

**Remarks of the Right Honourable Beverley McLachlin, P.C.  
Chief Justice of Canada**

**Reaction and Pro-action:  
Bringing Family Law Advocacy Into the 21<sup>st</sup> Century**

**Family Law Dinner  
Ontario Bar Association  
Toronto, Ontario**

**Thursday, January 24, 2002**

Thank you for your generous welcome. I appreciate it.

**INTRODUCTION**

Every lawyer will say at one time or another that his or her work is the most demanding, most critical, and most important to society, no exceptions. Judges and legislators will express comparable sentiments. All of us will be right because what we do and say affects the lives not only of clients and litigants but also of all Canadians in most fundamental, practical, and specific ways. But of all the matters the law deals with, none touches Canadian men, women and children more directly or more profoundly than family law. That is why I am particularly pleased to have the opportunity to address family law lawyers tonight.

My topic tonight is "Reaction and Pro-action". We in the justice system tend to see ourselves as reactive. This is certainly true of family law. Couples and families find themselves in difficulties. They bring these difficulties to lawyers, and often the courts. Lawyers and courts help them cope with the process of working through their problems, finding solutions, and re-establishing their lives. We take what we find and respond. We are, in a word, reactive.

But there is another way to see our work, and this is what I want to leave with you tonight. It is not enough that we in the justice system be reactive. To do our jobs properly, we must also be pro-active. Our task is to solve peoples' problems, yes. But we can only really solve those problems in a thorough way if we take pro-active steps to ensure that family law and procedure

are modified to keep pace with changes in society. Pro-active means progressive, innovative thinking and action that strives to meet the actual problems in the lives of the men, women and children the law serves. Family law is perhaps closer to the basic norms and values of our society than any other area of the law. And if it is to be effective, it must reflect them.

The pro-active side of practice, as it relates to the substance of the law, is strikingly illustrated by four substantive areas of family law — family violence, property rights, spousal support, and children's issues. It is equally evident on the procedural front. Both in substance and in process, family law has developed pro-actively in recent decades to meet the changing needs of Canadians. I am immensely proud of everything we who are involved in the practice and administration of justice have accomplished in the area of family law over the past 30 years. But I am also sharply aware, as no doubt you are, that there is much yet to be done.

## **I. Substantive pro-action**

### **(i) Family Violence**

Let me turn first to family violence. For centuries, the law trained its sights on violence outside the home. Assaulting, wounding, or maiming a stranger in the street brought the full force of the law's investigative and penal apparatus into action. The same was true for violence perpetrated by strangers inside the home.

But the law took a different view when family members wreaked havoc on one another. Only in cases of most grievous harm, such as murder, did the law involve itself. A cone of silence was dropped over much of the rest, effectively muffling the cries of the victims.

The silence extended even to reports of child sexual abuse. As Nicholas Bala and Sara Edwards of Queen's University noted in their 1999 report, "Legal Responses to Domestic Violence in Canada and the Role of Health Care Professionals," such reports were dismissed as exaggerated or fabricated or simply quietly ignored.

The law, faced with family violence, often chose to pretend that it didn't exist. It was not even reactive, much less pro-active. Yet the problem, however hard we tried to ignore it, was — and remains — all too real. The evidence shows that almost one-third of women in Canada are assaulted at least once by a husband or intimate partner. The evidence also shows that children are far more likely to be abused or killed by a parent or trusted adult than by a stranger.

The consequences of family violence are devastating to the individuals involved and to society. All victims of violence suffer personal pain and humiliation, but victims of domestic violence often suffer the added burdens of gnawing, unceasing fear, as well as guilt and shame. The bitter fruit is individuals consumed by anger and distrust.

As a society, we too pay a significant price. Violence begets violence. Our courts and prisons are full of people who perpetuate the cycle. We cannot precisely calculate the direct and indirect costs of dealing with the social and criminal consequences of domestic violence. But we know they are very high.

So, during the past few years, we have confronted family violence. We have stopped ignoring it and have put it on the social agenda. We have acknowledged that inequality in the family is the dark heart of domestic violence. We have accepted that it crosses all socio-economic lines and exists in all forms of family relationships. We have come to understand that anyone at any age, including the elderly, can be at peril. Finally, we have come to understand that sexual, financial, and emotional abuse can be as devastating as physical abuse and that all involve issues of power and control. In view of all this, we have decided that we must not only react to the sequella of violence, but take pro-active steps to minimize it.

An important step was to break the privacy veil. As Chief Justice Antonio Lamer wrote, privacy must not be allowed to trump the safety of all members of the household. As a result, police now investigate allegations of domestic abuse more promptly and frequently.

We took another step forward when we broadened our view of what constitutes a criminal offence. Before 1983, men who forced their wives to engage in sex without their consent could

not be charged with rape. Now, it is possible. Stalking, once dismissed as inconsequential, is recognized as a serious threat to personal security. Since 1993, the *Criminal Code* has permitted prosecution of the offence of criminal harassment to deal with this injurious behaviour.

A third critical step was the realization that crimes of domestic violence must be evaluated not just in terms of the physical context of who did what to whom but in the full context of their social and psychological realities. Court decisions on family violence now take this reality into account: *R. v. Lavallee*, [1990] 1 S.C.R. 852. Dealing with the social and psychological aftermath of family violence is now the norm. Lawyers, including family law practitioners, now routinely collaborate with the courts, police, legislators, educators, health care professionals, clergy, and social agencies, to reduce the incidence and impact of family violence.

Lawyers representing separating parties play a special role, working with people on the front line, like the staff of women's shelters, to assess the risk to women and children fleeing abusive relationships and help them develop "safety plans," especially during the critical post-separation period. According to Statistics Canada, marital separation substantially increases the rate of spousal homicide for women. Between 1991 and 1999, when a woman was killed by her husband, it was eight times more likely that she was estranged from him than still living with him.<sup>1</sup> Preventing these tragic consequences by providing essential support in the post-separation period is, in the best sense of the word, pro-active. Another example of pro-active conduct is the creation of courts specializing in cases of domestic violence. Ontario is a leader in this area. Organizations such as the Woman Abuse Council of Toronto give efforts like these high marks. So would I.

Slowly, through a pro-active stance, the situation seems to be improving. The most recent statistics show that while the reporting of domestic violence has increased, its overall incidence is diminishing.<sup>2</sup> The law's attack on family violence is, it appears, having an impact. More and more people are getting the message — violence in the home is unacceptable, and its victims

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must be helped. We are a long way from eradicating family violence. But through a pro-active approach to the law, we have made a start.

## **(ii) Property Rights**

The evolution of the law of spousal property rights is a second area of family law that illustrates a move from reactive to pro-active thinking. The fundamental problem poses a Solomonesque dilemma: how to ensure that family property — often limited — is divided in a way that respects the contribution and economic interests of both former partners in the marriage.

As in the area of domestic violence, the approach of the law as recently as 30 years ago, was simply to ignore the property rights of separating spouses. The husband held the property in his name, and divorce did not change that. Even if a wife had spent a life-time working to build up the family assets, when the marriage ended she was left with nothing but the right to claim maintenance.

*Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 is rightly seen as the first case that directly challenged society's assumptions about what is right and just in dividing property. Mrs. Murdoch had worked with her husband for 25 years to buy and build the family ranch. When the marriage ended, she did the then unthinkable — she asked the courts to recognize her claim for what she and many Canadians saw as a fair share of the family property in return for the years of work she had contributed to acquiring it and building its value. Disappointment followed. Mrs. Murdoch fought her battle to the Supreme Court, only to be told that there was simply no way the law could recognize any right of property except that of her husband. Justice Laskin wrote a spirited dissent, to no avail. The majority decision in *Murdoch* was reactive, accepting the *status quo* of past law. Justice Laskin's dissent was eloquently pro-active, confronting the changing reality of equality of the sexes and women's new role in the economy.

The Supreme Court's decision may have marked the end of Mrs. Murdoch's saga. But it was only the beginning of the larger legal story. The decision galvanized Canadians, who reacted with a mix of astonishment and shock to the idea that married women had no property rights in the

family home, farm or business. Public pressure was brought to bear. In short order, every province enacted laws recognizing the right of spouses to share family property, regardless of who holds legal title. The *Divorce Act* was amended to the same effect. It was truly a revolution in the property rights of married couples.

But the battle was not yet won. The next stage brought the remedy of constructive trust for unmarried couples and a recognition that unpaid domestic work counts in property division. In *Peter v. Beblow*, [1993] 1 S.C.R. 980, the Supreme Court awarded the plaintiff the family home as a fair approximation of the value of her household services.

As society began to recognize the legitimacy of same-sex relationships in the 80s and 90s, the focus shifted to same-sex couples. In *M. v. H.*, [1999] 2 S.C.R. 3, the Supreme Court ruled that the Ontario *Family Law Act* discriminated against same-sex couples by excluding them from its support provisions. Lawyers and courts are still working on harmonizing the law with this latest social development in the family.

The variation of property orders to conform to changed circumstances in the parties' lives continues to raise issues.<sup>3</sup> The impact of pension division — an important part of many couples' wealth — on property settlements; recently dealt with in *Boston v. Boston*, raises recurring questions. Dividing pensions is an area where lawyers can play a positive and pro-active role. Unfortunately, despite recommendations from bodies like the Actuarial Society, some legislatures have not yet set clear rules for pension division. I know lawyers welcome the opportunity to argue before the Supreme Court, and, personally speaking, I enjoy listening to you. But for the sake of the men, women and children affected, the utmost possible clarity in legislative direction should be our goal. The pro-active thinking that we have become accustomed to in family law remains as necessary as ever.

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<sup>3</sup> See e.g. *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Caron v. Caron*, [1987] 1 S.C.R. 892; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; and *Boston v. Boston*, 2001 SCC 43.

### **(iii) Spousal Support**

In dealing with property rights is challenging, dealing with spousal support is even more difficult. Property, at least, can be appraised and valued in concrete terms. What constitutes fair valuation and division is often fiercely disputed, but agreeing on a formula for spousal support sometimes makes those arguments seem like child's play.

Here too, pro-active approaches have radically altered the law during the past decades. In an era when women were viewed as dependent and divorce as immoral, allowing the wife a modest monthly stipend seemed adequate. "Maintenance" — with its connotation of just getting by — was the term commonly used to describe the divorced husband's legal obligation. But such a view was incompatible with an era that regarded women as independent and equal, and no longer stigmatized divorce.

Gradually, over the years, pro-active thinking has brought the law of spousal support — note the new improved name — more into line with modern social norms. The *Divorce Act* and provincial family property acts were modified to recognize that to determine spousal support justly, courts must take into account a variety of factors, like the needs and means of the parties, the ability of each party to be financially independent, and the respective contributions of the parties to the marriage and the family's financial status. The courts helped to ferret out stereotypes that even after these changes short-changed many stay-at-home wives.

In *Moge v. Moge*, [1992] 3 S.C.R. 813, the Supreme Court rejected the idea that such women are "expected" to become economically self-sufficient within a certain time, and elucidated the relationship between the traditional housewife role and long-term economic disadvantage. It also clarified another point — that when balancing the objectives enunciated in the *Divorce Act*, no single objective should be considered more important than the others.

Again, in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, a case involving a disabled plaintiff, the Court emphasized that it is important to look at every relationship on its individual facts and merits, and unfair to apply blanket solutions.

The law of spousal support has moved a long way toward true equality. But problems remain. Adjusting support to reflect changes in circumstances remains the single largest issue. A current concern is what happens when the claimant spouse has released her rights for good consideration in a valid and fair agreement. On the one hand stands the need for fair adjustment. On the other stands the need for certainty and finality in divorce settlements. Later this year, the Court will deal with this issue when it hears *Miglin v. Miglin*, [2001] S.C.C.A. No. 328. Questions such as these admit of no easy answers. But if we approach them in an objective and creative way, we can hope to find legal solutions that mirror our society's needs and sense of justice.

#### **(iv) Children's Issues**

Children are often the unheard victims of family breakdown. At one time, that was seen as normal and unobjectionable. The Victorian maxim, "Children should be seen but not heard", applied in the courts as elsewhere.

As we all know, family breakdown can victimize children in many ways. It can effectively deprive them of a parent. It can have them living in poverty. It can result in abuse. And it does all this without allowing them an adequate voice. Where children's rights are at stake, perhaps more than anywhere else, reactive legal solutions are inadequate. It takes pro-active attitudes in lawyers and judges to bring children's problems to light and to find solutions to them.

For many years, child support norms were woefully low, in relation to the actual cost of raising a child. This approach favoured the payor spouse, usually the father, at the expense of the child. In recent years, however, lawyers, judges and governments have recognized this difficulty, along with the other major source of injustice in the area of child support — non-payment.

National attention focussed (sic) on child support in the wake of the Supreme Court's decision in *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, which held that a custodial spouse could not deduct tax payments from her income tax. (The payor spouse could.) Subsequently, Parliament changed this law.

In 1997, the federal government also introduced Child Support Guidelines that changed the way child support was dealt with throughout Canada. Since then, these Guidelines have been mirrored in every province's legislation. It's now easier, we hope, to determine appropriate levels for child support and tax compliance.

Sadly, enforcing court orders for payment of child support remains a major problem. Reliable statistics are hard to get, but it appears that between 30 per cent and 60 per cent of cases are in arrears. Many provinces have enforcement schemes that provide for collecting money at source where there is a history of delinquency. But delays remain a problem. In 1997, Parliament amended the *Family Orders and Agreements Enforcement Assistance Act*.<sup>4</sup> Advocacy groups for battered women, children of divorced parents, non-custodial fathers, and grandparents have been disputing its merits ever since. In a country as rich as ours, we should not have children living in poverty. Yet sadly, statistics tell us that is exactly how many are forced to live. This is an area where we are in desperate need of more pro-active thinking and — dare I say — a little more pro-active action.

Child custody remains challenging. In the old days, things were simple. Mother got custody. Period. But that approach does not always square with new norms of equality and parenting and the realities of our multicultural society. Issues like culture, race, mobility, and new family structures become the flashpoints for family law during the next decade. Ready or not, we will have to deal with them. The test — the best interests of the child — is malleable enough to accommodate a host of solutions. The problem is how to apply it in the complex multiplicity of family situations our society produces. What happens when parents have very different ideas about the child's religious education, an issue raised in *Young v. Young*, [1993] 4 S.C.R. 3. Again, should the child's cultural and racial heritage have an impact on who gets custody? Some provincial legislators have answered this question in the affirmative.<sup>5</sup>

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<sup>4</sup> R.S., 1985, C. 4.

<sup>5</sup> See e.g. *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46.

The decisions in *N.H. v. H.M.*, [1998] B.C.J. No. 221 and *Van de Perre v. Edwards*, 2001 SCC 60, suggest that while race may be a factor, it is only that, and may be outweighed by other considerations in the child's best interests.

Yet another problem is adjusting custody to changes in parents' lives. In our global economy, people move around the world with ease. Should the child move too? And if she does, what about access to the non-custodial parent? *Gordon v. Goertz*, [1996] 2 S.C.R. 27 dealt with the issues of mobility of a custodial mother who moved to Australia. The Supreme Court rejected the view that there was a presumption in favour of the custodial parent. The test remains the best interests of the child. These cases illustrate that.

In child custody, as in other areas of family law, we have moved from reactive acceptance of the *status quo* to pro-active recognition of the changing reality of the family in modern society.

## **II. PROCESS AND FAMILY LAW ADVOCACY IN THE 21ST CENTURY**

I have argued that pro-active thinking is essential if we are to keep the substance of family law instep with the changing needs of society. This is also true of process. We all know that the fairest laws may produce grave injustices if the process is flawed.

The old, reactive approach to family law procedures simply treated family break-up like any other legal dispute. Get a lawyer and go to court was the universal solution we offered the wounded, newly-separated spouse. And when you get there, don't expect any special rules or accommodations. You'll get the same process as you would in an insurance dispute.

The results of this strict adversarial approach were often unfortunate in family law cases. First, it was slow, often leaving the lives of men, women and children in legal and emotional limbo for literally years. Second, it was costly, using up precious resources that would have found better uses in providing housing and clothing for children and parents. Third, it tended to heighten the animosity between the parties. Instead of reconciling themselves to the past and getting on with

their futures, parties too often became mired in permanent sinkholes of hatred and acrimony, which in turn impacted on their children.

Slowly, over the past few decades, we have been modifying procedures for family law disputes. Old-style litigation is still available. But early mediation and counselling are being introduced in many jurisdictions, with the aim of getting disputes about property and custody resolved, quickly, cheaply, and without undue rancor.

In addition, a legal practice known as collaborative lawyering, which started in the United States during the early 90's, has moved north and is starting to spread through parts of Canada. A collaborative law group exists in British Columbia and Saskatchewan, and groups are being created in Toronto, Calgary and other cities. Last week's edition of *The Lawyers Weekly* carried a story on collaborative lawyering as does *Maclean's* in this week's edition. The aim is to get lawyers and clients together in creative problem-solving, instead of pulling in opposite directions, as may happen in conventional litigation.

On the court side, procedures have also been changing. In many jurisdictions, special settlement-oriented rules govern family litigation. Changes in case and statute law now permit children to testify, and to do so with less trauma. Unified Family Courts have been established, that cut through the jurisdictional divides of different courts and provide "one-stop shopping". Courts are constantly striving to find ways to make family litigation cheaper, speedier and above all, consistent and just.

Yet here again, all is not won. For all the pro-active steps that have been taken, much more remains to be done. Providing affordable legal counselling presents a huge and growing challenge. Lawyers and courts must work together to stem what Chief Justice Richard Scott of the Manitoba Supreme Court describes as the increasing flow of "lawyers litigants".<sup>6</sup> And insofar as lawyerless litigants cannot be avoided, we must assist them. In Alberta, a publically (sic)

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<sup>6</sup> See "Lawyers litigants slow wheels of justice," by Kirk Mackin, *The Globe and Mail*, January 14, 2002, page A1.

funded advisory service operates out of the Edmonton courthouse to advise family "in-person" litigants. A creative approach. We need more like it.

## **CONCLUSION**

All of us must use all our intelligence and our hearts to bring family law into the 21st century with pride, honour, and respect. Above all, we must be pro-active. It is our task to ensure that family law continues to meet the needs and expectations of our changing society. Our track record in recent decades, both in terms of substance and procedure, is impressive. But we cannot rest on our laurels. Societal changes continue to demand progressive, innovative thinking in family law, from lawyers, legislatures and judges. No responsibility could be more important. I am confident that with your energy and leadership, we will succeed, and that Canadian families will be the better for it.

Thank you.

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But the battle was not yet won. The next stage brought the remedy of constructive trust for unmarried couples and a recognition that unpaid domestic work counts in property division. In *Peter v. Beblow*, [1993] 1 S.C.R. 980, the Supreme Court awarded the plaintiff the family home as a fair approximation of the value of her household services.

As society began to recognize the legitimacy of same-sex relationships in the 80s and 90s, the focus shifted to same-sex couples. In *M. v. H.*, [1999] 2 S.C.R. 3, the Supreme Court ruled that the Ontario *Family Law Act* discriminated against same-sex couples by excluding them from its support provisions. Lawyers and courts are still working on harmonizing the law with this latest social development in the family.

The variation of property orders to conform to changed circumstances in the parties' lives continues to raise issues.<sup>3</sup> The impact of pension division — an important part of many couples' wealth — on property settlements; recently dealt with in *Boston v. Boston*, raises recurring questions. Dividing pensions is an area where lawyers can play a positive and pro-active role. Unfortunately, despite recommendations from bodies like the Actuarial Society, some legislatures have not yet set clear rules for pension division. I know lawyers welcome the opportunity to argue before the Supreme Court, and, personally speaking, I enjoy listening to you. But for the sake of the men, women and children affected, the utmost possible clarity in legislative direction should be our goal. The pro-active thinking that we have become accustomed to in family law remains as necessary as ever.

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<sup>3</sup> See e.g. *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Caron v. Caron*, [1987] 1 S.C.R. 892; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; and *Boston v. Boston*, 2001 SCC 43.

### **(iii) Spousal Support**

In dealing with property rights is challenging, dealing with spousal support is even more difficult. Property, at least, can be appraised and valued in concrete terms. What constitutes fair valuation and division is often fiercely disputed, but agreeing on a formula for spousal support sometimes makes those arguments seem like child's play.

Here too, pro-active approaches have radically altered the law during the past decades. In an era when women were viewed as dependent and divorce as immoral, allowing the wife a modest monthly stipend seemed adequate. "Maintenance" — with its connotation of just getting by — was the term commonly used to describe the divorced husband's legal obligation. But such a view was incompatible with an era that regarded women as independent and equal, and no longer stigmatized divorce.

Gradually, over the years, pro-active thinking has brought the law of spousal support — note the new improved name — more into line with modern social norms. The *Divorce Act* and provincial family property acts were modified to recognize that to determine spousal support justly, courts must take into account a variety of factors, like the needs and means of the parties, the ability of each party to be financially independent, and the respective contributions of the parties to the marriage and the family's financial status. The courts helped to ferret out stereotypes that even after these changes short-changed many stay-at-home wives.

In *Moge v. Moge*, [1992] 3 S.C.R. 813, the Supreme Court rejected the idea that such women are "expected" to become economically self-sufficient within a certain time, and elucidated the relationship between the traditional housewife role and long-term economic disadvantage. It also clarified another point — that when balancing the objectives enunciated in the *Divorce Act*, no single objective should be considered more important than the others.

Again, in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, a case involving a disabled plaintiff, the Court emphasized that it is important to look at every relationship on its individual facts and merits, and unfair to apply blanket solutions.

The law of spousal support has moved a long way toward true equality. But problems remain. Adjusting support to reflect changes in circumstances remains the single largest issue. A current concern is what happens when the claimant spouse has released her rights for good consideration in a valid and fair agreement. On the one hand stands the need for fair adjustment. On the other stands the need for certainty and finality in divorce settlements. Later this year, the Court will deal with this issue when it hears *Miglin v. Miglin*, [2001] S.C.C.A. No. 328. Questions such as these admit of no easy answers. But if we approach them in an objective and creative way, we can hope to find legal solutions that mirror our society's needs and sense of justice.

#### **(iv) Children's Issues**

Children are often the unheard victims of family breakdown. At one time, that was seen as normal and unobjectionable. The Victorian maxim, "Children should be seen but not heard", applied in the courts as elsewhere.

As we all know, family breakdown can victimize children in many ways. It can effectively deprive them of a parent. It can have them living in poverty. It can result in abuse. And it does all this without allowing them an adequate voice. Where children's rights are at stake, perhaps more than anywhere else, reactive legal solutions are inadequate. It takes pro-active attitudes in lawyers and judges to bring children's problems to light and to find solutions to them.

For many years, child support norms were woefully low, in relation to the actual cost of raising a child. This approach favoured the payor spouse, usually the father, at the expense of the child. In recent years, however, lawyers, judges and governments have recognized this difficulty, along with the other major source of injustice in the area of child support — non-payment.

National attention focussed (sic) on child support in the wake of the Supreme Court's decision in *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, which held that a custodial spouse could not deduct tax payments from her income tax. (The payor spouse could.) Subsequently, Parliament changed this law.

In 1997, the federal government also introduced Child Support Guidelines that changed the way child support was dealt with throughout Canada. Since then, these Guidelines have been mirrored in every province's legislation. It's now easier, we hope, to determine appropriate levels for child support and tax compliance.

Sadly, enforcing court orders for payment of child support remains a major problem. Reliable statistics are hard to get, but it appears that between 30 per cent and 60 per cent of cases are in arrears. Many provinces have enforcement schemes that provide for collecting money at source where there is a history of delinquency. But delays remain a problem. In 1997, Parliament amended the *Family Orders and Agreements Enforcement Assistance Act*.<sup>4</sup> Advocacy groups for battered women, children of divorced parents, non-custodial fathers, and grandparents have been disputing its merits ever since. In a country as rich as ours, we should not have children living in poverty. Yet sadly, statistics tell us that is exactly how many are forced to live. This is an area where we are in desperate need of more pro-active thinking and — dare I say — a little more pro-active action.

Child custody remains challenging. In the old days, things were simple. Mother got custody. Period. But that approach does not always square with new norms of equality and parenting and the realities of our multicultural society. Issues like culture, race, mobility, and new family structures become the flashpoints for family law during the next decade. Ready or not, we will have to deal with them. The test — the best interests of the child — is malleable enough to accommodate a host of solutions. The problem is how to apply it in the complex multiplicity of family situations our society produces. What happens when parents have very different ideas about the child's religious education, an issue raised in *Young v. Young*, [1993] 4 S.C.R. 3. Again, should the child's cultural and racial heritage have an impact on who gets custody? Some provincial legislators have answered this question in the affirmative.<sup>5</sup>

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<sup>4</sup> R.S., 1985, C. 4.

<sup>5</sup> See e.g. *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46.

The decisions in *N.H. v. H.M.*, [1998] B.C.J. No. 221 and *Van de Perre v. Edwards*, 2001 SCC 60, suggest that while race may be a factor, it is only that, and may be outweighed by other considerations in the child's best interests.

Yet another problem is adjusting custody to changes in parents' lives. In our global economy, people move around the world with ease. Should the child move too? And if she does, what about access to the non-custodial parent? *Gordon v. Goertz*, [1996] 2 S.C.R. 27 dealt with the issues of mobility of a custodial mother who moved to Australia. The Supreme Court rejected the view that there was a presumption in favour of the custodial parent. The test remains the best interests of the child. These cases illustrate that.

In child custody, as in other areas of family law, we have moved from reactive acceptance of the *status quo* to pro-active recognition of the changing reality of the family in modern society.

## **II. PROCESS AND FAMILY LAW ADVOCACY IN THE 21ST CENTURY**

I have argued that pro-active thinking is essential if we are to keep the substance of family law instep with the changing needs of society. This is also true of process. We all know that the fairest laws may produce grave injustices if the process is flawed.

The old, reactive approach to family law procedures simply treated family break-up like any other legal dispute. Get a lawyer and go to court was the universal solution we offered the wounded, newly-separated spouse. And when you get there, don't expect any special rules or accommodations. You'll get the same process as you would in an insurance dispute.

The results of this strict adversarial approach were often unfortunate in family law cases. First, it was slow, often leaving the lives of men, women and children in legal and emotional limbo for literally years. Second, it was costly, using up precious resources that would have found better uses in providing housing and clothing for children and parents. Third, it tended to heighten the animosity between the parties. Instead of reconciling themselves to the past and getting on with

their futures, parties too often became mired in permanent sinkholes of hatred and acrimony, which in turn impacted on their children.

Slowly, over the past few decades, we have been modifying procedures for family law disputes. Old-style litigation is still available. But early mediation and counselling are being introduced in many jurisdictions, with the aim of getting disputes about property and custody resolved, quickly, cheaply, and without undue rancor.

In addition, a legal practice known as collaborative lawyering, which started in the United States during the early 90's, has moved north and is starting to spread through parts of Canada. A collaborative law group exists in British Columbia and Saskatchewan, and groups are being created in Toronto, Calgary and other cities. Last week's edition of *The Lawyers Weekly* carried a story on collaborative lawyering as does *Maclean's* in this week's edition. The aim is to get lawyers and clients together in creative problem-solving, instead of pulling in opposite directions, as may happen in conventional litigation.

On the court side, procedures have also been changing. In many jurisdictions, special settlement-oriented rules govern family litigation. Changes in case and statute law now permit children to testify, and to do so with less trauma. Unified Family Courts have been established, that cut through the jurisdictional divides of different courts and provide "one-stop shopping". Courts are constantly striving to find ways to make family litigation cheaper, speedier and above all, consistent and just.

Yet here again, all is not won. For all the pro-active steps that have been taken, much more remains to be done. Providing affordable legal counselling presents a huge and growing challenge. Lawyers and courts must work together to stem what Chief Justice Richard Scott of the Manitoba Supreme Court describes as the increasing flow of "lawyers litigants".<sup>6</sup> And insofar as lawyerless litigants cannot be avoided, we must assist them. In Alberta, a publically (sic)

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<sup>6</sup> See "Lawyers litigants slow wheels of justice," by Kirk Mackin, *The Globe and Mail*, January 14, 2002, page A1.

funded advisory service operates out of the Edmonton courthouse to advise family "in-person" litigants. A creative approach. We need more like it.

## **CONCLUSION**

All of us must use all our intelligence and our hearts to bring family law into the 21st century with pride, honour, and respect. Above all, we must be pro-active. It is our task to ensure that family law continues to meet the needs and expectations of our changing society. Our track record in recent decades, both in terms of substance and procedure, is impressive. But we cannot rest on our laurels. Societal changes continue to demand progressive, innovative thinking in family law, from lawyers, legislatures and judges. No responsibility could be more important. I am confident that with your energy and leadership, we will succeed, and that Canadian families will be the better for it.

Thank you.