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Step-Parent Adoptions in Nova Scotia and British Columbia

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1. *Introduction*

The basic purpose of this article is to examine that area of the law which deals with adoption by step-parents. In particular, the law of Nova Scotia and British Columbia will be considered. The approach taken will be to focus on the relevant statute law and selected cases which deal with the subject under scrutiny. Reference will also be made to recent developments in the law relating to adoption in England. Additionally, the latter part of this paper will deal with some alternatives to the granting of adoptions to step-parents.

The particular issues and problems raised by step-parent adoptions, however, are best understood if viewed against the background of the history and practice of "conventional" adoptions.

II. *History of Adoption*

The origins of adoptions are lost in the early mists of history. References to adoption are to be found in such antique records as the Code of Hammurabi,¹ the Old Testament,² and the writings of the Roman philosophers.³ As Huard notes, ancient adoption practice had two primary purposes — first, it insured the continuity of the adopter's family and second, it perpetuated the local worship by initiating the adoptee into the new religion.⁴ "Adoption, as thus practised, contemplated complete severance of relationship between the adoptee and his natural family and complete acceptance into the adopter's family."⁵ Thus, under the Roman law, the adopted person acquired all the benefits of a natural son, including inheriting the family name, the family religion, and (more

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1. "If a man take a child in his name, adopt and rear him as a son, this grown up son may not be demanded back," from Huard, "Law of Adoption: Ancient and Modern" (1956), 9 Vanderbilt L.R. 743 at 744

2. Ecodus 2:10

3. *Supra*, note 1 at 745

4. *Supra*, note 1 at 745

5. *Id.* at 744

importantly) the family wealth. Roman adoption subsequently became part of the civil law of the countries on the European continent.

Adoption, in its current form, made a late entrance on to the stage of Anglo-American jurisprudence.⁶ The American states of Louisiana and Texas had a form of Roman-style adoption as evidenced by case reports of 1832⁷ and 1863⁸ respectively. This undoubtedly reflects the continued influence of French and Spanish civil law which had earlier been introduced into those areas. Adoption statutes appeared in Mississippi in 1846⁹, in Massachusetts in 1851¹⁰, and in New Brunswick in 1873.¹¹ In England, Roman-style adoption was not possible until the passing of the Adoption of Children Act 1926.¹²

As Huard¹³ and Stone¹⁴ point out, the early English and North American adoption statutes were motivated primarily by an increasing public concern for the welfare of children who were the victims of unfortunate circumstances. Thus, unlike the ancient adoption practices, modern adoption statutes have a genesis in a concern for the "welfare of the child." If one accepts the fact that the precursors of present-day adoption statutes were enacted to help solve the "troublesome social problem of illegitimate, abandoned, dependent and neglected children,"¹⁵ then it becomes obvious that the advent of increasing numbers of joint adoptions by one natural parent and a step-parent forms a class of adoptions which was not within the contemplation of the original legislators, and for which the rules governing "conventional" adoptions may not be appropriate.

There is no doubt that social attitudes are changing. Divorce has become relatively common-place, and more single parents are

6. *Id.* at 747. Also see O. Stone, *Family Law* (London: The MacMillan Press Ltd., 1977) at 225, 226

8. *Teal v. Sevier* (1863), 26 Tex. 516

7. *Fuselier v. Masse* (1832), 4 La. 423

9. *Supra*, note 1 at 748

10. *Id.*

11. S.N.B. 1873, c. 30. The giving of consent of the natural parents, then, as now, was of concern to the legislators drafting this quaint statute. In the event that the adoptee had neither parents, guardians, nor next of kin, then consent (by s.3) could be given by a "discreet and suitable barrister, to be appointed by the Judge . . ."

12. 16 & 17 Geo. 5, c. 29

13. *Supra*, note 1 at 748

14. *Supra*, note 6 at 226

15. *Supra*, note 1 at 749

tackling the job of raising their illegitimate children. These two social phenomena have given rise to two recurring scenarios in the case reports. The one is that of the couple who marry, have children, and subsequently go through divorce proceedings. In the stereotypical case one parent (generally the mother) is granted custody of the children, while reasonable access is given to the other parent. Some time later the parent with custody remarries and applies with the new spouse to adopt the children of the previous marriage.

The other scenario is that of the unwed mother who marries someone other than the putative father of her child and then applies to adopt her child jointly with her husband.

Both of these situations are reflected in recent adoption statistics. For example, in Nova Scotia between April 1, 1977 and March 31, 1978 one-half of the 714 adoptions granted involved an application by a relative of the adoptee.¹⁶ In British Columbia step-parent adoptions accounted for 34 per cent of all adoptions granted in the province between 1970 and 1974.¹⁷

III. *Interests of the Parties*

Any consideration of step-parent adoptions should focus on the interests of the three distinct parties involved: the child, the step-parent and his spouse, and the non-custodial natural parent.

There can be no doubt that a child has an interest in being brought up in a "stable and loving home."¹⁸ With step-parent adoptions, however, the adoption *per se* does not change the home environment of the child (as it does in a conventional adoption); the child continues to live in the security of the home which his step-parent and natural parent provide. This basic need of the child is therefore met without any legal proceedings. In most step-parent adoption cases, however, there has been a prior divorce by the child's natural parents. Until recently, the conventional wisdom of the psychological pundits has been that in order to create a stable home for the child of a divorce, it was advisable in the majority of cases to terminate contact between the child and his non-custodial

16. Source: Nova Scotia Dept. of Social Services

17. Fifth Report of the Royal Commission of Family and Children's Law, Vancouver, British Columbia, March 1975, Part VII — Adoptions, App. A

18. *Re Application for Adoption* (1967), 64 D.L.R. (2d) 538 (N.S. Co. Ct.) per O'Hearn, C.C.J. at 552

biological parent.¹⁹ Currently, however, there is a dawning realization within the helping professions that a child has a need for both parents.²⁰ When one considers that a child may have developed a deep emotional attachment to the non-custodial parent, it becomes obvious that the child has a vested psychological interest in maintaining that relationship. This point of view has received judicial attention in recent Canadian cases. In *Re Munro*,²¹ Zalev, Co. Ct. J acknowledged that:

. . . a child has a right to the knowledge of the existence of its natural parents, to a normal association with those parents, and to the benefit of the love, understanding and guidance which may be developed in the intimate relationship between the child and its natural parents. No court should deny a child those rights without serious reason.²²

Re Munro was expressly approved by the Nova Scotia Supreme Court, Appeal Division in the recent case of *Wolfe v. Cherrett*.²³

Even if the relationship between the child and the absent parent is not a particularly good one, or due to the young age of the child, has not had a chance to develop, the research of Triseliotis²⁴ would indicate that it is in the child's psychological interest not to be deprived of a knowledge of his "origins."

What are the interests which the step-parent (usually this is the step-father) and his spouse have in adopting the child? First one must recognize that simply by marrying the child's mother, the step-father acquires no parental rights. In law, a step-parent and step-child are not related to each other.²⁵ Thus as Ormrod, J. said:

. . . it seems clear that the only way an individual who is not one of the natural parents can acquire parental rights is by some legal process vesting in that person the so called parental rights in

19. Goldstein, Freud and Solnit, *Beyond the Best Interest of the Child* (London: Collier MacMillan Publishers, 1973)

20. This point of view, and the research supporting it, is summarized consisely in Rosen, "Joint Custody: In the Best Interests of the Child and Parents" (1978), 1 R.F.L. 116

21. (1973), 11 R.F.L. 21 (Ont. Co. Ct.)

22. *Id.*, at 33. Also see *Csicsiri v. Csicsiri* (1974), 17 R.F.L. 31 (Alta. S.C., T.D.) where Cullen, J. held that "Children are part of a family. They have two parents and have a right to be influenced in their upbringing by each of the two and while divorce may dissolve the marriage it does not dissolve the parenthood . . ."

23. (1978), 28 N.S.R. (2d) 17 (N.S.S.C., A.D.)

24. J. Triseliotis, *In Search of Origins* (London: Routledge and Keigan Paul Ltd., 1973)

25. "The Step-Relationship and Its Legal Status" (1976), 5 Anglo-American Law Rev. 259 at 259

respect of the given child.²⁶

Until recently, the courts have been willing to confer these rights upon a step-parent by granting adoptions almost as a "matter of course." The acquisition of parental rights, however, is not the only motivation. Often the "new couple" will want the adoption to go forward in order to facilitate a change in the surname of the child.²⁷ In this way an unsuccessful first marriage will not be as apparent to the couple's neighbours. Additionally, the new couple may wish to remove the non-custodial natural parent from the child's life, in the hope that the child "will grow closer to the step-father."²⁸ Adoption, because of its finality, will also put an end to any further custody battles between the natural parents.²⁹ Later in this paper some alternatives to step-parent adoptions will be considered. At this point it is sufficient to say that the interests of the step-parent and his wife may not be congruent with, or facilitative of, the interests of the child in either the short or long-term.

The non-custodial parent (generally the natural father) who feels any affection or responsibility for his offspring has an interest in maintaining contact with the child. This contact is generally maintained by utilizing access provisions which the father enjoys by virtue of the divorce decree (or an order made under provincial legislation). As Davey, J. A. has commented:

. . . the so-called right of access is more than provision of an opportunity to gratify parental affection for the children; it is also a right of visitation to enable a parent to discharge adequately his remaining duties as guardian of the person and estate of his child.³⁰

Not only is access of concern to the father, he also has an interest in preserving his right to apply for the custody of his child should the appropriate change in circumstances arise.

While the above do not exhaust the possible motivations of the parties, they are sufficient to indicate that the interests of each of them are highly divergent.

26. *Re. N.*, [1974] 1 All E.R. 126 (Fam. Div.) at 130

27. In *Wolfe v. Cherrett*, *supra*, note 23 at 32 MacKeigan, C.J.N.S. comments that a change of name is not an appropriate consideration in weighing the benefits of a step-parent adoption.

28. Bissett-Johnson, "Step-Parent Adoptions in English and Canadian Law," Baxter and Eberts (ed.), *The Child and the Courts* (Toronto: Butterworths and Company, 1978) at 336

29. Khan, "Adoption by Parent and Step-Parent" (1978), 8 Fam. Law 146 at 148

30. *Sharp v. Sharp* (1962), 40 W.W.R. 521 (B.C.C.A.) at 525

IV. *Dispensing With Consent*

"A frequently litigated issue is the power of the court to dispense with parental consent when an adoption application is made by the natural parent, who has been awarded custody of the child in a divorce decree, and his or her new spouse."³¹

Both the British Columbia *Adoption Act*³² and the Children's Services Act³³ of Nova Scotia have provisions for dispensing with parental consent to an adoption. Section 8(6) of the British Columbia Act reads:

8(6) The Court may dispense with any consent required by sub-section (1) if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the child or cannot be found or is incapable of giving such consent, or being a person liable to contribute to the support of the child, either has persistently neglected or refused to contribute to such support or is a person whose consent ought, in the opinion of the Court and in all the circumstances of the case, to be dispensed with, and the Court may act on the written report of the circumstances by the Superintendent, without further evidence.³⁴

The comparable section of the Children's Services Act (N.S.) is as follows:

17. Where the county court is satisfied that a person whose consent is required under subsection (2) or subsection (3) of section 16

- (a) is dead;
- (b) is of unsound mind;
- (c) is missing or cannot be found;
- (d) has deserted or neglected to provide proper care and maintenance for the child;
- (e) has suffered the child to be supported for more than two years continuously next preceding the date of the application by a child placing agency;
- (f) is divorced and neither has custody nor is contributing to the support of the child at the time of the application; or
- (g) is a person whose consent in all circumstances of the case ought to be dispensed with.

the county court may order that his consent be dispensed with, if it is in the interest of the person to be adopted to do so.³⁵

31. Hughes, "Adoption in Canada", D. Mendes da Costa (ed.), (Butterworths and Company, 1972) at 147

32. R.S.B.C. 1960, c. 4 as am.

33. S.N.S. 1976 c. 8

34. R.S.B.C. 1960, c.4 as am.

35. S.N.S. 1976, c. 8

Of immediate interest is the fact that these two statutes have different criteria for dispensing with consent. The Nova Scotia Act requires the court to consider subsections (a) through (g) *and* whether dispensing with the consent of the parent is "in the interest of the person to be adopted." This "in the interest of the person to be adopted" qualifier is not found in the *Adoption Act* (B.C.). Margaret Hughes states that it was thought that those adoption statutes which dispensed with consent based on a consideration of the "interest of the child", would have been interpreted so that the interests of the child would prevail over the rights of parents,³⁶ irrespective of the parents' conduct. In fact, she suggests, this has not been the case. "Although there is a dislike of the proprietary conception of a parent's rights, many courts, reflecting the sentiments of Ferguson J., in *Re LeSieur*, feel that a vast difference exists between a custody award and an adoption order and that the courts must protect a parent's fundamental right to raise her own child until she is shown to be unfit."³⁷ An examination of step-parent adoption practices in British Columbia and Nova Scotia casts some doubt on Hughes' statement.

V. *Dispensing With Consent in British Columbia.*

The leading case dispensing with consent in British Columbia is *Sharp v. Sharp*.³⁸ Although the members of the British Columbia Court of Appeal were divided over whether the natural mother, who was opposing the step-parent adoption application, had in fact misconducted herself to the point where her consent should have been dispensed with, their Lordships were in agreement on what the law was. Davey, J. A. stated that:

In our province attention must be focused in the light of the attendant circumstances, on the person whose consent is to be dispensed with. The welfare of the child is no doubt one of the principal circumstances, but it must be related to the qualities, character, personality, or conduct of the parent whose consent is to be dispensed with, or matters pertaining to him. *The welfare of the child cannot be considered at large or be treated as a governing circumstance if it is unrelated to such parent.*"³⁹

His Lordship also forcefully points out that there is a clear

³⁶ *Supra*, note 31 at 140

³⁷ *Id.*

³⁸ *Supra*, note 30

³⁹ *Supra*, note 30 at 530

distinction between custody and adoption considerations. While there is no doubt that the judicial test in custody proceedings is the "best interest of the child,"⁴⁰ the same considerations should not be used in order to justify dispensing with consent in an adoption situation. Wilson, J. A. agreed with Davey, J. A. in relation to the necessity to consider the fitness of the parent in relation section 8(6) of the *Adoption Act* and said at p. 540:

I do not apply the *ejusdem generis* rule, but I do say that where particular provisions relating only to fitness for parenthood and custody, such as those in sec. 8(6), dealing with the abandonment and non-support, are followed by a general provision that the court may dispense with consent if the natural parent is

a person whose consent ought, in the opinion of the Court and in all the circumstances of the case, to be dispensed with;

then *fitness*, and hence the welfare of the infants, remains (subject to what Cartwright, J. has said as to the elementary rights of parents) the subject to be explored, always of course in the light of limitations stated by Cartwright, J.⁴¹

The rule in the *Sharp* case has been applied in subsequent cases in British Columbia. Illustrative of the court's approach with regard to dispensing with consent in step-parent adoptions are the cases of *Re Adoption Nos. 60-09-017014 and 62-09-027718*,⁴² *Waldron v. Adams*⁴³ and *Smallenberg v. Smallenberg*.⁴⁴ In *Re Adoption Nos.*, McIntyre, J. (as he then was) dispensed with the consent of a natural father whom he described as a "painter, part-time actor, poor provider and habitual drinker" who was at least partly responsible for the emotional problems of his children.

The appellant (natural mother) in *Waldron v. Adams* based her appeal on the grounds that the trial judge, in dispensing with her consent, had "directed his attention only to the interests of the children and did not consider that aspect of the case together with the fact that the appellant was a fit parent."⁴⁵ Craig, J. A., speaking for the Court, re-affirmed the *Sharp* test that "on an application to dispense with the consent of a natural parent to the adoption, the welfare of the children must be considered in relation to the

40. Robinson, "Custody and Access", D. Mendes da Costa (ed.), *Studies in Canadian Family Law* (Toronto: Butterworths and Company 1972) at 576

41. *Supra*, note 30

42. [1972] 1 W.W.R. 759 (B.C.C.A.)

43. (1978), 2 R.F.L. (2d) 220 (B.C.C.A.)

44. (1978), 5 R.F.L. (2d) 315 (B.C.S.C.)

45. *Supra*, note 43 at 227

“fitness” of the natural parent and that, furthermore, this determination must also be subject to what Cartwright J. said in *Martin v. Duffell* “as to the elementary rights of parents.”⁴⁶ The Court, while holding that the trial judge had not considered the fitness of the natural mother in determining whether to dispense with her consent, declined to overturn his decision on the basis that there were grounds for dispensing with the mother’s consent which fell within the principles set out in *Sharp v. Sharp*. It is difficult to ascertain from the case report just what these grounds were. The trial judge had explicitly held that the natural mother was a “fit” person! The fact that the mother had only visited the children three times in five years seemed to leave Craig, J.A., with the impression that she was less than sincere in her desire to maintain a relationship with her children, but even the learned Judge conceded that the probable reason for the low number of visits was the fact that the appellant lived in Edmonton while the children’s residence was in Victoria, B.C. The less than satisfactory *dicta* of Craig, J.A. will be discussed further on in this paper in the context of alternatives to step-parent adoptions. However, before leaving this case and *Re Adoption Nos.* we should consider the possible effect which reports of the Superintendent of Child Welfare may have had on the decisions.

The *Adoption Act* of British Columbia was amended by S.B.C. 1970, c.1, s.3 and the words “and the Court may act on the written report of the circumstances by the Superintendent, without further evidence,” were added to section 8(6). While reports by social workers of home circumstances may be of great value to the court, it is somewhat disturbing to this writer to find as reported in *Waldron v. Adams*, that the Court was highly influenced by the fact that “the Superintendent of Child Welfare has conducted a thorough investigation into the matter and has concluded that the court should dispense with the appellant’s consent.”⁴⁷ As Professor Bissett-Johnson has correctly pointed out, the attitudes of social workers may have been shaped by Goldstein, Freud, and Solnits’ *Beyond the Best Interests of the Child*, and this may result in reports which favour the position of the adopting couple without a proper appreciation of the fact that the natural father will be permanently “cut out of the child’s life” if the adoption is granted.⁴⁸ Too great a

46. *Supra*, note 43 at 225

47. *Supra*, note 43 at 227

48. *Supra*, note 28 at 347

reliance on this type of report could well result in the Court failing to apply the correct test in step-parent adoption cases.⁴⁹

The ideal approach to the question of dispensing with consent, in this writer's view, was employed by Mr. Justice MacDonald in the recent case of *Smallenberg v. Smallenberg*.⁵⁰ The child's parents had married in 1969, their daughter being born the following year. The couple divorced in 1974 with custody being given to the mother and a right of reasonable access being granted to the father. The mother remarried in 1975 and petitioned with her new husband to adopt the little girl, but the natural father refused to give his consent. The considerations of His Lordship are highly instructive. While he is mildly critical of the natural father's conduct in not visiting the child more often, he points out that this was largely due to the fact that the mother and step-father often refused access. His Lordship is sensitive to the fact that there is "the fullest affection between him (the natural father) and his daughter and she is glad to see him."⁵¹ The slight emotional disturbance experienced by the child upon the occasions of her father's visits is viewed by the Judge as the result of animosity generated by the mother and he expresses his feeling that "it would be ironic if the party seeking adoption could improve his chances of success in litigation by conducting himself in such a way as to increase the disturbance of the child."⁵² In refusing to dispense with the father's consent His Lordship states that:

The natural father has something to offer his daughter for the years to come. His mother has the property of Aldergrove, which the child has enjoyed visiting, riding the horses and enjoying generally the farm life. The father as well as the mother has, in addition to the grandmother, family who welcome the child as one of themselves. The natural father is there to assume responsibility and help his daughter should misfortune strike. He could, and likely would, be helpful to her in material and non-material ways in connection with her growing up and the furtherance of her life plans.⁵³

This judgment, focusing as it does on the fact that adoption will not confer any benefits upon the child which she is not already

49. For another example of the court relying heavily on the recommendations of a social worker (perhaps to the detriment of the natural father) see *Re McLean*, Vancouver Registry No. A01771, May 12, 1978 (B.C.S.C.).

50. *Supra*, note 44

51. *Supra*, note 44 at 323

52. *Supra*, note 44 at 324

53. *Supra*, note 44 at 323

receiving with her mother and step-father, the dubious motivation of the mother and husband,⁵⁴ and the drastic consequences to the child of losing not only the benefit of a loving parent, but the benefit of his kin, is truly an “enlightened” decision. It is also instructive on the issue of reports by social workers. In this case both the counsel for the child and the Superintendent of Child Welfare recommended that the adoption order be made. The last line of the Superintendent’s report reads: “I continue to believe as stated in my earlier report, that adoption would be in the best interest as it presents *the least detrimental alternative available*.”⁵⁵ There is no doubt that this social worker had applied the philosophy contained in *Beyond The Best Interest of the Child!* Unlike Craig, J.A. in the *Waldron* case, MacDonald, L.J.S.C., considers the report, but makes up his own mind in favour of the natural father.

VI. *Dispensing with Consent in Nova Scotia*

As noted earlier, Section 17 of the Children’s Services Act provides for dispensing with the consent of a natural parent if the court “is satisfied that the parent falls within one of the clauses (a) to (g). . . and “if it is in the interest of the person to be adopted to do so.”⁵⁶ This provision has been interpreted by the Nova Scotia Supreme Court, Appeal Division in the leading cases of *Block v. Benight*⁵⁷ and *Wolfe v. Cherrett*.⁵⁸ In the former case, MacKeigan, C.J.N.S. explained the statutory test in the following words:

The basic question for the judge was whether or not the father was ‘a person whose consent in all the circumstances of the case ought to be dispensed with’ under clause (g) of s.5 (of the old *Adoption Act*, R.S.N.S. 1967, c.2) and, if so, whether it was, in the concluding words of s. 5, ‘in the interest of the person to be adopted’ that his consent be dispensed with. Accordingly, the judge had to determine whether on balance there would be a *positive contribution* to the welfare of the child by her being adopted. His conclusion, although expressed in negative terms, clearly showed that he did not think that adoption would positively contribute to the child’s welfare or that it would accordingly be in her interest to be adopted. The child would, of

54. “Their desire for the adoption is natural and understandable, but its motivation is not what they think is best for the child. An objective is to snuff out the father’s right of access to end a disruptive factor in their lives,” *supra*, note 44 at 323.

55. *Supra*, note 44 at 322

56. *Supra*, note 23 at 19 per MacKeigan, C.J.N.S.

57. (1974), 8 N.S.R. (2d) 210 (N.S.S.C., A.D.)

58. *Supra*, note 23

course, continue to have all the benefits of the home with the appellants whether she was adopted, or not. She would, if adopted, be deprived, however, of the love and affection of her natural father.⁵⁹

In *Wolfe v. Cherrett*, the Chief Justice expanded the reasoning in the *Block* case. The “rights” or natural parents are to be taken into account in considering whether to dispense with consent only if the child may benefit, now or in the future, from their exercise in the particular case. The Chief Justice points out that the Nova Scotia rule, by not requiring a finding of parental “misconduct” or moral turpitude, differs from that in operation British Columbia. His Lordship also re-iterates that custody considerations should not influence the issue of dispensing with consent, and, in allowing the appeal by the natural father, he criticizes the trial judge whose “attention was, unfortunately, primarily, if not entirely, directed by counsel to the custody issue — would it be better for child to live with Mr. Cherrett or Mr. Wolfe?”⁶⁰

In weighing whether or not there will be a “net gain” to the child’s welfare the Court suggested that the following factors be considered. On the gain side of the inventory are considerations of whether the child needs protection from a “bad” parent, whether the child would benefit from a cessation of visits from the natural parent which are emotionally upsetting to him, and whether the child’s life will be made more stable and happy if the adopting parents were themselves made more secure by the granting of the adoption order. The loss side of the ledger requires asking whether the child will be deprived of the love, affection, and other benefits which he could expect from his natural parent, if the adoption is granted. In addition, the Court suggests that one must consider whether the child’s needs are such that he will benefit, not only now, *but in the future*, from continued contact with his natural parent. This latter point is an extremely important factor in the Chief Justice’s view if the new marriage is of short duration. In the *Wolfe* case itself the child’s mother had died shortly after remarrying and the contest was between the objecting natural father and the step-father. In refusing to dispense with consent the Appeal Division concluded that the Wolfe boy had nothing significant to gain by being cut off from his father and could only benefit by having a “parent in reserve.” In Mr. Justice Coffin’s view, “the

59. *Supra*, note 57 at 213

60. *Supra*, note 23 at 32.

interests of the parties could, if necessary, be well satisfied in custody proceedings without embarking on the final and irrevocable course of dispensing with the consent of the natural father . . . '61

How is the preceding test applied in Nova Scotia? It is clear from the cases considered that in order to dispense with consent there need not be a finding of parental misconduct. However, one would predict that under the gain — loss analysis of the "positive contribution" test enunciated by MacKeigan, C.J.N.S. that if (all other things being equal) non-custodial natural parents had any contribution to make to the present or future well being of their child, the courts would not deprive that parent of his rights by dispensing with his consent.

Interestingly enough, the realities tend to confound the theories. In Nova Scotia adoption comes within the jurisdiction of the County Court, with a high proportion of these cases coming before O'Hearn, Co. Ct.J. Research by this writer (which included searches in the Dalhousie Law Library, the Nova Scotia Barrister's Society Library, and a trip into the bowels of the Prothonotary's vault) failed to discover a single case concerning a step-parent adoption in which His Honour had refused to dispense with a natural parent's consent.⁶² There is no doubt that Judge O'Hearn personally favours the granting of step-parent adoptions. This is evident from both his judicial⁶³ and extra-judicial statements.⁶⁴ In view of the fact that the *Block* case was reported in 1974, one could reasonably expect that in subsequent decisions the lower courts would have

61. *Supra*, note 23 at 34

62. See: *Re Application for Adoption* (1967) 64 D.L.R. (2d) 538 (N.S. Co. Ct.); *Re T.A.P., R.E.P., and T.E.P.*, Halifax Registry No. C.C.1 49629, 1971 (N.S. Co. Ct.); *Re J.H.K.* Halifax Registry No. C.H. 03688, 1973 (N.S. Co. Ct.); *In Re Hill* (1975), 20 N.S.R. (2d) 528 (Co.Ct.); *Re A.E.C.* (1975) 23 R.F.L. 398 (N.S. Ct.); *Re Whynot* (1977), 23 N.S.R. (2d) 716 (Co. Ct.), and *In Re Low*, Halifax Registry No. C.H. 23117, 1978 (N.S. Co. Ct.). The preceding all deal with step-parent adoptions. The consent of a natural parent was also dispensed with in *Re A.C.C.*, Halifax Registry No. C.C.1 40192, July 4, 1969 (N.S. Co. Ct.) (natural mother opposing adoption by paternal grandparents of child born out of (wedlock) and *Re D.I.C.* (1971), 4 R.F.L. 35 (N.S. Co. Ct.) (unwed mother seeking to revoke consent to an adoption).

63. *In Re Hill* (1975), 20 N.S.R. (2d) 528 N.S. Co. Ct.) at p. 534 O'Hearn J. says: "I have yet to see a case where the decision (to dispense with the natural parent's consent) did not prove the better solution."

64. In an interview with County Court Judge O'Hearn on November 7, 1978, His Honour stated to Ms. Marion Ferguson that he personally was in favour of step-parent adoptions and was willing to grant them unless there were reasons which indicated that it was not in the best interests of the child to do so. His prime concern was to create a stable and secure family in which the child could grow up.

applied the "positive contribution" approach. *In Re Hill*⁶⁵ is a case in point. An application for adoption was brought by the father of a seven-year-old boy and his new wife. The child's mother opposed the adoption and refused to give her consent. In spite of the fact that the child got along well with his natural mother and enjoyed her visits, visited his maternal grandparents, and that there was no animosity between the divorced couple which might disturb the child, the learned Judge dispensed with the mother's consent and granted the adoption. Clearly this was a case where adoption made no positive contribution to the welfare of the child. His reasons seem to be influenced largely by the fact that the boy's father was in a dangerous occupation, and in the event of his death, the step-mother would be left with no legal status vis-a-vis the child if the adoption wasn't granted. With the greatest respect it is submitted that alternatives short of adoption could have met this possible contingency without cutting off the legal rights of the boy's mother. Judge O'Hearn also notes in his reasons that the natural mother had admitted that "she would not oppose the application if she thought it was for the benefit of the child."⁶⁶ This unfortunate phrase may well prove fatal to the interest of the natural parent if they are appearing before Judge O'Hearn.⁶⁷ In the *Hill* case, His Honour distinguishes *Block v. Benight* on the dubious basis that in *Hill* there was no real possibility of the boy being deprived of his natural mother's affection,⁶⁸ and illustrates his preference for creating a new "secure" family for the child by stating that "the law cannot guarantee what affection is unwilling to provide, but the legal bond helps to cement the unity that affection has founded."⁶⁹

The adoption cases decided by Judge O'Hearn are highly instructive, if for no other reason, than that they illustrate how the psychological "set" of a trial judge may affect the outcome of a case. *In Re Hill*, *Re A.E.C.*, *Re J.H.K.*, and *Re Low* all illustrate that when the "gain-loss" scales are evenly balanced (and in some of these cases they are clearly tipped in favour of *not* granting the

65. *Supra*, note 63

66. *Supra*, note 63 at 530

67. See similar statements in *Re Application for Adoption*, note 18, at 541 and *Re Whynot*, *supra*, note 62 at 716.

68. On November 7, 1978 Judge O'Hearn admitted in an interview with Ms. Marion Ferguson that he had been "overly optimistic" in hoping that the mother-son relationship could continue in this case.

69. *Supra*, note 63 at 533.

adoption) the personal preference of the judge will be the deciding factor.

Given the reluctance of appellate courts to overturn findings of fact in the lower courts, the *de facto* result of the trial judge's preferences may well be a successful circumvention of applying the "positive contribution" test in Nova Scotia.

The recognition by the Superior Courts in both British Columbia and Nova Scotia of the need for caution in dispensing with a parent's consent is consistent with recent developments in English law. This subject has been exhaustively discussed by academic writers,⁷⁰ but may be illustrated by considering s. 10(3) of the English Children Act, 1975 which states that:

Where the application is made to a court in England or Wales and the married couple consist of a parent and step-parent of the child, the court shall dismiss the application if it considers the matter would be dealt with under section 42 (orders of custody, etc.) of the Matrimonial Causes Act 1971.⁷¹

This approach is eminently sensible since the making of a "custodianship" order gives the step-father limited parental (legal) rights⁷² without resorting to the drastic consequences of adoption. As Professor Bissett-Johnson has observed: "However convenient a beast of burden the step-father might be, it is probably necessary to grant him some *rights* to accompany the duties imposed upon him, without cutting one of the child's parents out of his life."⁷³

Section 10(3) was recently considered by the English Court of Appeal in *Re S(infants) (adoption by parent)*⁷⁴. There the Court of Appeal upheld the trial judge's refusal to grant the adoption although the natural father had consented to the application. The trial judge had taken the view that adoption would not give the children an increased "sense of security or make them feel more "integrated" into the new family unit."⁷⁵ This decision confirms the earlier decision of *Re S*⁷⁶ in which it had been held that even

70. See: Seago and Bissett-Johnson, *Cases and Materials on Family Law* (London: Sweet and Maxwell, 1976) at 418-481; Bissett-Johnson, "Step-Parent Adoptions" (1978), 41 Mod. L.R. 96; Bissett-Johnson, "Step-Parent Adoptions in English and Canadian Law," *supra*, note 28; and Hoggett, "Adoption by Step-Parents" (1973), 117 Sol. Jo. 606

71. (U.K.), 1975, c. 72

72. See (U.K.), 1975, c. 72, s. 86

73. *Supra*, note 28 at 338

74. [1977] 3 All E.R. 671 (C.A.)

75. *Id.* at 676

76. (1974), 5 Fam. Law 88(C.A.)

though the consent of the natural father had been given, the court could still deny the adoption order in the interests of the child.

VII. *Putative Father Consideration*

What is the position of the putative father in a step-parent adoption? The recent Nova Scotia case of *D.F.T. and D.M.T. v. A.-G. of Nova Scotia*⁷⁷ considered whether or not a putative father had to be served with notice of application to adopt. The court considered the restrictive definition of the term "parent" in section 2 of the Children's Services Act⁷⁸ and concluded in the words of MacDonald, J. A. that a putative father "was not a person whose consent to the adoption was required and further that there was no discretion vested by the Act in the trial judge to direct that he be given notice of the application to adopt his illegitimate child."⁷⁹

Section 8(1) (b) of the *Adoption Act*⁸⁰ (B.C.) is similar to the Nova Scotia provision and only requires the mother's consent providing the child is illegitimate at the time the mother's consent was signed.

The fact that a putative father is not entitled to notice means that in some cases he will not be informed of the adoption until after the fact. If, however, he does hear of the impending adoption he can protect his interests before either the Nova Scotia Supreme or County Court by making an application under the Infant's Custody Act.⁸¹

In the alternative he can apply for custody of his child by invoking the inherent equitable jurisdiction which the Supreme Court has by virtue of s. 39(10) of the Judicature Act.⁸²

In British Columbia, a putative father can also apply for custody under the *parens patriae* jurisdiction of the Supreme Court. This equitable jurisdiction is conferred on the Court by s. 2(23) of the *Laws Declaratory Act*.⁸³ Additionally, the new B.C. *Family*

77. Halifax Registry No. S.C.A. 00241, Dec. 28, 1978 (N.S.S.C., A.D.)

78. S.N.S. 1976, c. 8.

Section 2(w) reads:

(w) "parent" means . . .

(vii) for the purposes of section 10 and 16, the mother of the child, where the child was born out of wedlock . . .

79. *Supra*, note 77 at 10

80. R.S.B.C. 1960, c. 4 as am.

81. R.S.N.S. 1967, c. 145

82. S.N.S. 1972, c. 2

83. R.S.B.C. 1960, c. 213 as am.

*Relations Act*⁸⁴ will allow a putative father to *apply for custody or guardianship* of his child providing he falls within the definition of 'parent' in section 1. "Parent" includes . . . (ii) where this person contributes to the support and maintenance of a child for not less than 1 year, . . . (B) the father of the child where the father and mother are not married to each other.

VIII. *What are the Alternatives?*

Given the assumption that step-parent adoptions as a matter of course may not be a good policy, one must then ask what alternatives are available to meet the needs of the parties involved.

(1) *Alternative One — Custody*

It must be remembered that in the majority of situations where a step-parent appears on the scene there is an order of the Divorce Court lurking in the background. Generally, one natural parent has been granted custody of the child of the marriage under section 11(1) (c) of the *Divorce Act*.⁸⁵ This section allows the Divorce Court, upon granting a decree *nisi*, to make an order providing for the custody . . . of the children of the marriage. It should be noted that the section does not *expressly* restrict the court to giving custody to either the petitioner or respondent; the possibility exists that custody could be vested in a third party. Section 11(2) which is also broadly stated, provides for variation of the original custody order if the court that made the order thinks it fit and just to do so having regard to the conduct, change in condition, means or *other circumstances of either of the parties*. It is submitted that, as an alternative to the drastic consequences of a step-parent adoption the custodial parent should be able to go back to the Divorce Court under section 11(2) and have the custody order varied so as to vest custody, not only in herself, but in her new spouse as well.

If used, this approach would have the distinct advantages of being available throughout Canada, and, since it is under Federal legislation, of not being subject to the differences in provincial custody or guardianship statutes.

Chief Justice MacKeigan, in the *Wolfe*⁸⁶ case, suggested yet another way in which a step-parent could acquire custody. His

84. S.B.C. 1978, c. 20.

85. R.S.C. 1970, c. D-8

86. *Supra*, note 23 at 31

suggestion was that the step-father, with the Administrator's consent, could apply for a custody order under s. 67 of the Children's Services Act.⁸⁷ Given the propensity of child welfare professionals to favour step-parent adoptions, it would probably not be difficult to get the Administrator's consent to proceed with a custody application. In this way the step-father's needs for some legal authority *vis-a-vis* the child could be satisfied. In British Columbia step-parents are expressly defined as 'parents' by section 1 of the *Family Relations Act*⁸⁸ thus giving them standing to apply for custody of their step-children.

(2) *Alternative Two — Guardianship*

One of the frequently given reasons for granting a step-parent adoption over the protestations of the non-custodial natural parent is that should the parent with custody die, the step-parent (who may have become emotionally attached to the child) will have no legal rights *vis-a-vis* the child and hence will not be able to prevent the surviving parent from regaining custody of the child.

This consideration was given great weight in the *obiter dicta* of Craig, J. A. in the case of *Waldron v. Adams and Adams*⁸⁹ where he said at p. 228:

If the court refused to make the order in this case, what would be the position of the respondent (step-mother) Gloria Adams in the event that Wayne Adams died while the children were young? In such a case, the respondent Gloria Adams would not have any right to custody of the children. Should the appellant, in such circumstances, have the right to take the children into her custody and into a home in Edmonton where her husband is a total stranger to the children and she is only regarded as the "aunt", particularly when there is nothing before the court with regard to the character of the new husband, his suitability as a parent, or his willingness to act as a parent to the children?

In my opinion, *this consideration alone*, in the circumstances of this case, is a very cogent reason for dispensing with the appellant's consent in making the adoption order.

87. S.N.S. 1976, c. 8

88. S.B.C. 1978, c. 20, s. 1 reads:

"parent" includes

(ii) where this person contributes to the support and maintenance of a child for not less than 1 year,

(A) the stepmother or stepfather of the child . . .

89. *Supra*, note 43

It is submitted that this reason becomes considerably less “cogent” if one considers that under the *Equal Guardianship of Infants Act*⁹⁰ either a father or mother may, by deed or will, appoint a person to act as a guardian of an infant child after his or her death respectively.⁹¹ Where a guardian has been appointed under section 6 of the Act, the surviving parent exercises all his powers jointly with the guardian.⁹² Furthermore, a guardian is granted standing in custody proceedings relating to the child by virtue of section 13,⁹³ and if the guardian assumes, in writing, his guardianship, he “thereupon possesses the same authority over the infant as he or she would have were the ward his own or her own child, and is bound to perform the duties of a parent toward such ward.”⁹⁴

As the law in British Columbia presently stands, only a parent (or the court, after the removal of an existing guardian) may appoint a guardian. This restriction on who can apply for guardianship led the British Columbia Royal Commission on Family and Children’s Law to make the following recommendations:

30. *Recommendations:* The Court should be able to at any time, on application made for the purpose or on the making of an order for the removal of a guardian, appoint a guardian of a child either as sole guardian or in addition to any other guardian, providing that it is in the best interests of the child to do so. In addition, the court should be able, where necessary, to specify the period of time during which the guardian may exercise his guardianship . . .⁹⁵
32. *Recommendation:* Where there is an application to adopt the Court should be able to deny the application and substitute instead an order for guardianship if it thinks that it is in the best interest of the child to do so.^{95A}

Both of these recommendations are based on the express recognition by the Commission of the “emotional ties between the child and his natural non-custodial parent”⁹⁶ and the value of preserving those ties. Even if the custodial parent hadn’t appointed a

90 R.S.B.C. 1960, c. 130

91. *Id.*, s. 6

92. *Id.*, s. 7

93. And note: a guardian may himself appoint a guardian by section 15(1) *Re Wood* [1971] 2 W.W.R. 392 (B.C.S.C.)

94. R.S.B.C. 1960, c. 130, s. 15

95. Fifth Report of the British Columbia Commission on Family and Children’s Law, Part VI — Custody, Access and Guardianship, at 52

95. A *Id.*, at 55

96. *Id.*, at 55

guardian, the problem of concern to the Court in *Waldron v. Adams*⁹⁷ could certainly be solved in these recommendations were implemented. The consequence would be that the bond between one natural parent and their child would not be irrevocably served.

The Guardianship Act⁹⁸ of Nova Scotia provides that

3. The parents jointly, or the parent having the custody or care of an infant may be instrument in writing executed in the presence of two witnesses appoint a guardian of such infant until the infant reaches the age of majority or marries, or for any shorter period, and such parents or parent may make the appointment even though not of the age of majority.⁹⁹

While the main thrust of the Nova Scotia Act deals with probate matters, section 7 provides that a guardian appointed under the Act "shall (*inter alia*) have the charge and management of his (the child's) property, real and personal, and the care of his person and education."

(3) *Alternative Three — Change of Name*

The recently enacted Change of Name Act¹⁰⁰ in Nova Scotia makes it possible for a parent having the custody of an infant child to apply to the County Court to have the child's name changed. "Name" is defined by section 2(f) to include surname. By section 6 of the Act "a person whose marriage has been dissolved or annulled may make application for a change of name of one or more of his unmarried infant children, with the consent of the other parent." Under section 10 of the Act, consent can be dispensed with under certain circumstances. In the context of alternatives to a S - P adoption, the relevant reasons for dispensing with consent would be that the person whose consent is required is (s. 10(1) (f)) "divorced and neither has custody nor is contributing to the support of the child at the time of application," or (s. 10(1) (h)) "is a person whose consent in all the circumstances of the case ought to be dispensed with." Additionally, the judge must consider whether it is in the interest of the person whose name is to be changed to do so.

By section 8 of the Act the mother of a child born out of wedlock, and not adopted or legitimated may apply to have the child's name changed. If, however, the child has been registered with the

97. *Supra*, note 43

98. R.S.N.S. 1967, c 121 as am.

99. *Id.*, s. 3

100. S.N.S. 1977, c. 6

surname of a person who acknowledges paternity, that person's consent is required to change the child's name.¹⁰¹

The requirements of consent can largely be circumvented by a judge using his discretion under section 10(2) to dispense with consent where a child has informally changed his name and has been known by that name for a period of at least three years immediately preceding the application. This section may be of limited use in the context of re-marriages where the pressure to legally formalize the family surname often occurs very shortly after the divorce of the natural parents, however the use of an alias is not illegal in British Columbia (*Hoodekoff v. Hoodekoff* (1976), 25 R.F.L. 8(B.C.S.C.)) so many couples simply change the child's name informally and "wait out" the three years.

Unlike the Nova Scotia situation, where the natural parent who has remarried brings the application to change the surname of her children, in British Columbia it is the step-father who must apply to have the surname of his wife's children changed.

Section 4(5) of the *Change of Name Act*¹⁰² reads as follows:

4(5) If a person is a married man, he may, with the consent in writing of the mother and of the father, and subject to subsection (7), make application . . .

(b) to change the surname to his own surname; . . . of any of the unmarried minor children of his wife born prior to his marriage to her of whom she has lawful custody.

In the event that the natural father's consent isn't given, the Supreme Court may make an order under section 4(9) dispensing with his consent, if it considers that the change of name will not "unduly prejudice" *the person whose consent is dispensed with*. While the phrase "unduly prejudice" has not yet been the subject of judicial comment in the change of name context, it should be noted that the current section 4(9) was the result of a very recent amendment.¹⁰³ Prior to this amendment the test for dispensing with consent to a change of name was "the best interest of the *applicant*

101. This results in the anomalous situation where in adoption proceedings under the Children's Services Act, S.N.S. 1976, c. 8 a putative father's consent to adoption isn't required (*D.F.T. and D.M.T. v. Attorney General of Nova Scotia* (1978) unreported decision (N.S.S.C., A.D.) while under the Change of Name Act his consent is required, providing he has acknowledged that he is the father!

102. R.S.B.C. 1960, c. 30 as amended by S.B.C. 1972, c. 11 and S.B.C. 1977, c.5

103. S.B.C. 1977, c. 5, s. 2(d)

and all other persons included in the application.¹⁰⁴ This “best interest test” was applied by MacKinnon, L.J.S.C. in the case of *Re Keehn*,¹⁰⁵ where a 15 year old boy applied to have his given name changed. The boy’s parents had recently divorced with considerable animosity. Mr. Justice MacKinnon notes that the husband was probably correct in suggesting that his former wife had brought the application in order to embarrass him, but granted the application on the basis that since the boy had been using his “new” name for a considerable period of time, and was known by it, that it was in his best interest to have it changed.

The new “undue prejudice test” will hopefully make judges more aware of the effects of name changes by focusing their attention on the interests of the non-custodial parent which could be adversely affected. This would be consistent with the view expressed by Professor Bisset-Johnson that:

It may be necessary for the courts to consider with greater sensitivity the plight of divorced husbands, so they do not feel that in addition to losing custody of their children . . . they also have their children known by another man’s name. To divorced husbands this is not a peripheral matter. . . nor is it just a sense of proportion. In the long term, children may need to feel that they have not had their good name filched from them by their mothers and their ties with their fathers weakened.¹⁰⁶

In addition to the possibility that a required consent might not be dispensed with, the British Columbia Act provides that:

8(2) Where the Director of Vital Statistics is of the opinion that the name that the applicant seeks to adopt might reasonably cause mistake or confusion, or be a cause of embarrassment or confusion to any other person, or that a change of name *is sought for an improper purpose*, or is on any other ground objectionable, he shall refuse the application.¹⁰⁷

Again, there has been no judicial comment on how broadly this section should be interpreted. Does it mean that even where all required consents are given, the Director has discretion to refuse the application if, for example, a step-father brings an application at the insistence of his new wife who is motivated only by a desire to embarrass her former spouse, and to alienate him from his children

104. S.B.C. 1972, c. 11, s. 2

105. (1976), 28 R.F.L. 53 (B.C.S.C.)

106. Bissett-Johnson, “Name Changes” (1978), 4 *Adoption and Fostering* 58, at 61

107. S.B.C. 1972, c. 11, s. 5

by introducing the subtle psychological pressure of a name change?

Finally we must consider the situation where a woman, who has had a child out of wedlock, marries a man who is not the father of her child. In the event that the step-father doesn't wish to adopt the child, whose consents are necessary in order to effect a change of name? Section 4(6) (e) of the British Columbia Act says that an "unmarried mother" may apply to change the name of her minor children. The section clearly implies that the putative father's consent isn't required.¹⁰⁸ This section obviously applies to the situation where an "unmarried mother" is still unmarried. If she does marry she will not be an "unmarried mother" at the time of her application for a name change for her child, and therefore section 4(6) is inapplicable. In theory her husband (the step-father) should bring the application under section 4(5), *supra*. This raises the neat question as to whether the consent of the putative father will be required under section 4(5) while it is not required under section 4(6). Unfortunately the Interpretation Act¹⁰⁹ does not solve the dilemma — no definition of "father" is given.

[X. *Alternatives for the non-custodial parent — the question of access*

Generally, applications to adopt step-children are met with resistance in the form of refusal to give consent on the part of the non-custodial parent. The motivation for such refusal is that adoption will terminate whatever access rights the non-custodial parent presently has, or might acquire in the future. The conventional wisdom (legally and otherwise) for many years was that an order for adoption acted as a guillotine, cutting off one natural parent from his child's life forever. As McIntyre, J. put it while dispensing with the consent of a natural father to an adoption:

It follows that the father's application for access to the children must also fail, since the order for access would be inconsistent with the adoption.¹¹⁰

In Nova Scotia, O'Hearn, C.C.J. has often stated in his judgments in step-parent adoption cases that he wished he could make access of the natural parent a condition of the adoption order,¹¹¹ and, while

08. See Fifth Report of the British Columbia Royal Commission on Family and Children's Law, Part II, at 78

09. S.B.C. 1974, c. 42 as am.

10. *Re Adoption*, *supra* note 42 at 765

11. See, for example: *Re Hill* (1975), 20 N.S.R. (2d) 528 at 534

acknowledging that this was not possible, has expressed the hope that the adopting parents would allow the biological parent a place in the child's life.

The basis of the judicial reluctance to grant access to a natural parent in the adoption order is to be found in those sections of the adoption statutes of the various provinces which deal with the *effects* of an adoption order. In Nova Scotia this is section 22 of the Children's Services Act.¹¹²

There appears to have been, until very recently, considerable consistency between the literal wording of the statute, the case law and the academic writers as to the effect of these sections.¹¹³ The effect of both the British Columbia and Nova Scotia adoption statutes is to give "the adopted child the status of a child born in lawful wedlock to the adopters"¹¹⁴ with all the legal rights and obligations which flow therefrom. The corollary of this is that the relationship between the natural parent and the child ceases upon the granting of the adoption order. In the conventional view this included termination of access.

Three recent cases, all originating in British Columbia, have cast some doubt on this particular view of the law. In *Kerr v. McWhannell and McWhannell*¹¹⁵ the appellant had been found to be a person *in loco parentis* (as defined by the *Divorce Act*)¹¹⁶ and had been granted access to the child under the divorce decree. The child's mother subsequently remarried and applied with her new spouse to adopt the child. The judge of first instance granted the adoption, and the appeal was made on two issues:

- (a) the appellant's right to continued access should have been determined on a substantive application for the purpose before any adjudication could be made on the adoption; and (b) the appellant is a 'parent' within the meaning of *The Adoption Act*, R.S.B.C. 1960, c. 4, s. 8(1) (b) (re-en. 1968, c.4, s.4), and his consent to the adoption has been neither given nor dispensed with.¹¹⁷

While McFarlane, J.A. found against the appellant on both grounds, his *obiter dicta* dealt directly with the question of whether

112. S.N.S. 1976, c. 8. For the relevant legislation in British Columbia see *The Adoption Act*, R.S.B.C. 1960, c. 4 as am., s. 10

113. e.g. Hughes, M., "Adoption in Canada" in Mendes da Costa (ed.) *Studies in Canadian Family Law* at 167 *et seq.*

114. *Id.*, at 167

115. (1974), 16 R.F.L. 185 (B.C.C.A.)

116. R.S.C. 1970, c. D-8, s.2

117. *Supra*, note 115 at 186, 187

an order for adoption could terminate existing access rights granted under the *Divorce Act*.

. . . It is apparent this ground of appeal rests on the view that the order appealed from terminates the appellant's rights of access given to him in the divorce proceedings.

In my opinion, the order does not, and does not support, to have that effect. Accordingly, the question whether Rae J. had the necessary authority in this adoption matter to terminate the rights of access does not arise. I should not be understood as suggesting that he did not have the authority. I think his reasons show that he considered the possibility of such termination being a result of his decision to approve the adoption. He did not, however, terminate the appellant's rights to access expressly or formally and, in my opinion, his order does not do so by implication. I see nothing inconsistent in the child's being adopted by the respondents while at the same time the appellant retains his rights of access. Adoption affects legal relationships of the child. Custody and access rights can be given in proper cases to persons who have no legal relationship to the child involved.

The view that the order appealed from does not deprive the appellant of his rights to access is concurred in by the counsel who appeared for the respective Attorneys General. What is more important in my opinion is that counsel for the respondents took the same position and reaffirmed that stand on the hearing of this appeal. He went further and stated frankly that if this appeal be dismissed it is his clients' intention to apply in the divorce proceedings to have all the appellant's rights of access terminated. I cannot, therefore, give effect to the first ground of appeal and in reaching that conclusion I do not overlook the provisions of s. 10(2) of The Adoption Act.¹¹⁸

The fact that the appellant lost on his first ground of appeal did not mean that his access rights had been terminated, since no application had been made on that issue and the trial judge had not so held..

The paramountcy of rights conferred by a Federal Statute was considered by the Supreme Court of Canada in *Natural Parents v. Superintendent of Child Welfare*,¹¹⁹ in a case where a white couple attempted to adopt an Indian child with treaty-status. The child had been apprehended on two occasions under the *Protection of Children Act*, R.S.B.C. 1960, c. 303 because he had been injured and neglected by his parents. The trial Judge, while desirous of dispensing with the natural parent's consent, declined to do so and

118. *Supra*, note 115 at 187, 188

119. (1975), 21 R.F.L. 267 (S.C.C.)

dismissed the application on the basis that "to the extent that the operation of *The Adoption Act* would affect the status of the child as an Indian, and so extinguish his rights as an Indian, it is inconsistent with the *Indian Act*, R.S.C. 1970, c.I-6."¹²⁰ The British Columbia Court of Appeal reversed the decision unanimously.¹²¹ The Supreme Court of Canada, while dividing over the issue as to whether or not the British Columbia *Adoption Act* was referentially incorporated into the *Indian Act*, dismissed the appeal and allowed the adoption. The Court confirmed the validity of the provincial adoption legislation, holding that as legislation generally applicable throughout the province, it could affect Indians.¹²² As Martland, J. said:

I do not find any conflict between the provisions of *The Adoption Act* and the *Indian Act*. I agree with the view expressed in the Court of Appeal that the words "for all purposes" in subss. (1) and (2) of s. 10 of *The Adoption Act* must be taken to refer to all purposes within the competence of the British Columbia Legislature. Section 10, even prior to the enactment of subs. (4a), did not purport to deprive the child of any status or rights which he possessed under the *Indian Act* at the time of his adoption, and it is clear that no provincial legislation could deprive him of such rights.¹²³

The result of the *Natural Parents v. Superintendent of Child Welfare* case is that the Supreme Court of Canada has re-affirmed a principle of constitutional law which is of great importance in the "adoption-after-divorce" context. There has been no doubt that adoption fell within the domain of provincial legislative competence since the *Reference re Adoption Act* case,¹²⁴ and that s. 91(12) of the *B.N.A. Act* clearly gives the Federal Parliament the right to legislate in relation to "marriage and divorce." In reaching the decision in *Natural Parents* the Court once again reaffirmed the principle that where rights conferred under a Federal statute come into conflict with a piece of provincial legislation, the Federal statute will prevail. As Hogg puts it:

Since the introduction in 1968 of the corollary relief provisions of the federal Divorce Act there has been the possibility of conflict between orders made under provincial law and orders made under

120. *Id.*, at 280 per Martland, J.

121. [1974] 3 W.W.R. 363 (B.C.C.A.)

122. *Supra*, note 119 at 282 per Martland, J.

123. *Supra*, note 119 at 285

124. [1938] S.C.R. 398

the Divorce Act. In my opinion, the existence of conflict and its consequences should be determined by the relatively well-settled body of constitutional law which resolves conflicts between federal and provincial laws, that is to say, the doctrine of federal paramountcy.¹²⁵

Thus, a particular status granted by a federal statute cannot be defeated by the operation of a valid provincial Adoption Act. This leads to two potential arguments as to why a non-custodial parent's access should not be terminated by an order for adoption.

First, if access is perceived as a "right of the child",¹²⁶ then on the basis of the reasoning in the *Natural Parents* case, the operation of federal paramountcy would preclude the *Adoption Act* from altering that status, thus leaving the child with his "right" intact after an adoption order. Alternatively, on the basis of *Kerr v. McWhannell* and *McWhannell*, if an order giving access has been made under the *Divorce Act*, federal paramountcy will operate to maintain that person's right of access, although the provincial adoption order will extinguish his or her rights as parent *per se*.

Given this background of judicial thinking in both the Supreme Court of Canada and the British Columbia Court of Appeal, it is not surprising that the Supreme Court of British Columbia made the final conceptual leap in the recent case of *North v. North*.¹²⁷

The facts of this case are of interest. Mr. North had married in 1964, and two children were born during the course of the marriage. The couple divorced in 1973 and under the *decree nisi* the petitioner (husband) was granted custody of the children with reasonable and generous access to the respondent (mother). The respondent subsequently moved to New Zealand and did not return to British Columbia until 1976. During her absence from the province, her former husband remarried and applied with his new spouse to adopt his children. When efforts to contact the natural mother proved unsuccessful, her consent was dispensed with by the Court and the adoption was granted. On her arrival back in Canada, the natural mother sought an order from the Court to define the terms of the access which had been granted to her under the divorce decree. As Mr. Justice MacFarlane put it:

The question arises whether the granting of an order under the

125. Hogg, *Constitutional Law of Canada* (Toronto: The Carsell Co. Ltd., 1977) at 376

126. See: *M. v. M.*, [1973] 2 All E.R. 81 (Fam. Div.)

127. Vancouver Registry No. 5936/14590, May 3, 1978 (B.C.S.C.)

Adoption Act, R.S.B.C. 1960, c. 4, has the effect of terminating access rights granted in an order made under the *Divorce Act*.¹²⁸

His Lordship cites *Kerr v. McWhannell and McWhannell* with approval and agrees with counsel for the biological mother that "a right of access does not depend upon a parental relationship, and that the *Adoption Act* provisions deal primarily with the legal status of the natural and adopting parents *vis-a-vis* the child, not with the inter-personal relationship of the natural parents and the child."¹²⁹ His Lordship concludes:

In my opinion a valid order made in the exercise of jurisdiction conferred by the *Divorce Act* must be considered paramount to an order made under a provincial statute, and rights so acquired cannot be taken away by an adoption order.¹³⁰

It will be interesting to see if other provincial superior courts follow the lead of *North v. North*. In many respects it could be argued that it paves the way to meeting many of the needs of the parties to a step-parent adoption.

X. Summary

This article has attempted to survey a number of current issues of the law relating to step-parent adoptions in British Columbia and Nova Scotia. The recent cases of *Smallenberg* (in B.C.) and *Wolfe v. Cherrett* (in N.S.) are encouraging signs that Canadian courts are becoming more sensitive to the needs of non-custodial parents and more aware of the long-term interests of the child in deciding whether or not to dispense with consent. It is hoped that this trend will continue.

Additionally, the basic alternatives to step-parent adoptions have been explored. The use of custody and guardianship orders in favour of step-parents under the new *Family Relations Act* in British Columbia should prove to be a useful method of giving step-parents some rights towards the child of their spouse, thus increasing their security in the new family.

The latest developments relating to access after adoption in British Columbia will bear watching. It will be of particular interest to see if the decision of *North v. North* is applied in Nova Scotia by judges who wish to grant step-parent adoptions while simultaneously maintaining access rights for a deserving natural parent.

128. *Supra*, note 127 at 2

129. *Id.*, at 5

130. *Id.*