³⁹ It is possible that joint guardianship may be ordered in some cases, or

³⁷ In the *Anson* case, the parents often disagreed on questions of the health care and education of their son, but Huddart Co. Ct. J. nevertheless overturned the Provincial Court decision, which had awarded sole custody to the mother with joint guardianship, but not joint custody. I wonder whether the Provincial Court Judge had resisted joint custody precisely because of the history of disagreement on health care and education. Huddart Co. Ct. J. instead emphasized the history of cooperation with regard to parenting. Recall that this decision is one that Huddart J.A. distanced herself in *Robinson v. Filyk*, *supra* note 9.

³⁸ Shaffer, “Joint Custody Since *Kaplanis*”, *supra* note 3 at page 322.

³⁹ *Falvai v. Falvai*, 2008 BCCA 503, [2008] B.C.J. No. 2365.

suggested in settlement conferences,⁴⁰ in order to encourage parents to stop contesting custody and get on with post-separation parenting. Interestingly, joint guardianship is awarded not only in non-divorce scenarios in which the provincial *Family Relations Act* would be the governing statute, but also in claims for custody in divorce scenarios.

As we have seen, joint guardianship and joint custody are not always awarded together. In fact, B.C. decisions generally indicate an “unbundling”⁴¹ of the rights and responsibilities associated with custody, with a perhaps surprising variety of orders. Joint guardianship sometimes is ordered in tandem with a sole custody award and sometimes with a joint custody award. A “Master Joyce Model” of joint guardianship is sometimes used to clarify what is meant.⁴² Under this model, which is premised on one parent having primary care, each parent has the obligation to discuss with each other matters and decisions of a significant nature

⁴⁰ Justice Donna Martinson suggested in 2007 that there is a growing trend among judges in family law cases, particularly in the context of pre-trial settlement conferences, to emphasize the importance of shared parenting so that children have the benefit of contact with both parents: Donna Martinson, “Post-Separation Parenting – Submerged Gender Issues”, Paper for the National Judicial Institute Conference on Emerging Gender Issues – *Why Gender Equality Still Matters*, Toronto, November 28-30, 2007 (Toronto: Canada). Full evidence about issues such as conflict or abuse is not typically available at pre-trial settlement conferences, which raises concerns about any trend towards emphasizing shared arrangements.

⁴¹ The term “unbundling” is more commonly used in relation to legal services, offering parties who cannot afford full legal representation the option to choose legal services à la carte rather than having to opt between full and no legal services: Franklin R. Garfield, “Unbundling legal services in mediation: reflections of a family lawyer” (2002) 40(1) *Family Court Review* 76-86. A special issue of the *Family Court Review* covering issues of unbundled law was published in January 2002

⁴² http://www.familylaw.lss.bc.ca/resources/fact_sheets/guardianship.asp . Other models include the Charlton Model, which emphasizes the importance of cooperation and the Master Horne Model, which is similar to the Joyce Model but has no clause giving one parent final decision-making authority; guardianship is described primarily in terms of a parent's right to get information about the child and participate in decision-making. The Joyce Model is used more often in orders and agreements, according to J.P. Boyd (<http://www.bcfamilylawresource.com/03/0302body.htm>) but my study does not indicate it is used in a majority of joint guardianship awards.

concerning the child, including those concerning health (except emergency decisions), education, religious instruction, and general welfare. In the event the parents cannot reach agreement despite best efforts, the primary care parent has the right to make such decision. The other parent may seek a review under the afore-mentioned section 32. Each parent has the right to obtain information about the child from third parties.

Having identified the terminological minefield in British Columbia (which may or may not be resolved when the *Family Relations Act* is revised), I turn now to examine the trends in the B.C. Court of Appeal cases relating to joint custody.

Appellate Trends in B.C. 1996-2008

The Court of Appeal made some strong statements in *Robinson v. Filyk*, and a key question is whether the Court has followed its directives in favour of deference to trial judgements and against the use of presumptions of any sort. Another question is how the Court deals with difficulties with communication and cooperation, given its distancing from the approach of the Ontario Court of Appeal and from the use of any presumptions. Prior to addressing these questions, an overview of the decisions will reveal the “unbundling” of the rights and responsibilities associated with custody that characterizes the B.C. decisions, as well as the gender dynamics.

Unbundling of Custody

Perhaps the most interesting finding in this study is the need to carefully examine the actual orders under the labels “sole custody” or “joint custody” and the “unbundling” of custody that is revealed. Orders that appeared on their face to be for sole custody might actually involve aspects

commonly associated with joint custody, such as joint decision-making (often via a joint guardianship order). By the same token, orders for joint custody might relegate physical custody and/or decision-making authority primarily to one parent. This unbundling of custody relates to a trend that I have previously referred to as the enlargement of access and a diminishing of the authority associated with custody.⁴³ As Justice D.M. Smith has said, this narrower concept of custody has become increasingly prevalent.⁴⁴ The trend to “unbundle” custody may lend support to those who would argue that the language of “custody” and “access” is outmoded and should be removed in law reform processes. On the other hand, the fact that so many joint custody awards preserve primary residence or decision-making to one parent speaks to some degree of caution that B.C. courts signal about awarding “equal” rights to parents. Moreover, in a not insignificant number of cases, courts still decide that sole custody orders are warranted.

1. Sole Custody

About 58% of the cases reviewed involved orders for sole custody that were usually appealed by a parent who argued for sole or joint custody, or often, one of those in the alternative. In some cases, joint custody was barely discussed by the Court, the implication being that it was inappropriate. These decisions were made on the basis of the best interests of the child and/or a finding that the parents could not communicate or were not cooperative.⁴⁵ There was little evidence in these decisions of any presumption against joint custody when there is an inability to

⁴³ Susan B. Boyd, *Child Custody, Law, and Women's Work* (Don Mills: Oxford University Press, 2003) at 130.

⁴⁴ *Falvai*, *supra* note 39 at para. 37.

⁴⁵ E.g. *Pratap v. Pratap*, 2005 BCCA 71, where the trial judge found that it would not be in the best interests of the children to disrupt their lives by removing them from the situation (sole custody with the mother; generous access with the father) in which they had been comfortably settled for 2.5 years. The father's “controlling personality” was also a factor, but only one factor.

communicate; rather, evidence of inability to communicate was usually assessed and taken into account, albeit sometimes briefly.

Sole custody awards were not always traditional in form, although the majority were. A few cases awarded sole custody to one parent (more often, but not always, the mother) but then varied the exclusivity of sole custody by awarding an aspect of custody such as joint guardianship, or even primary care to another party. *Ness v. Ness*, for instance, awarded the mother sole custody, but granted joint guardianship to the father.⁴⁶ Joint custody was viewed as inappropriate because the parents lacked the proper degree of mutual deference and respect to create a harmonious environment for the children. A very unusual award was affirmed in *Metzner*, with sole custody to the father but primary care to the mother. Joint custody, on the other hand, was viewed as inappropriate because “the parties could not agree on anything.”⁴⁷ In two cases involving aboriginal children, sole custody was granted to one parent, with joint guardianship to the other parent.⁴⁸ This unbundling of the rights and responsibilities associated with traditional awards of sole custody dilutes the exclusive and primary control that sole custody connotes, often making the award more palatable to the other parent.⁴⁹

2. Joint Custody

⁴⁶ *Ness v. Ness*, 1999 BCCA 51, [1999] B.C.J. No. 262, per Lambert J.A.

⁴⁷ *Metzner v. Metzner*, [1997] 91 B.C.A.C. 241, [1997] B.C.J. No. 904, at para. 58.

⁴⁸ *L(A). v. K. (D.)*, 2000 BCCA 455, additional reasons in *L(A.) v. K.(D.)* 2000 BCCA 633; *M.(B.L.) v. M. (G.T.)*, 2003 BCCA 381.

⁴⁹ This was clearly not the case in the unusual *Metzner* decision, given that the mother appealed on the grounds that the award of sole custody to the father was not workable and went against the children’s best interests. This award also generated various questions with regard to child support, since the payor parent was also the custodial parent. *Metzner*, *supra* note 47.

Joint custody awards were made at trial in about 42% of the cases we reviewed, usually combined with joint guardianship. Only two of these cases were successfully appealed, and not on the joint custody award itself. Problems of communication rarely seemed to be the key issue in these appeals, which is not to say that problems of communication or about access never existed.⁵⁰ In one case, evidence of ability to communicate under a joint guardianship model worked against a mother's appeal against a joint custody award. A "Master Joyce" model of guardianship was involved under which the mother, who held the responsibilities of primary parent, had to consult with the father about significant decisions concerning the children.⁵¹ The mother's argument that the joint custody award should be overturned in favour of sole custody to her (to reflect the respective roles she and the father now played in the children's lives) failed because she was agreeable to extensive parental consultation (joint guardianship), plus her children were of an age (nine to eighteen) where, the Court of Appeal said, custody has little significance.⁵² A few appeals reflected a challenge by a parent who sought sole custody on the basis that the joint custody scheme was not workable,⁵³ or that the trial court did not give weight to the status quo.⁵⁴ In one case, the parents had joint custody of two elder children but sole custody of a younger child was awarded to the father; the mother applied unsuccessfully for an

⁵⁰ E.g. *McLean v. Russell*, (1999) 126 B.C.A.C. 203, (communication problems); *Ebrahim v. Ebrahim*, 2000 BCCA 398; (joint custody had been awarded in order to permit the mother to 'enforce' access! The appeal was about contempt of court.)

⁵¹ *Skrivanek v. Pow*, 2006 BCCA 239, [2006] B.C.J. No. 1087.

⁵² *Ibid.* at para. 5. The father now saw the children for some hours every other weekend, on both Saturday and Sunday. In other words, the mother clearly had the primary responsibility.

⁵³ *Carr v. Carr*, 2001 BCCA 415, [2001] B.C.J. No. 1219. It was specified that the children should live with each parent alternately.

⁵⁴ *A.(M.F.) v. A.(R.D.)*, 2002 BCCA 210, additional reasons at *A.(M.F.) v. A.(R.D.)*, 2002 BCCA 477.

extension of time to adduce fresh evidence about how joint custody had (or had not) worked out.⁵⁵

The vast majority of joint custody awards were modified by an award of primary residence or primary care to one parent and, notably, more appeals arose on these details rather than on joint custody itself. In one case, the mother appealed, unsuccessfully, a variation order specifying that each parent had primary residence for one child.⁵⁶ Sometimes the parents had initially agreed on the terms in a separation agreement, but often they were judicially imposed at some stage. Most of these “detail” appeals related to a relocation. For instance, one parent might want to overturn a primary residence order to the other parent to prevent that parent from moving with the child. Or, one parent might seek a primary residence order in his or her favour in order that s/he be able to move with the child.

The preponderance of appeals on collateral issues such as primary care rather than joint custody itself, even if problems related to communication or access existed or if relations seemed acrimonious,⁵⁷ indicates a certain acceptance of the normativity of joint custody – which sometimes had been agreed to by the parents themselves rather than judicially imposed. It also illustrates that awarding joint custody in an effort to diffuse adversarial stances between parents may not always succeed; the disputes simply shift to the details such as primary residence and relocation.⁵⁸

⁵⁵ *Pharaoh v. Brace*, 2000 BCCA 385, [2000] B.C.J. No. 624.

⁵⁶ *Rail v. Rail*, (1999) 129 B.C.A.C. 245, [1999] B.C.J. No. 2283.

⁵⁷ E.g. *McLean*, *supra* note 50, (communication); *C.L.R. v. R.A.R.*, 2006 BCCA 209 (acrimonious relations).

⁵⁸ Similarly, research in Australia, which eradicated the terms “custody” and “access” in the mid-1990s in an effort to diffuse acrimony, shows that litigation did not diminish, but rather increased on questions such as contact. It also became more difficult to protect the interests of vulnerable parties, particularly abused women and children. Helen Rhoades, “Posing as Reform: The case of

Gender and Appeals

All of the cases reviewed involved opposite sex parents, which is not surprising given how few custody disputes between same sex parents have, as yet, reached the courts. In a majority of cases (about 71%), the father was the appellant and, as we will see below, most appeals failed. His appeal often reflected his wish to alter an award of sole custody to the mother (mothers received the vast majority of sole custody awards) in favour of either sole custody to him or joint custody. Fathers also appealed orders of primary care or residence to mothers, who received a majority of such awards. Sometimes they challenged relocations by mothers or wanted to alter a joint custody award to a sole custody award in his favour.⁵⁹ Fathers successfully appealed three cases. Two fathers succeeded in having the trial judgement of sole custody to the mother overturned and in gaining custody.⁶⁰ The third father succeeded in having the case remanded to trial to determine whether sole custody to the mother was warranted or whether the separation agreement providing for joint custody, with primary residence to the father, should have been reflected in the order.⁶¹

Mothers generally appealed orders for sole custody to the father (sometimes related to relocation); awards of primary residence to the father or a refusal of relocation; or a Hague Convention return of a child to another jurisdiction. In one case, a mother succeeded in having an

the Family Law Reform Act” (2000) 14(2) Australian J. of Family Law 142; John Dewar and Stephen Parker,” The Impact of the New Part VII Family Law Act 1975” (1999) 13 Australian J. of Family L. 96.

⁵⁹ *Carr*, *supra* note 53, involved the latter scenario.

⁶⁰ *Van de Perre v. Edwards*, 2000 BCCA 167, [2000] B.C.J. No. 491; *Struck v. Struck*, 2003 BCCA 623. The decision in *Van de Perre* was overruled by the Supreme Court of Canada: *Van de Perre v. Edwards*, 2001 SCC 60.

⁶¹ *M.L.H. v. T.R.H.*, [2006] B.C.J. No. 521. Separation agreements were by no means always simply confirmed by the courts.

interim award of sole custody to the father overturned in favour of interim joint custody.⁶² In another she was able to obtain sole custody on appeal.⁶³

Although the gendered dynamics in these appeal cases might be seen as feeding the fire of the fathers' rights movement,⁶⁴ awards of sole custody and primary care to mothers must be seen against the backdrop of evidence that in most opposite sex parenting scenarios, parenting remains gendered. Mothers still assume more primary responsibility for children and most of the responsibility dimension that involves the planning, scheduling, orchestrating and coordination of family activities. The time that mothers devote to child care actually increased between 1986 and 2005, even as fathers become more involved in child care. Women also account for 89% of stay-at-home parents.⁶⁵ It should be no surprise that these patterns would often continue after separation or divorce. Nevertheless, fathers did receive several awards of primary residence or care, in addition to the numerous joint custody awards.

It must also be noted that in some cases, a father's behaviour (e.g. substance abuse, assaults) accounted for judicial resistance to awarding him joint (or sole) custody rather than any predetermined bias against paternal custody. For example, in three cases, (self-represented) fathers had actually refused to exercise access with their children because they had not been awarded custody. In *Dhaliwal v. Beloud*, joint custody had been ruled out by the trial judge due

⁶² *Testawitch v. Farquhar*, (1997) 34 R.F.L. (4th) 461, [1997] B.C.J. No. 2866 (BCCA).

⁶³ *Nunweiler*, *supra* note 30, discussed further below. Other successful appeals by mothers resulted in remands to the trial court.

⁶⁴ Richard Collier & Sally Sheldon, eds., *Fathers Rights Activism and Law Reform in Comparative Perspective* (Oxford: Hart, 2006); Jocelyn E. Crowley, *Defiant Dads: Fathers' Rights Activists in America* (Ithaca & London: Cornell University Press, 2008).

⁶⁵ Statistics Canada: Katherine Marshall, *Converging Gender Roles (Perspectives on Labour and Income)*, vol. 7, no. 7 (Ottawa: Ministry of Industry, 2006) 5-17 at 11; Kerry Daly, *The Changing Culture of Parenting. Contemporary Family Trends Series*. (Ottawa: The Vanier Institute of the Family, 2004).

to the inability of the parents to communicate. Although the mother had shown a more amenable and flexible attitude in the latter stages of proceedings, the parties continued to have a “high degree of antipathy” at appeal.⁶⁶ The father was also found to have terminated his access with his son in an attempt to gain custody. The father had been self-represented, which had clearly presented the Court with difficulties, but he could well afford counsel and the Court advised that he consider retaining a lawyer to assist with negotiations.⁶⁷ Somewhat similarly, in *E.J.P. v. E.A.K.*, the father had refused to exercise his supervised access. One of the orders he sought was: “For the judge to be held responsible for his actions in forcefully removing a loving father from the son's life, slandering the father in the son's eyes, and having this published on the internet, and violating the state's obligation to help parents protect their children.” Southin J.A. called him on his strategy: “... you told us this morning that you do not propose to attempt to implement the order because your position is that either there should be joint custody or you do not want this access.”⁶⁸ Given that he agreed, the Court decided that his mission was to retry the question of the sole custody award to the mother, and dismissed the appeal. In *Green v. Millar*, a father who challenged the constitutionality of the statutory provisions concerning custody and access in addition to wanting to set aside the order of sole custody and guardianship to the mother, refused to exercise access because it was supervised (due to the fact that the father imposed conflict on the child during access visits). He asked that “the parties be recognized in full equality at law as the parents” of their child, which the Court took to mean joint guardianship and joint custody.⁶⁹

⁶⁶ *Dhaliwal v. Beloud*, (1998) 107 B.C.A.C. 249, [1998] B.C.J. No. 1152 at para. 53.

⁶⁷ *Ibid.* at para. 54.

⁶⁸ *P.(E.J.) v. K.(E.A.)*, 2003 BCCA 520, [2003] B.C.J. No. 2379, leave to appeal refused: [2004] 328 N.R. 396, at para 8.

⁶⁹ *Green v. Millar*, 2004 BCCA 590, [2004] B.C.J. No. 2422, leave to appeal refused: *Green v. Millar*, [2005] 344 N.R. 193.

He had left the mother after he kicked down a bedroom door (she had locked herself in with the child), after which a restraining order was made and then varied to permit him supervised access. In the last two cases at least, the discourse of the father appellants resembled that used in the fathers' rights movement, which often takes a stance quite antagonistic to mothers.⁷⁰

Deference to Trial Judges: Only Occasional Reversals

The B.C. Court of Appeal generally appears to apply the principle of deference to trial judges: in only about 15% (7) of the 45 cases did the Court of Appeal reverse the trial decision or remand the case back for further hearing. As C.M. Huddart J.A. put it in *Bain v. Bain*, “this Court rarely interferes with a child care regime put in place by a trial judge. It may do so only when there is a material error, a serious misapprehension of the evidence or an error in law.”⁷¹ The scope of appellate review regarding interim orders is even narrower,⁷² and the court should maintain the status quo in the absence of reasons to the contrary.⁷³ Moreover, since appeals will be generally unsuccessful because of the narrow scope of appellate review, the Court has said that, provided parents have a long history of cooperating, it is usually in the best interest of the child that their disagreements be dealt with through an application for variation before the trial court.⁷⁴

⁷⁰ See Susan B. Boyd, “‘Robbed of Their Families’? Fathers' Rights Discourses in Canadian Parenting Law Reform Processes” in Richard Collier & Sally Sheldon, eds., *Fathers Rights Activism and Law Reform in Comparative Perspective* (Oxford: Hart, 2006) at 27-51.

⁷¹ *Bain v. Bain*, 2008 BCCA 49, [2008] B.C.J. No. 179 at para 21.

⁷² *F.(J.G.) v. B.(C.L.)*, 2003 BCCA 382, [2003] B.C.J. No. 1548, at para 11, per Huddart J.A. in chambers; see also *Testawitch*, *supra* note 62.

⁷³ *Leung v. Leung*, (1998) 44 R.F.L. (4th) 121, [1998] B.C.J. No. 2614 (BCCA), at paras. 11-12, 14. The Court also noted that the status quo can be defined in different ways, e.g. where the children have resided versus which parent had day-to-day care. Moreover, once parents separate, ideal arrangements are not always possible. MacFarlane J.A.

⁷⁴ *M.(B.L.) v. M.(G.T.)*, 2003 BCCA 381, [2003] B.C.J. No. 1549.

Given its strong statement against presumptions, one might have expected that the Court of Appeal would be inclined to overturn trial decisions that ventured too close to a legal or factual presumption. But rarely did it do so, reflecting the dominance of the principle of deference to the orders of trial judges. The reasons for overturning mostly related to a lack of sufficient evidence to ground the order, or to improper weight given by trial judges to material evidence. An example of the latter was the well known decision overturning a sole custody award to the (single) biological mother Kimberley Van de Perre, with joint guardianship to the biological father Theodore (Blue) Edwards, who was married to a third party. In a controversial decision subsequently overturned by the Supreme Court of Canada,⁷⁵ the BC Court of Appeal overturned the trial judge because it found that the judge had relied excessively on negative factors related to the father. The appellate court not only added Edwards' wife as a party but granted joint custody to her and to Edwards, with joint guardianship and access to the mother. The Court also laid some emphasis on the fact that the child was mixed race and might benefit from living with the father, who was African American.

In one case, *Nunweiler v. Nunweiler*, involving a mother's relocation, the Court of Appeal did address problematic presumptions in its finding of reversible error in the trial judge's (mis)apprehension of the facts and evidence. Madam Justice Saunders noted that an approach that considers the status quo to be the preferred position should a convincing case for a move not be made re-inserts a presumption (in favour of the status quo) into custody discussions. The Court also found this approach to be contrary to the instruction in *Gordon v. Goertz* to respect the view of the parent wishing to relocate, barring an improper motive.⁷⁶ The trial judge had

⁷⁵ *Van de Perre*, *supra* note 60.

⁷⁶ *Nunweiler*, *supra* note 30 at para. 30, citing *Gordon*, *supra* note 16.

attempted to determine the mother's residence by awarding her joint custody and primary residence only if she were to move back to the town where the father lived. Otherwise the father would be awarded sole custody. The Court of Appeal found that the trial judge had not fully considered the child's best interests and took the rare step of substituting an order rather than ordering a new hearing. Taking into account that the trial judge had recognized the appropriateness of the child residing primarily with her mother, the Court substituted an order of sole custody with the mother, without geographic restriction, combined with generous access to the father and joint guardianship to confirm his legal responsibility.⁷⁷

No Presumptions

The strong statement by the B.C. Court of Appeal in *Robinson v. Filyk* against presumptions either in favour or against sole or joint custody has not been challenged at the appellate level. Indeed the Court of Appeal applauded a trial judge for not relying "upon any presumption in favour of the mother as a primary caregiver".⁷⁸ In a dissent in *Rail v. Rail*, however, Prowse J.A. indicated some push-back on Huddart J.A.'s reiteration for the majority that "[o]ne cannot begin with presumptions with articulated premises."⁷⁹ The issue in this case was not joint custody *per se*, but rather whether the son should have his primary residence with the father instead of the mother. (Permanent residence with the mother had been agreed under a joint custody and guardianship arrangement for the two children). Prowse J.A. found two errors made by the

⁷⁷ See also *Falvai*, *supra* note 39, (a case that falls outside the time frame of our study), in which a mother succeeded in appealing a condition of a sole custody order requiring her to reside in the community where the father lived.

⁷⁸ *Langtry v. Langtry*, (1997) 85 B.C.A.C. 284, [1997] B.C.J. No. 264 (BCCA) at para. 7, per Goldie J.A.

⁷⁹ *Rail*, *supra* note 56.

chambers judge and would have retained the status quo. While she stated clearly that it could not be disputed “that the court must not commence a best interests analysis with presumptions in favour of the status quo or of the primary parent, that is not to say that those factors are not entitled to significant weight in determining where the best interests of the child lie.”⁸⁰ She emphasized that the seven year old son had lived primarily with his mother and his sister since he was 10 months old and that, although the relationship with his father was a good one, it had not been put to the test on a day-to-day basis.⁸¹ In a prefiguring of the Supreme Court of Canada warning in *Van de Perre v. Edwards*, Prowse J.A. also stated that she could not see how the fact that the father could offer a two-parent home, while the mother could not, could tilt the balance in favour of moving the son out of his mother’s home, given the strong support network the mother had in place involving grandparents and other competent caregivers.⁸² The majority decision by Huddart J.A. acknowledged that factors such as maintenance of the status quo, the tender years doctrine and the premise that courts should avoid splitting siblings were not rules of law, but were considerations to be taken into account in the context of all the factors that must be considered when determining best interests of a child whose parents cannot agree.⁸³

Some appellate cases implicitly referenced the dangers of presumptions, but rarely were they explicitly addressed. In *M.J.D. v. J.P.D.* the Court emphasized a trial judge statement that a lack of co-operation does not always lead to a refusal of an order of joint custody, but affirmed the trial holding that where co-operation on any controversial matter appears unlikely, joint

⁸⁰ *Ibid.* at para. 34, per Prowse J.A. in dissent.

⁸¹ *Ibid.* at para. 38, 39.

⁸² *Ibid.* at para. 49. See also *Van de Perre*, *supra* note 60.

⁸³ *Ibid.* at para. 18, per Huddart J.A.

custody might be unwise.⁸⁴ In *Cross v. Cross*, Hall J.A. affirmed a variation of a joint custody award with alternating blocks of time with each parent, in favour of sole custody to a mother, citing “an unfortunate history of controversy over the care and custody of their child”.⁸⁵ Although he had found that both husband and wife were loving and worthy parents, he noted that it “has been observed in other cases that joint custody is usually only feasible where there is a fairly highly level of agreement between the parents” and in this case it had been demonstrated that there was “a quite low level of agreement.”⁸⁶ Some might see a hint of a presumption in this language.

Communication and Co-operation

The Ontario Court of Appeal decision in *Kaplanis* has not yet been cited by the B.C. Court of Appeal, as of November 2009, which may not be surprising given that, as we saw above, the B.C. Court earlier distanced itself in *Robinson v. Filyk* from the cautious approach to joint custody endorsed by the Ontario Court when there is evidence of inability to communicate. In one case in our study, *Carr v. Carr*, the appellant father challenged an award of joint custody, with children living with each parent during alternate weeks. He invoked the 1994 B.C. Court of Appeal decision in *Stewart v. Stewart*, standing for a cautious approach to joint custody.⁸⁷ The Court did not state that *Stewart* had been altered by *Robinson v. Filyk*, but dismissed the appeal because a new custody and access report reported only relatively minor difficulties in communication, whereas the children had adjusted well to the routine and appeared to be

⁸⁴ *D.(M.J.) v. D.(J.P.)*, 2001 BCCA 155, [2001] B.C.J. No. 378.

⁸⁵ *Cross v. Cross*, (1997) 33 R.F.L. (4th) 387, [1997] B.C.J. No. 2758 (BCCA) at para. 3.

⁸⁶ *Ibid.* at para. 4.

⁸⁷ *Stewart*, *supra* note 8.

benefiting from the schedule.⁸⁸ Arguably this approach reflected the spirit of *Robinson*, which directs that the evidence must be looked at carefully, rather than making assumptions based on the quality of communication.

Despite its strong position against presumptions, the B.C. Court has paid attention to the ability or inability of parents to communicate or cooperate. Sometimes a determination of inability to communicate was based on evidence that one parent has an anger management problem or has assaulted the other. For instance, in *Javid v. Kurytnik*, the trial judge found that an order for joint custody would not be in the children's best interests. The father had organized his time in order to be able to be with the children as much as possible, but had not dealt with his anger management problems and he attributed all problems to the mother or others, rather than himself. The Court of Appeal found that "the evidence is overwhelming that these two parents could not communicate sufficiently to permit them to co-parent two young girls."⁸⁹ It also stated that: "Whatever reasons underlie their parents' inability to communicate sensibly and to cooperate in caring for Emma and Maxwell, the parents' conflict is real and continuing".⁹⁰ In *Bain v. Bain*, the Court stated that the evidence was overwhelming that the parents could not communicate sufficiently to permit them to co-parent the two young daughters.⁹¹ The Court did not state specifically why, but a restraining order prohibiting the father from having contact with

⁸⁸ *Carr, supra*, note 53 at para. 10. Somewhat troubling is that the second custody and access report stated that "[w]hatever strain the children may experience could be attributed to the ongoing tensions between their parents, rather than arising from the custodial schedule", apparently ignoring that studies indicate that such strain can pose risks for children in joint custody arrangements if their parents are in high conflict: Shaffer, "Joint Custody, Parental Conflict" *supra* note 3 at 309.

⁸⁹ *Javid v. Kurytnik*, 2006 BCCA 565, [2006] B.C.J. No. 3195, leave to appeal refused; (2007) 375 N.R. 389, at para. 28

⁹⁰ *Ibid.* at para. 26.

⁹¹ *Bain, supra* note 70 at para. 18.

the mother and entry on the property where she was residing was kept in place. The mother was not concerned that the father would be physically violent with the children, but there were references to the volatility of his behaviour and “the nasty difficulties during some access visit exchanges.”⁹² The trial judge had found that the father had threatened and intimidated the mother. In *Ness v. Ness*, the trial judge had found that the mother expressed a continued fear about Mr. Ness and referred to an earlier restraining order, although the Court of Appeal simply referred to a lack of the requisite degree of mutual deference and respect to warrant joint custody.⁹³

In her Ontario study, Shaffer found that in their focus on communication and cooperation, some post-*Kaplanis* decisions tend to lose sight of the point that joint custody should only be considered where both parents have a strong claim to custody based on the relevant statutory factors speaking to children’s best interests, and should not be ordered if it is clearly in the children’s best interest to be in the custody of one parent.⁹⁴ Problematic parental conduct can be overlooked in the focus on communication and cooperation that *Kaplanis* generated. Possibly the last three B.C. cases discussed reveal a similar tendency but a study of trial decisions will be necessary in order to shed proper light on B.C. trends. However, in another case involving abuse, *Narayan v. Narayan*, the Court of Appeal dismissed the appropriateness of joint custody/guardianship without making communication the key. The Court referred back to the trial judge’s rejection of Mr. Narayan’s claim for joint guardianship, stating:

This is not an appropriate case for an order for joint custody or joint guardianship. The defendant has admitted assaulting the plaintiff in the past,

⁹² *Ibid.* at para. 19.

⁹³ *Ness*, *supra* note 46 at para. 17, per Lambert J.A.

⁹⁴ Shaffer, “Joint Custody Since *Kaplanis*”, *supra* note 3.

he has an obvious animosity to her and blames her without justification for his problems and he has a demonstrated lack of reliability. ...⁹⁵

The B.C. Court of Appeal found no basis for interfering with this decision, although it left it open to the parties if they wished later to agree to joint guardianship.

Other cases on (in)ability to communicate include *Green v. Millar*, where the trial judge had found that the father's attitude made it impossible for the parties to co-operate as joint custodial parents. The father had also alleged that the mother was psychotic, which was unfounded in the eyes of the trial judge.⁹⁶ In *Chan v. Chan*, the trial judge had found that poor communication between the parties was clear in evidence and likely to continue in the future.⁹⁷

Conclusion

It appears, then, that the Ontario and the B.C. Courts of Appeal differ somewhat in their approaches to joint custody, with the Ontario Court of Appeal being more cautious while the B.C. Court of Appeal is more neutral as to what evidence might ground a determination of whether joint custody was in the best interests of a child. Both Courts – of necessity, given governing legislation and Supreme Court of Canada precedents – accept that the only consideration in custody and access cases is the best interests of the child, and neither Court applies presumptions *per se*. However the Ontario Court has come closer to an approach that says that without clear evidence of ability to cooperate, a joint custody award is inappropriate.

One could argue that without a strong cautionary statement in a case such as *Kaplanis*, and with a strong directive to look carefully at the evidence in each case in determining an

⁹⁵ *Narayan v. Narayan*, 2006 BCCA 561, [2006] B.C.J. No. 3178, at para. 18.

⁹⁶ *Green*, *supra* note 69 at para 29.

⁹⁷ *Chan v. Chan*, (1997) 28 R.F.L. (4th) 426, [1997] B.C.J. No. 1105 (BCCA), at para 4, per Hollingrake J.A.

individual child's best interests, the B.C. Courts are more able to dispense individual justice. After all, Huddart J.A.'s instruction to find a child's best interests within "the practical context of the reality of the parents' lives and circumstances"⁹⁸ comes close to suggestions from many law reform minded scholars who seek to ground decision-making about children in their familial and social realities, including the history of care, any abusive relationships, and so on.⁹⁹ However, in a society and legal system that increasingly favours shared parenting, the lack of a cautionary precedent in relation to joint custody can equally lead to complacency about its appropriateness in circumstances that either generate risk (to a parent or a child) or are simply not conducive to consensual decision-making. Some parents, unfortunately, require clear direction from courts in order to avoid ongoing disputes and court applications. It must be remembered that the minority of parents who appear before judicial panels are, of necessity, in some degree of conflict – sometimes high conflict – and that some of these cases involve spousal abuse. As we know from Shaffer's social science review, children do not fare better after divorce in joint custody arrangements than they do in sole custody and some children may fare worse, including those in high conflict families.¹⁰⁰ In addition, parental conflict significantly increases the risk of reduced well being on the part of children who experience their parents' divorce. Joint custody awards should therefore be awarded only when the evidence shows that they are appropriate.

On the whole, it appears that joint custody awards that have reached the B.C. Court of Appeal thus far are more about joint decision-making than equal shared time with children.¹⁰¹ As

⁹⁸ Huddart J.A. in *Robinson v. Filyk*, *supra* note 21.

⁹⁹ For one example, see Carol Smart & Bren Neale, *Family Fragments* (Cambridge: Polity Press, 1999) at 192 et seq.

¹⁰⁰ Shaffer, "Joint Custody, Parental Conflict" *supra* note 3.

¹⁰¹ This finding sheds some light on what lies beneath the increasing rate of joint custody awards in Canadian divorce courts. 2003 statistics indicate that in 44% of court-determined custody

such, the question of what conditions are requisite for reasonably consensual decision-making is key. The awarding of joint guardianship in some cases where joint custody was deemed inappropriate is somewhat puzzling in this regard, to the extent that joint guardianship is, for most purposes, very similar to joint custody. This pattern means that the proportion of joint custody awards is higher than might be thought, although apparently not the proportion of shared parenting. Perhaps the existence of joint guardianship in B.C., with the potential for orders on the “Joyce Model”, makes it possible for judges to craft arrangements that at least to some degree control any potential for inappropriate wielding of control via the power given through joint guardianship or joint custody. An upcoming review of B.C. trial decisions dealing with joint custody will hopefully shed more light on how joint custody (and guardianship) is being dealt with in the B.C. courts and whether adequate attention is being paid to whether such orders are appropriate, including the ability to communicate and cooperate. Preliminary evidence indicates that when joint custody is requested by one party, a majority of awards were in favour of that claim, particularly when joint guardianship orders are added. This evidence could support an argument that British Columbia has departed from the more cautious approach in Ontario, although it is too soon to tell.

cases in the Canadian divorce context, the outcome is an order for joint custody, which is more than double the number from the mid-1990s and four times the figure when compared to the late 1980s: Statistics Canada, *Women in Canada: A Gender Based Statistical Report*, 5th ed. (Ottawa: Target Group Project, 2006) at 40.