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BACKGROUND PAPER

**DIVORCE REFORM
AND THE JOINT EXERCISE
OF PARENTAL AUTHORITY**

The Quebec Civil Law Perspective

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Divorce Reform and the Joint Exercise of Parental Authority

The Quebec Civil Law Perspective

Prepared by:

Dominique Goubau

Professor, Faculty of Law, Laval University

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SUMMARY

This study was prepared in 1999 at the request of the Department of Justice and it describes the civil law notion of joint exercise of parental authority and provides a critical analysis of how it is applied and understood in Quebec. The purpose of this study is to determine whether, in the event of divorce reform, Quebec law offers an alternative in terms of parental roles.

PART I—PARENTAL AUTHORITY IN THE UNITED FAMILY: CONCEPT AND PRINCIPLES

Before elaborating on the issue of parental authority, it is important to reiterate the basic principles related to this concept. These principles apply to united and separated families alike.

In keeping with the law of other civil law jurisdictions, Quebec civil law uses the concept of parental authority. This concept can be analysed as being a blend of rights and duties. Certain duties include the responsibility of providing for all aspects of raising and nurturing children.

Though it originally was patterned largely on the Napoleonic Code of 1804, Quebec law has since evolved a great deal. As such, it has changed from being a system predicated largely on a the concept of “paternal authority” which entailed that authority was vested in both parents but was exercised, so long as the couple lived together, by the father alone, to that of “parental authority,” a system with more shared responsibility in which the authority is exercised by the father and mother equally.

During this period of transformation, not only did the Quebec legislature change the terminology used, it also introduced the notion of custody in 1969 and the concept of “legal tutorship of parents” in 1994. Legal tutorship gives parents the right to joint exercise of administrative rights as well as joint legal representation of their children. In this manner, one can say that legal tutorship completes the rights and duties entrusted to parents in the scope of their parental authority.

Parental authority is also comprised of certain general responsibilities mentioned at article 599 of the *Civil Code of Quebec* (C.C.Q.), including “custody, supervision and education,” as well as more specific responsibilities set out in many Quebec statutes and other *Civil Code* articles.

Both parents jointly exercise parental authority and tutorship. However, this shared responsibility is provided for in a practical manner, meaning that in reality, the physical participation of both parents is not required. Instead, there exists a presumption with regard to third persons in good faith, that where a parent performs alone any act of authority concerning the child or an act related to the tutorship, it is presumed that they are acting with the consent of the other parent. Like tutorship, simply being a parent to a child confers parental authority. However, this authority is not absolute since a judge may deprive parents of one or all attributes of their authority. It should be emphasized that deprivation of parental authority is not final and it is imposed in the interest of the child and where there are grave reasons for its justification. To conclude, custody is only one element of the concept of parental authority. It can be said that

custody is in a sense the physical element of parental authority (home, presence of the child, physical control over the child), whereas child-raising is the moral element.

The distinction between custody and parental authority takes on greater importance in the context of divorce or separation. The issue that arises is what effect the assignment of custody has on the exercise of parental authority.

PART II—THE EXERCISE OF PARENTAL AUTHORITY AFTER SEPARATION OR DIVORCE

The application of the *Divorce Act* concept of custody creates some uncertainty in Quebec that has been noted in academic articles and jurisprudence. The issue is to know whether or not to apply the civil law notion of custody, or on the contrary, the notion used in other provinces. Most Quebec authors opt for an interpretation confined within the civil law of Quebec. However, there exists a diverging body of case law to the contrary. This explains why practitioners, like those in other provinces, have started making distinctions which incorporate pointless notions (joint legal custody) or notions foreign to Quebec law (physical custody). Foreign because in principle custody is always physical, and pointless because the exclusive assignment of custody does not call the principle of joint exercise of parental authority into question.

In the legal environment, there exists confusion and a difference of interpretation in relation to the rights of the non-custodial parent. However, it can be said that Quebec civil law is undeniably based on a general philosophy of co-parenting in the event of separation and it clearly rejects the theory that parental authority is concentrated in the hands of the parent with sole custody.

A. CERTAINTIES

1. Power of the Courts to Set the Terms of the Exercise of Parental Authority

Jurisprudence and the *Civil Code* recognize that the courts can determine the manner in which parental authority is exercised by giving the notion of custody a specific meaning on a case by case basis. This power comprises, for example, the possibility of specifically ordering the joint exercise of parental authority by both parents or restricting certain parental rights. In practice, it is relatively unusual for Quebec courts to set such specific parameters in assigning parental roles. They are satisfied to award custody to one parent and access to the other, with no further specifications. On the other hand, restrictions or adjustments to a particular parental right are often included in judgments.

With regard to the power a court possesses in determining the roles of parents, Quebec law is no different from the law in the other provinces.

2. The Effect of the Awarding of Custody on the Existence of Parental Authority and Tutorship

An order granting sole custody of a child to one parent does not strip the non-custodial parent of his or her parental authority. That principle has been upheld in case law since the Supreme Court of Canada ruling in *C. (G.) v. V. -F. (T)* rendered in 1987. The application of this principle is less clear with regard to certain aspects of the exercise of joint authority. Secondly, the non-custodial parent retains the exercise of the right to tutorship (article 195). He or she may legitimately continue to represent the child in the exercise of his or her civil rights and the administration of his or her property.

Whether the parents are divorced or separated, Quebec civil law clearly establishes the principle of co-parenting in the exercise of the child's civil rights and the administration of the child's property.

3. Specific Acts Establishing Authority

The *Civil Code*, as well as many statutes, specifically grant the person having parental authority the right to act for a child in a certain number of situations, such as required consent, access to administrative records, and the right to receive information about the child. In doing so, these statutes confirm that the non-custodial parent retains his or her right to take an active part in matters pertaining to the child and that a custody order does not deprive him or her of that right. These statutes confirm that the principle of shared responsibility in the exercise of parental authority continues to be the rule. The only exceptions to that principle are death, incapacity, and deprivation of parental authority.

The principle of joint exercise of parental authority, as a consequence, sets forth the presumption with regard to third persons in good faith, that a parent having authority who acts alone is presumed to act with the consent of the other.

4. Right of Supervision, Right of Challenge, and Right to Information

In civil law, the assignment of sole custody with no specification as to parental roles means that the non-custodial parent has an automatic right to supervision. This right, foreseen by article 605 of the *Civil Code* includes the right to be informed of the child's situation and the right to challenge in court decisions made by the custodial parent.

Some courts rely on an *ex contrario* interpretation of this article to conclude that the non-custodial parent does not continue to have the right to participate *a priori* in major decisions concerning the child's upbringing. Though this body of case law represents a minority view, it perpetuates the confusion over the sharing of parental responsibility in a family that has broken down.

B. UNCERTAINTY: PARTICIPATION OF THE NON-CUSTODIAL PARENT IN RAISING THE CHILD

The decision rendered in 1996 by the Supreme Court of Canada in *W. (V.) v. S. (D.)* confirmed the principle that without any indication to the contrary, it is the custodial parent who alone has the right to determine the residence of the child. This practical solution fits logically into the concept of custody as it exists in Quebec and is generally supported by Quebec doctrine and case law. However, if it is admitted that the physical presence of a child entails that the custodial parent make practical decisions regarding the child, what about the other more important decisions that affect the child's development and upbringing?

In our opinion, the approach taken by case law, which directs the child-raising authority into the hands of the custodial parent, is based on an error in law. The non-custodial parent retains the right to participate in decisions that are not routine. The Supreme Court of Canada unanimously established this principle in *C. (G.) v. V. -F. (T.)*. Article 605 *C.C.Q.* by no means limits, therefore, the exercise of the non-custodial parent's parental authority. On the contrary, it adds a right, the right to determine the major choices affecting the direction of the child's life *C. (G.) v. V. -F. (T.)* to supervise and disagree with decisions made by the custodial parent, even if they are decisions which cannot be considered major.

There exists a fundamental distinction between the "assignment of custody" and the "exercise of parental authority." The assignment of custody does not deprive the non-custodial parent of the exercise of parental authority. In Quebec, most of the case law and doctrine accepts the fact that the non-custodial parent retains the right to participate in major decisions about the child's upbringing as a consequence of the exercise of parental authority.

However, case law in Quebec is divided on the issue of assignment of parental roles following separation. This division is largely due to recent Supreme Court of Canada decisions which give custodial parents most of the child-raising authority, in contrast with its unanimous decision in *C. (G.) v. V. -F. (T.)*. Despite the other Supreme Court of Canada decisions recently rendered, we think that the decision in *C. (G.) v. V. -F. (T.)* still represents the view of the Supreme Court of Canada on this issue.

C. THE VIEWPOINT OF FAMILY LAW PROFESSIONALS

Family law practitioners, as well as the general public, share the confusion that surrounds the issue of assignment of parental roles following separation.

This confusion has generated a concern for clarification among practitioners. To remedy the confusion, practitioners have begun inserting very specific clauses in separation or divorce agreements that specify the terms and conditions under which parental authority is exercised. The clauses are often added for the sole purpose of expressly stating the principle of co-parenting. Courts tend to render orders of joint custody or of joint parental exercise of authority.

D. TERMINOLOGY

Criticism of the terminology (“custody” and “access”) reflects the desire to include both parents in the raising of their children. However, the issue of terminology has not sparked a great deal of debate in Quebec. The reason for this resides in the fact that Quebec law makes a distinction between the notion of custody and that of the exercise of parental authority. Custody is only one element of parental authority and, therefore, does not affect the essence of that authority.

In reality, the problem is not so much the term used as the scope of its meaning. The confusion surrounding the legal effects of the awarding of exclusive custody is the main cause of any dissatisfaction that may exist with the terminology itself. The majority view in Quebec is that changing the legal terminology will not change the substance of the matter and that the real problem is parental awareness and the social perception of parental roles.

In practice, lawyers try to eliminate the problem of terminology by attempting to clarify the term “custody” or by simply trying to avoid using the word. Therefore, they use expressions such as “joint legal custody” or “joint exercise of parental authority” not only to clarify the division of responsibilities but also to eliminate any ambiguity in each parent’s dealings with third parties. Thus, the term “custody” is often replaced with phrases such as “the child’s schedule,” “sharing of the child’s place of residence,” “the child is with *the father* from this date to that date and with *the mother* from this date to that date” and “custody time,” etc. Agreements are generally very detailed in this regard.

E. ADVANTAGES AND DISADVANTAGES OF THE QUEBEC SOLUTION

For the purpose of this analysis, it is assumed that where sole custody of a child is awarded to one parent, other aspects of parental authority are not affected.

The disadvantage of the solution afforded by Quebec law is that it is not sufficiently clear in the minds of the public or within the legal community. I myself have already suggested that the Quebec law should be amended to eliminate any of this uncertainty.

By assuming that the principle of post-separation or post-divorce co-parenting is for the most part socially desirable, how can we assess the advantages of the solution afforded by Quebec law?

The most obvious advantage is that where sole custody is awarded to one parent, the non-custodial parent continues to share the responsibility of raising the child. This does not mean (and this is another advantage) that the parents are equal, but simply that the parents have to cooperate in making major decisions concerning the children. However, choice of residence and other day-to-day decisions related to the physical presence of the child are made by the custodial parent. The non-custodial parent has a right to be informed about such decisions and a right of supervision once the decisions have been made. The presumption relative to third parties applies as well. Thus, the Quebec solution is fair and practical.

The solution afforded by Quebec law could in fact be an interesting option in the event of changes to the *Divorce Act*. All it would take would be to:

- introduce into the *Divorce Act* a distinction between the notion of custody and the notion of parental authority;
- affirm the principle of joint exercise of parental authority after divorce, except where the interests of the child warranted a different solution;
- establish the presumption whereby each parent acts with the consent of the other with respect to third persons in good faith.

The distinction between “custody” and “authority” is similar to the distinction made in some Canadian provinces concerning the terms “custody” and “guardianship.” The latter in some ways is more akin to the civil law notion of parental authority.

F. COMPARATIVE LAW: IS THERE A “CIVIL LAW” APPROACH TO THE SHARING OF PARENTAL ROLES?

The traditional law of other civil law jurisdictions shows that the principle of co-parenting has not always been the rule. Still, many civil law jurisdictions have in recent years made significant changes and there now exists a strong trend towards a rebalancing of parental responsibilities. As such, France, Belgium, Germany and the Netherlands have recently modified their legislation to introduce the principle of shared responsibility.

In France, the 1987 and 1993 reforms modified article 287 of the French Civil Code to introduce the rule of joint exercise of parental authority. In Belgium, Germany, and the Netherlands, the laws also underwent a similar evolution. In these four countries, the legislation provides certain exceptions to the principle of joint exercise of parental authority. Thus, when the interests of the child dictates, the judge may award the exercise of authority to only one of the two parents.

The reforms also extended to the terminology used in these countries. In France, the word “custody” has been dropped in favour of the more neutral phrase “the parent with whom the child will normally reside.” In Belgium, the statute of April 13, 1995, modified the Civil Code which uses the word “accommodation” instead of “custody.” It is interesting to note, however, that the new terminology has not been embraced by all Belgian jurists.

The German Civil Code was modified July 1, 1998 by the *Parentage Law Reform Act*, and Dutch Civil Code was modified on January 1, 1998.

To conclude, the evolution of law in civil law countries restores the non-custodial parent’s status as having shared responsibility for the upbringing of children while affirming that the interests of the child must take precedence in decisions concerning the child.

FOREWORD

This study was prepared over the summer of 1999 at the request of the Family, Child and Youth Section of the Department of Justice of Canada. It comes in the wake of the Report of the Special Joint Committee on Child Custody and Access entitled *For the Sake of the Children*¹ and the Government of Canada's response, *Strategy for Reform*.²

In its response, the federal government supports "a child-centred policy that will encourage parents to share the responsibilities of child rearing in a way that will allow both parents to have the opportunity to guide and nurture their children." The response also indicates that the government "will review the concepts, terminology and language used in family law with a view to identifying the most appropriate way to emphasize the continuing responsibilities of parents to their children and the ongoing parental status of both mothers and fathers post-divorce."

In its report, the Special Joint Committee made several references to the specific situation of Quebec law, which, in keeping with civil law tradition, draws on the notion of "joint exercise of parental authority." The purpose of this study is to describe that civil law concept and the manner in which it is applied and understood in Quebec in order to assess the advantages and disadvantages." Reference to the solutions used in other civil law jurisdictions will serve to highlight the unique character of this concept. The aim of my presentation is ultimately to answer the following question: in the context of divorce reform, does Quebec law offer an interesting prospect in terms of parental roles?

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¹ Parliament of Canada, *For the Sake of the Children*, Report of the Special Joint Committee on Child Custody and Access, Ottawa, December 1998.

² Government of Canada, *Strategy for Reform*, Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access, Ottawa, May 1999.

PART I

PARENTAL AUTHORITY IN THE UNITED FAMILY: CONCEPT AND PRINCIPLES

An important step before expanding on the subject of parental authority in the context of the breakup of a couple is to reiterate the basic principles related to the civil law concept of parental authority. This section gives a brief overview of the exercise of authority in the united family.

Quebec civil law, like the law of all other civil law jurisdictions, uses the concept of “parental authority,” which encompasses most of the attributes needed to raise children. Parental authority can be analysed as a blend of rights and duties: while it does entail rights, it is first and foremost a responsibility, namely the responsibility of overseeing all aspects of the raising and nurturing of children.

Patterned largely after the Napoleonic Code of 1804, the *Civil Code of Lower Canada* of 1866 used the term “puissance paternelle” [*patria potestas*]: authority was vested in both parents but was exercised, so long as the couple were together, by the father alone. The notion of “custody” did not exist in the old *Civil Code*, not even in the chapter on judicial separation, article 214 of which simply stated that children were *entrusted* to the spouse who obtained the judicial separation (emphasis added). It was not until 1969 that the term “custody” first appeared in the *Civil Code*.³

In 1977, the Quebec legislature followed the lead of French law by replacing the phrase “puissance paternelle” with “autorité parentale” [parental authority] and, more importantly, by introducing the principle of joint exercise of that authority by the father and the mother equally. The concept of joint exercise of parental authority has not changed since 1977. However, in 1994 (the year the new *Civil Code of Québec* came into force), the National Assembly complemented the notion by introducing the principle of “legal tutorship of parents.” This right of tutorship means that in addition to exercising authority over the person of their children, the parents also jointly represent their minor children in exercising their civil rights and jointly administer their patrimony.⁴ Parental authority and legal tutorship are automatic effects of filiation and exist irrespective of the parents’ marital status. The moment filiation is legally established, whether or not the parents are married, parental authority and tutorship are exercised by the two jointly.

In keeping with civil law tradition, Quebec law stipulates that parental authority includes “the rights and duties of custody, supervision and education of their children” and the obligation to

³ S.Q. 1969, c. 74, ss. 9 and 14: “The court may also decide as to the custody, maintenance and education of the children...” Quoted by A. Mayrand, “La garde conjointe (autorité parentale conjointe) envisagée dans le contexte social et juridique actuel” in Formation permanente du Barreau du Québec, *Droit et enfant*, Cowansville : Les Éditions Yvon Blais, 1990, p. 22.

⁴ Art. 192 C.C.Q.

maintain their children.⁵ Beyond this general principle, parental authority also implies more specific responsibilities which are set out in many Quebec statutes as well as the *Civil Code*.

Examples include the right to consent to care required by the state of health of a minor⁶ and the right to consent to the marriage of a minor.⁷ Shared responsibility in the exercise of parental authority and legal tutorship is provided for in a practical manner: where the father or the mother performs alone any act of authority concerning the child or an act related to the exercise of tutorship, he or she is, with regard to third persons in good faith (daycare, school, hospital, financial institution, etc.), presumed to be acting with the consent of the other parent.⁸ Joint exercise of parental authority therefore does not actually require the physical participation of both parents. This is a common-sense rule that applies to united families and separated families alike.

In civil law, parents can lose parental authority under a declaration of *deprivation*.⁹ Deprivation may be complete or may apply to only one attribute of the authority. Complete deprivation leads not only to loss of parental authority, but also and automatically to loss of tutorship. Where an attribute is withdrawn, the court may decide whether or not tutorship is also lost.¹⁰ Deprivation or withdrawal of an attribute may not be imposed unless it is in the interest of the child and where there is a *grave reason*. The case law is consistent in stating that deprivation of parental authority entails a value judgment on the parents' basic failings in exercising their authority (violence, abandonment, gross neglect, etc.).¹¹ A declaration of deprivation or withdrawal is not necessarily final because a parent may, on producing evidence of new circumstances, have his or her authority restored.¹² Restoration of parental authority is somewhat theoretical, however. In reality, deprivation of parental authority is usually a step toward the child being adopted. It is therefore important to note that the deprivation of parental authority and the eventual assignment of parental authority under a custody order are two entirely different things. We will not address the deprivation of parental authority in this presentation, as deprivation is an extraordinary measure not taken in ordinary cases of divorce or separation.

⁵ Art. 599 *C.C.Q.*

⁶ Art. 14 *C.C.Q.*

⁷ Art. 373(1) *C.C.Q.*

⁸ Art. 194(2) and 603 *C.C.Q.*

⁹ Art. 606 *C.C.Q.*

¹⁰ Art. 197 *C.C.Q.*

¹¹ See the Supreme Court ruling in *C.(G.) v. V.-F.(T.)*, [1987] 2 S.C.R. 244, 261.

¹² Art. 610 *C.C.Q.*

To conclude this brief overview of the principles governing the exercise of parental authority in a united family, we underscore a point that takes on its full meaning in a situation of separation or divorce: **custody is only one element of the concept of parental authority**. It can be said that “custody” is in a sense the physical element of parental authority (home, presence of the child, physical control over the child),¹³ whereas *child-raising* is the moral element.

In the context of a united family, this distinction is of course never an issue. However, when *custody* is granted to one of the parents following a separation or divorce, the question that arises is what *effects* that assignment has on the exercise of parental authority, which as we just saw is a far broader concept than *custody*.

¹³ Albert Mayrand defines custody as the right and obligation of a person (normally the father or mother) to house and keep a child near or to establish a home for the child elsewhere; A. Mayrand, “La garde conjointe (autorité parentale conjointe) envisagée dans le contexte social et juridique actuel,” in Formation permanente du Barreau du Québec, *Droit et enfant*, Cowansville : Les Éditions Yvon Blais, 1990, p. 23.

PART II THE EXERCISE OF PARENTAL AUTHORITY AFTER SEPARATION OR DIVORCE

It is important to note at the outset that there is currently some uncertainty in the application of the *Divorce Act* in Quebec as to which should prevail: the notion of custody as it exists in the other provinces (that is, the custodial parent having most of the authority to make decisions on the children's upbringing), or the civil law notion of custody, which is only one element of parental authority and the assignment of which to one parent does not deprive the other of his or her authority over the child. Most Quebec authors contend that the *Divorce Act* must be applied within the confines of civil law in Quebec.¹⁴ The Honourable Albert Mayrand even went so far as to say that "[TRANSLATION] the Parliament of Canada accomplished a feat in respecting the two systems of law unique to two distinct societies."¹⁵ However, in spite of everything, there is a substantial body of case law in Quebec which (in the specific case of divorce) applies the concept of custody in a broad sense, that is, depriving the non-custodial parent of much of his or her parental authority and relegating that parent to the role of supervisor.¹⁶ This explains why practitioners in Quebec, like those in the other provinces, have started to make a distinction between "physical custody" and "legal custody"¹⁷ and to use the notion of "joint custody," leaving intact the ability of the non-custodial parent to take part in major decisions about the upbringing of the children. However, as the Supreme Court of Canada pointed out in 1987, the notion of physical custody does not exist in civil law (in principle, all custody is "physical") and the notion of joint legal custody is useless because civil law is not prejudicial to the principle of joint exercise of parental authority in cases where one parent is given sole custody.¹⁸ The notion of joint custody makes up for an imbalance in the exercise of parental authority. In reality, however, the claim of such an imbalance is based on an error in law.¹⁹ There is uncertainty in this area of which many judges are very aware and which leads them to remedy it by specifically relying on the notion of joint custody or joint exercise of parental authority. In *Droit de la famille 3202*,²⁰ Mr. Justice Sénécal, noting that Quebec courts and doctrine do not always agree on the real meaning of a sole custody order, particularly in cases of divorce, wrote:

[TRANSLATION] To prevent parental authority from being exercised by the parent with sole custody and to prevent that parent from alone making major decisions about the child, lawyers and the courts stipulate in agreements and judgments that, despite their separation, the parents shall continue to jointly exercise parental authority.

¹⁴ P.-A. Côté, "La Loi de 1985 sur le divorce et le droit civil," (1987) 47 *Can. Bar Rev.*, 1187; M. Pratte, "La garde conjointe des enfants de familles désunies", (1988) 19 *R.G.D.* 525; R. Joyal, *Précis de droit des jeunes*, Vol. 1, 2nd edition, Cowansville : Les Éditions Yvon Blais Inc., 1994; and, more recently, M. Giroux, "Le partage des responsabilités parentales après une rupture : une matière à débat," (1998) 77 *Can. Bar Rev.*, 354.

¹⁵ A. Mayrand, *loc. cit.*, p. 31.

¹⁶ For example, *Droit de la famille*, (1993) R.J.Q. 1728 (C.A.); *Droit de famille-120*, (1984) C.A. 101; *Droit de la famille-301*, (1988) R.J.Q. 17 (C.A.).

¹⁷ *Droit de la famille-2471*, (1996) R.D.F. 556 (C.S.); *Droit de la famille-2233*, (1995) R.D.F. 489 (C.S.).

¹⁸ *C.(G.) v. V.-F.(T.)*, [1987] 2 S.C.R. 244.

¹⁹ See A. Mayrand, *loc. cit.*, p. 33.

²⁰ *Droit de la famille-3202*, (1999) R.J.Q. 248 (C.S.). Similarly, *Droit de la famille-2384*, (1996) R.J.Q. 912 (C.S.).

We do not intend to expand further on the issue of whether or not the federal *Divorce Act* must be interpreted in Quebec from a civil law perspective, since the purpose of our study is in fact to analyse and assess the various aspects of the civil law approach to the sharing of authority after divorce. All we will say is that this debate adds to the confusion that generally surrounds in Quebec the legal aspect of parental roles following the breakup of a relationship. It is striking to note that on issues as important as these (What decisions can the custodial parent make? What role does the non-custodial parent play in the child's upbringing?) which affect a growing number of individuals, there has been confusion in legal circles for many years. Regarding the civil law response to the question of the exercise of parental authority following the breakup of a relationship, let us say in all honesty that neither the courts nor legal practitioners share a single vision, although a majority view is currently emerging. Some favour an interpretation whereby, in principle, the custodial parent alone makes decisions about the children's upbringing; others take the opposite view, namely that the non-custodial parent retains the right to participate in major decisions and therefore to stay very actively involved in raising the children. And yet it can be said that almost all authors (the "doctrine") share the same interpretation of texts on the subject, arguing that the awarding of custody does not deprive the non-custodial parent of his or her right to take part in major decisions concerning the child.

Beyond this difference in interpretation of the power of the non-custodial parent to take part in major decisions, it can be said that Quebec civil law is otherwise undeniably based on a general philosophy of co-parenting in the event of separation, and that it clearly rejects the theory of a concentration of parental authority in the hands of the parent with sole custody.

What this means is that in Quebec law today, there are *certainties* and *uncertainties* as to the sharing of parental roles after separation or divorce.

A. CERTAINTIES

1. Power of the Courts to Set the Terms of the Exercise of Authority

Without question, the courts have the power to determine on a case-by-case basis the manner in which separated parents will in future exercise their authority regarding the children and to order that some parental decisions be made jointly or establish the specific parameters of the role of the non-custodial parent.²¹ In other words, the *Civil Code* does not stand in the way of the courts giving the notion of custody specific meaning in each particular case, based on the interests of the child. As the Quebec Court of Appeal clearly indicated in a landmark decision:²²

[TRANSLATION] A judge may, if he or she sees fit, identify for the parties activities or decisions on which they will have to come to terms. The judge may specifically state that the former spouses must agree, for example, on choice of schools, summer camps or long-term medical treatment for a disabled child. By clearly setting the boundaries of the additional role assigned to the non-custodial parent, the judge helps prevent disputes over the exact nature of each parent's rights.

²¹ See P. Rayle, "Le juge, l'enfant et ... le parent pauvre du divorce," address given at the National Judicial Institute's symposium on family law, February 10-12, 1999, Quebec City (unpublished).

²² *Droit de la famille-301*, (1988) R.J.Q. 17 (C.A.).

This means that a court can, for example, specifically order the joint exercise of parental authority by both parents in order to preclude any ambiguity or to remind them of the rule of law whereby major decisions concerning the children are to be made jointly.²³ It also means that a court can restrict some rights, such as a parent's right to take part in certain decisions. In *Droit de la famille-2212*,²⁴ Mr. Justice Goodwin established the rights as follows:

[TRANSLATION] The Court therefore decides in this very special case to order partial suspension of Mrs. C.'s right to intervene first, but only regarding medical matters and academic matters such as the choice of a school for Ca..., the direction of the child's life and the child's recreational activities, choice of vacation, day camps, etc.

In practice, it is relatively unusual for Quebec courts to set such specific parameters in assigning parental roles, even though they have the power to do so. Many judgments in Quebec are satisfied to award custody to one parent and access to the other, with no further specifications. The question of the residual powers of the non-custodial parent is therefore not just academic. However, the case law abounds with decisions containing restrictions or conditions on the right of one parent to move or move with the child.²⁵

It is clear, then, that regardless of the solution put forward by the *Civil Code*, courts retain the upper hand in determining the roles of the parents. In that regard, Quebec law is no different from the law in the other provinces.

2. Effect of the Awarding of Custody on the Existence of Parental Authority and Tutorship

In the "traditional" and very common case of an order granting sole custody of a child to one parent (usually the mother) and visitation (or right of access) to the other parent, it is clear that the non-custodial parent is not stripped of his or her parental authority. That principle has been upheld in the case law since the Supreme Court ruling in *C. (G.) v. V.-F.(T.)*.²⁶ In that ruling, where the Court awarded custody of minor children to a third party rather than the widowed father, Beetz J. underscored that principle, which applies also in the case of a dispute between parents:

The non-custodial parent also has, pursuant to his or her status of person having parental authority, the right to decide as to the major choices affecting the direction of the child's life. Thus it is the right of the father or mother to consent to the marriage of a child who is a minor and the right of the person having parental authority to give his or her opinion as to proposed matrimonial agreements (arts. 119 *C.C.L.C.* and 466 *C.C.Q.*). The person

²³ See, for example, *Droit de la famille-3302*, J.E. 99-1024 (C.S.); *Droit de la famille-2756*, B.E. 97-738 (C.S.); *Droit de la famille-2473*, (1996) R.D.F. 580 (C.S.); *Droit de la famille-2384*, (1996) R.J.Q. 912 (C.S.); *Droit de la famille-3170*, (1998) R.D.F. 765 (C.S.); *Droit de la famille-2678*, (1997) R.D.F. 354 (C.S.); *Droit de la famille-2199*, (1995) R.D.F. 415 (C.S.); *Droit de la famille-2270*, J.E. 95-1852 (C.A.); *Droit de la famille-3202*, (1999) R.J.Q. 248 (C.S.).

²⁴ *Droit de la famille-2212*, (1995) R.D.F. 421 (C.S.). See also, *Droit de la famille-2494*, (1996) R.D.F. 647 (C.S.).

²⁵ *Droit de la famille-3297*, J.E. 99-972 (C.S.); *Droit de la famille-2683*, (1997) R.J.Q. 1752 (C.S.); *Droit de la famille-3202*, (1999) R.J.Q. 248 (C.S.).

²⁶ *C. (G.) v. V.-F.(T.)*, [1987] 2 S.C.R. 244.

having parental authority must also consent to the care and treatment required by his or her child if the latter is under fourteen years old and, if the child is fourteen or over, the person having parental authority must be informed in certain circumstances (p. 288)

Since then, the courts have been more than willing to reiterate in their judgments the basic principle that the awarding of custody addresses only one aspect of parental authority and leaves both parents' authority intact.²⁷ There may be unanimity on that rule, but as we will point out later, some aspects of the *exercise* of that joint authority are not so clear.²⁸

Second, it is also a fact that awarding custody does not result in loss of tutorship for the non-custodial parent. Despite the fact that he or she has nothing more than a right of access, the non-custodial parent can legitimately continue to represent the child in the exercise of his or her civil rights and the administration of his or her property. Article 195 *C.C.Q.* clearly states that principle:

Where the custody of a child is decided by judgment, the tutorship continues to be *exercised by the father and mother*, unless the court, for grave reasons, decides otherwise. [emphasis added]

Whether the parents are divorced or separated, Quebec civil law clearly establishes the principle of co-parenting in the exercise of the child's civil rights and the administration of the child's property.

3. Specific Acts Establishing Authority

The *Civil Code*, as well as many statutes, specifically grant certain rights to the persons having parental authority, without taking into account which of the parents has custody. Those statutes specifically refer to the *person having parental authority* where he or she acts for a child (required consent, access to administrative records, right to receive information about the child, etc.). It can therefore be said that these statutes confirm that the non-custodial parent is not

²⁷ Without citing too many examples, the following decisions, which came in the wake of *C.(G.) v. V.-F.(T.)*, specifically reiterate that principle : *Droit de la famille-301*, (1988) R.J.Q. 17 (C.A.); *Droit de la famille-3235*, B.E. 99BE-211(C.S.); *Droit de la famille-2983*, B.E. 98BE-485 (C.S.); *Droit de la famille-2826*, (1997) R.D.F. 823 (C.S.); *Droit de la famille-2487*, (1996) R.D.F. 617 (C.S.); *Droit de la famille-2473*, (1996) R.D.F. 580 (C.S.); *Droit de la famille-2471*, (1996) R.D.F. 556 (C.S.).

²⁸ See *infra*, "Certainties."

deprived of his or her right to take an active part in matters pertaining to the child.²⁹ In the area of medical care, for example, the legislation pertains to the *person having parental authority*. As we have seen, the non-custodial parent continues to have parental authority. What this means, still using the example of medical care, is that the non-custodial parent can legitimately give consent to a medical procedure for the child. The principle of shared responsibility in the exercise of parental authority continues to be the rule, even in the context of separation or divorce. The only exceptions to that principle are set out in restrictive terms in the statute; they are death, incapacity and deprivation of parental authority.³⁰ The practical results of this rule are that, even following separation or divorce, each parent can give consent to medical care for the child, and that with regard to third persons (physician, hospital), such a unilateral act is presumed to be carried out with the consent of the other parent. However, a non-custodial parent who learns that the custodial parent is about to have the child undergo surgery but disagrees with that decision could legitimately make his or her disagreement known to the medical authorities concerned and block the procedure. This is a tangible example of what is meant by joint exercise of parental authority. Consent to marriage is another example: article 373 *C.C.Q.* states that consent is a prerogative of the *person having parental authority*. A custody order does not deprive the non-custodial parent of that right. Of course, in the context of separation, as in the context of a united family, bear in mind that with regard to third persons in good faith, a parent having authority who acts alone is presumed to act with the consent of the other. That presumption is the necessary corollary to the principle of joint exercise of parental authority.

²⁹ The statutes are:

- *Civil Code of Québec*, S.Q. 1991, c. 64, art. 14, 16, 17, 18, 19, 21, 23, 26, 42, 43, 175, 373, 434, 601, 1459.
- *An Act respecting access to documents held by public bodies and the protection of personal information*, R.S.Q., c. A-2.1, ss. 53, 94.
- *An Act respecting prescription drug insurance*, R.S.Q. c. A-29.01, ss. 17, 24.
- *Charter of the French Language*, R.S.Q., c. C-11, s. 74.
- *Highway Safety Code*, R.S.Q. c. C-24.2, ss. 24, 68.
- *Code of Civil Procedure*, R.S.Q., c. C-25, ss. 776, 779, 818.1, 824, 826, 826.1.
- *Code of Criminal Procedure*, R.S.Q., c. C-25.1, s. 28.
- *Public Curator Act*, R.S.Q., c. C-81, ss. 34, 52.
- *Fire Investigations Act*, R.S.Q., c. E-8, s. 21.1.
- *An Act respecting offences relating to alcoholic beverages*, R.S.Q., c. I-8.1, ss. 103.2, 103.6.
- *Education Act*, R.S.Q., c. I-13.3, s. 13.
- *Education Act for Cree, Inuit and Naskapi Native Persons*, R.S.Q., c. I-14, s. 255.2.
- *Youth Protection Act*, R.S.Q., c. P-34.1, s. 91.
- *An Act respecting the protection of personal information in the private sector*, R.S.Q. c. P-39.1, ss. 30, 38.
- *An Act respecting the determination of the causes and circumstances of death*, R.S.Q., c. R-o.2, s. 118.
- *An Act respecting child day care*, R.S.Q., c. S-4.1, s. 1.
- *An Act respecting health services and social services*, R.S.Q., c. S-4.2, ss. 12, 21, 25.
- *An Act respecting health services and social services for Cree and Inuit Native Persons*, R.S.Q., c. S-5, ss. 8., 8.1.
- *An Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, R.S.Q., S.Q. 1997, c. 75, ss. 8, 19.
- *An Act respecting the distribution of financial products and services*, S.Q. 1998, c. 37, s. 243.

³⁰ Art. 600, *C.C.Q.*

4. Right of Supervision, Right of Challenge and Right to Information

In the case of a sole custody order with no other specification as to parental roles, it is firmly established that in civil law, the fact that the non-custodial parent is not deprived of his or her parental authority means at the very least that that parent has an automatic right to supervise the manner in which the custodial parent is raising the child. This implies the right to be informed of the child's situation,³¹ whether by the custodial parent or by third parties who deal with the child (at daycare, at school, etc.). The non-custodial parent's right of supervision naturally entails the right to challenge in court decisions made by the custodial parent.³² The exact wording of article 605 *C.C.Q.* bears noting:

Whether custody is entrusted to one of the parents or to a third person, and whatever the reasons may be, the father and mother retain the right to supervise the maintenance and education of the children, and are bound to contribute thereto in proportion to their means.

Some courts rely on this article to conclude that if the non-custodial parent continues, in civil law, to have a right of supervision, it must be concluded *ex contrario* that this parent does not continue to have the right to participate *a priori* in major decisions concerning the child's upbringing.³³ As we will see in the following pages, this body of case law represents a minority view. However, it perpetuates the confusion that we mentioned earlier and that persists in Quebec over the real sharing of parental responsibilities in a family that has broken down.

B. UNCERTAINTY: PARTICIPATION OF THE NON-CUSTODIAL PARENT IN RAISING THE CHILD

Since the 1996 Supreme Court of Canada decision in *W. (V.) v. S. (D.)*,³⁴ it is generally assumed that awarding sole custody to one parent implies that this parent has the right to alone determine where the child will live if the custody order does not contain any specific provisions to that effect. That approach is generally supported by doctrine³⁵ and case law³⁶ in Quebec. It is not only eminently practical, but also fits logically into the concept of custody as it exists in Quebec. To the extent that custody, as explained earlier, represents the *physical* aspect of parental authority, it is seemingly acceptable for the person having custody to be able to make decisions about the child's place of residence, subject, of course, to the non-custodial parent's right of supervision and challenge.³⁷ The same is true of the day-to-day decisions that by all indications are the responsibility of the custodial parent, just as the non-custodial parent is expected to make

³¹ Art. 605 *C.C.Q.*

³² Art. 604 and 612 *C.C.Q.*

³³ For example, in *Droit de la famille-3055*, (1998) R.D.F. 475 (C.S.), the court, asked to rule on a question of choice of school, found that in civil law it is up to the custodial parent, mother or father, to make the decisions she or he feels are appropriate concerning the child's upbringing, particularly in religious matters, and that the non-custodial parent has nothing more than a right of supervision.

³⁴ *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108.

³⁵ See M. Pratte, *loc. cit.*, and M. Giroux, *loc. cit.*

³⁶ *Droit de la famille-2683*, (1997) R.J.Q. 1752 (C.S.).

³⁷ *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

decisions of that nature when the child is with that parent pursuant to his or her right of access. The physical presence of a child, as we all know, entails a number of “little” decisions (bedtime, choice of entertainment, etc.) which the parent who has the child can make alone.

But what about the *other* decisions that are part of raising a child, the major decisions that go beyond the scope of everyday living? Examples include choice of school and key decisions affecting the child’s development, such as the decision to allow a child to invest a great deal of time and energy in intense athletic training or a highly demanding cultural pursuit. As we saw earlier, there are a number of court rulings which tend to concentrate child-raising authority in the hands of the custodial parent and make the non-custodial parent a more or less passive and distant bystander whose authority is exercised primarily through his or her right to be informed and to appeal to the courts where necessary.³⁸ When that happens, it is up to the non-custodial parent to demonstrate in court the harmfulness of a particular decision made by the custodial parent. In our opinion, that approach, which has led to the establishment in Quebec of the concepts of “legal custody,” “physical custody” and “joint custody,” is based, as the Honourable Albert Mayrand pointed out, on *an error in law*.³⁹ *The idea of making the custodial parent primarily responsible for child raising is unheard of in Quebec civil law.* As Mr. Justice Lesage wrote more than a decade ago:

[TRANSLATION] In civil law, a simple custody order leaves the non-custodial parent with a “*right of supervision*” relative to the custodial parent. The non-custodial parent also retains the right to participate in decisions that are not routine, that is, major medium- and long-term decisions, such as schooling, religious instruction and non-urgent medical treatment.... *Custody, whether or not it is “legal” custody, need not be awarded jointly to attain that same result.*⁴⁰

Consequently, article 605 *C.C.Q.*, which allows the non-custodial parent to supervise the custodial parent, does not take away from the non-custodial parent the right of participation which Mr. Justice Lesage so aptly described. While the aim of the right of supervision is to allow the non-custodial parent to monitor the custodial parent’s day-to-day handling of the child’s upbringing, it must be remembered that article 605 applies without distinction to situations where custody is awarded to one parent and situations where a third person is made guardian. There is absolutely no question in the latter case that the parent, as the person having parental authority, can not only monitor the guardian, but also make major decisions regarding the child. The Supreme Court unanimously established that principle in *C.G. v. V.-F. (T.)*; Beetz J. wrote:

The person who has custody has control over the child’s outings, recreation and associations. That person must also, as a consequence of his or her privileged position, make the day-to-day decisions affecting the life of the child. Nevertheless, the non-custodial parent who is deprived of the physical presence of his or her child most of the time enjoys a right to watch over the decisions made by the person who has custody....

³⁸ See *Droit de la famille-3055*, (1998) R.D.F. 475 (C.S.).

³⁹ See also *Droit de la famille-2473*, (1996) R.D.F. 580 (C.S.).

⁴⁰ R. Lesage, “Garde ou autorité parentale : l’emprise de la sémantique,” (1988) 91 *R. du N.* 46, 49.

The non-custodial parent also has, pursuant to his or her status of person having parental authority, the right to decide as to the major choices affecting the direction of the child's life. Thus it is the right of the father or mother to consent to the marriage of a child who is a minor and the right of the person having parental authority to give his or her opinion as to proposed matrimonial agreements.... The person having parental authority must also consent to the care or treatment required by his or her child if the latter is under fourteen years old....⁴¹

Given that article 605 *C.C.Q.* makes no distinction between situations where custody is awarded to one parent and situations where a third person is named guardian, it must be concluded that this basic principle set out in the Supreme Court of Canada's unanimous ruling prevails in all cases. Article 605 *C.C.Q.* by no means limits, therefore, the exercise of the non-custodial parent's parental authority; on the contrary, it *adds* a right, the right to supervise and disagree with decisions made by the custodial parent, even if they are decisions which cannot be considered major. This additional power is necessary to compensate for the fact that the non-custodial parent, because the child lives with the custodial parent most of the time, no longer has the opportunity to find out how the child is being raised. An added consideration is that this interpretation is supported by the fact that article 605 *C.C.Q.* states that the non-custodial parent remains bound to contribute to the maintenance and education of the children in proportion to his or her means.⁴² This ruling by the Supreme Court of Canada, which reiterates the fundamental distinction between "award of custody" and "exercise of parental authority," is entirely consistent with the traditional teachings of civil law. In the last century, Pierre Basile Migneault wrote the following in his treatise on Canadian civil law about the effects of a custody order:

[TRANSLATION] since custody has to be awarded to one of the spouses, the benefit to the children is used as a guide. However, all the other rights and duties of the parents with respect to their children remain intact.⁴³

Trudel echoes that view, writing in his own treatise that "[TRANSLATION] custody of children does not take away the exclusive exercise of paternal authority. The judgment notwithstanding, the parents retain their rights and especially their natural duties regarding their children."⁴⁴ In Quebec, most of the case law and the doctrine accept the fact that the non-custodial parent retains

⁴¹ C.(G.) v. V.-F.(T.), [1987] 2 S.C.R. 244, at 282 and 288.

⁴² Similarly, M. Giroux, *loc. cit.*

⁴³ P.B. Migneault, *Le droit civil canadien*, Vol. II, Montreal: C. Théoret, 1896, p. 37.

⁴⁴ G. Trudel, *Traité de droit civil du Québec*, Vol. II, Montreal: Wilson et Lafleur, 1942, p. 51.

the right to participate in major decisions about the children's upbringing,⁴⁵ even though it is agreed across the board that the reality is that it is often the custodial parent who alone makes most of the decisions on child-raising. The very recent decision *Droit de la famille-3331* clearly illustrates this majority view. The court, in awarding custody of the children to the father, had the following to say in a portion of the judgment we believe bears reproducing here:

[TRANSLATION] This does not mean, however, that he can impose his views and wishes on her as to the way J. and C. are to be raised. It is important to keep in mind that article 599 *C.C.Q.* frames parental authority in the following terms:

599. The father and mother have the rights and duties of custody, supervision and education of their children.

Those rights and duties are linked to a very specific goal: to raise the children in the best way possible. The right and duty of custody are related to the means, that is, keeping the child in order to meet that goal.

Parental authority is always shared, although the means of exercising it can to some extent be individualized. Everyone must therefore contribute to raising the child to the age of majority in the best possible physical, moral and mental conditions.

The persons having parental authority have a specific obligation to ensure the child's health, schooling, religious and moral instruction, and vocational training. The non-custodial parent retains his or her parental authority and his or her rights and obligations respecting the child even though custody is awarded to the other parent.⁴⁶

A number of recent Supreme Court of Canada decisions cast doubt, however, as to the state of Quebec law on the issue of the assignment of parental roles following separation. In *P. (D.) v. S. (C.)* (1993),⁴⁷ the Supreme Court of Canada seemed to indicate that on this issue, Quebec law may not be any different from the law in the other provinces and to clearly favour an approach which gives the custodial parent most of the child-raising authority, in contrast to its unanimous decision in *C.(G.) v. V.-F.(T.)*.

⁴⁵ M. Pratte, for example, aptly expressed this principle in writing that the non-custodial parent can not only make day-to-day decisions concerning the child in the course of exercising his or her right of access, "[TRANSLATION] but can also, in principle, be consulted on all decisions affecting the child's future. The non-custodial parent must consent, for example, to medical care and changes in religious or academic instruction." M. Pratte, "La garde conjointe ...," *loc. cit.*, p. 565. We therefore do not agree entirely with the opinion on this matter given by Madam Justice L'Heureux-Dubé, who wrote in *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108, that "... authors and the courts both affirm that the *Civil Code of Québec* has adopted a liberal concept of custody... that gives the custodian the exclusive power to make all decisions in respect of the child..." (paragraph 70). Suffice to recall the provisions on medical care and tutorship to point out the inaccuracy of such a statement. Even more surprising is the fact that opinion is based on *C.(G.) v. V.-F.(T.)*, [1987] 2 S.C.R. 244, which, as we saw earlier, says the opposite.

⁴⁶ *Droit de la famille-3331*, J.E. 99-1024 (C.S.).

⁴⁷ *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141.

In *P. (D.) v. S. (C.)*. The primary issue in these cases was limited to the criterion applicable to right of access. Madam Justice L'Heureux-Dubé expressed the view, however, that it is important to analyse the issue in the broader context of custody in general. In so doing, she offered an interpretation of the civil law concept of custody, which reduces the non-custodial parent to the status of distant observer. In a recent study, Professor Michelle Giroux clearly showed that L'Heureux-Dubé's decision should be viewed as nothing more than an *obiter dictum*⁴⁸ and that the opinion was based on a series of references to doctrine and case law which are somewhat ambiguous and incomplete.⁴⁹

In 1996, the Court handed down two major rulings on the right of custodial parents to move with their children where such a decision could jeopardize the other parent's access.⁵⁰ Reiterating her analysis in the 1993 decisions, L'Heureux-Dubé repeated, although this time it was on behalf of the entire Court, her broad interpretation of the concept of custody in Quebec law. Once again, this general statement should be viewed as nothing more than a passing comment, because in reality, the only issue before the Court was the authority of the custodial parent concerning the child's place of residence. Furthermore, under Quebec law as under the law of the other provinces, it is assumed that that authority is in fact held by the custodial parent. It was therefore not necessary to extend this claim to other areas of parental decision-making.

We share Giroux's opinion that the 1987 decision in *C.(G.) v. V.-F.(T.)* still represents the view of the Supreme Court of Canada on the issue of the authority of a non-custodial parent to participate in decisions on child-raising. Reducing the non-custodial parent to nothing more than a far-away monitor, as the Supreme Court of Canada did in *obiter* in a series of decisions between 1993 and 1996, is simply at odds with the state of civil law in Quebec, which in contrast, as we have already pointed out, is basically rooted in a philosophy of co-parenting after a couple separates. It is important to note, however, that these recent decisions from the Supreme Court of Canada add to the confusion in this area.

⁴⁸ This observation is even more germane to Madam Justice L'Heureux-Dubé's analysis of the civil law notion of custody in *Young v. Young*, which decision was handed down the same day, because that decision did not look at Quebec law, but rather the federal *Divorce Act*. Several years later, Madam Justice again put forward in passing an interpretation of the concept of custody in common law and in civil law which concentrates decision-making authority in the hands of the custodial parent.

⁴⁹ M. Giroux, *loc. cit.*, pp. 366 *et seq.*

⁵⁰ *Gordon v. Goertz, S.(D.) v. W.(V.)*.

Clearly, then, there are two conflicting bodies of case law in Quebec, one which relegates the non-custodial parent to the role of supervisor,⁵¹ and one (the majority if we rely on published judgments⁵²) which allows the non-custodial parent to take a more active role in child raising and specifically affirms that parent's right to participate in major decisions concerning the child.⁵³

C. THE VIEWPOINT OF FAMILY LAW PROFESSIONALS

The confusion to which we just referred can also be seen among family law practitioners, especially since the latest decisions by the Supreme Court of Canada. Some practitioners believe that in Quebec law, the non-custodial parent continues to be allowed to participate in major decisions concerning the children, while others believe that a sole custody order leaves the non-custodial parent with nothing more than a right of supervision. What this means is that, even among family law professionals, opinion is sharply divided as to the real effect of a sole custody order. For example, on the very practical subject of choice of schools, some professionals hold the view that the non-custodial parent can take part in that decision, while others contend that as the law currently stands, the decision is for the custodial parent to make and cannot be challenged other than in court.

In this regard, few practitioners make a distinction between situations of divorce and situations involving couples who are not married. It should also be noted that the vast majority of parties to separation or divorce proceedings and many educational and related institutions (schools, daycares, etc.) believe that decision-making authority is vested in the custodial parent alone. There is therefore a considerable gap between the theoretical solution afforded by Quebec civil law, which favours co-parenting, and the perception of the effect of a sole custody order held by most parties to separation or divorce proceedings and many professionals and judges, namely that the non-custodial parent is for all intents and purposes deprived of his or her active role as a parent except when the child is visiting or on an outing with that parent, whereas the custodial parent can do almost as he or she pleases in terms of raising the child.

⁵¹ For example, *Droit de la famille-3055*, (1998) R.D.F. 475 (C.S.).

⁵² Given that the number of decisions published in law reports is small relative to the number of decisions made, we realize that the word "majority" is tenuous.

⁵³ For example, *Droit de la famille-2473*, (1996) R.D.F. 580 (C.S.). See also *Droit de la famille-3235*, B.E. 99BE-211 (C.S.), where the court pointed out that the non-custodial father retained all his parental authority even though he did not have custody of the children and that he must be consulted on all major decisions affecting the welfare of the children. In that particular case, the former wife had alone made financial commitments which in the father's opinion were too costly. Because the mother had not obtained the father's consent, the court found that she alone must bear the consequences of her decisions. For a similar finding regarding the choice of a private school and the costs associated with such a unilateral decision, see *Droit de la famille-2826*, (1997) R.D.F. 823 (C.S.).

Whether to avoid concentrating decision-making authority in the hands of only one parent⁵⁴ or simply to eliminate any ambiguity over the matter,⁵⁵ the courts are perfectly willing to order joint legal custody or joint exercise of parental authority.⁵⁶ A telling sign of this trend is the following statement by the court in *Droit de la famille-2487*: “Reminds both parents that the law provides for the joint exercise of parental authority.”

Another reaction to the uncertainty surrounding the legal effects of custody orders is that family law professionals have in the past several years developed the custom of inserting in separation and divorce agreements very specific clauses on the terms and conditions under which parental authority is exercised (choice of schools, place of residence, organization of extracurricular activities, etc.). The purpose of such clauses, which generally lean toward greater participation by the non-custodial parent, is to make matters clearer and more predictable and to make the parties aware of their parental roles after separation. The clauses are often added for the sole purpose of expressly stating the principle of co-parenting, which clearly shows that in the minds of professionals, that principle is still not firmly established. Two examples of such clauses appear below. The first is a proposal from the continuing legal education division of the Quebec Bar Association. The second is taken from an agreement upheld by the Court of Appeal.

1. [TRANSLATION] The spouses shall continue to exercise jointly parental authority with respect to the children, and, without limiting the generality of the foregoing, the spouses shall consult each other on all major issues pertaining to religious instruction, education, health, medical care and welfare of the children, place of residence and choice of schools, and shall together decide which measures are most appropriate and in the best interests of the children.⁵⁷
2. [TRANSLATION] with general access rights established by agreement between the parties and joint participation in decisions concerning the children, including, directly or indirectly, health, education, extracurricular activities and any matters related to the welfare of the children, and each party shall inform and consult with the other on any matter related to the children’s health, educational progress and general well-being.⁵⁸

⁵⁴ *Droit de la famille-3302*, J.E. 99-1024 (C.S.); *Droit de la famille-2756*, B.E. 97BE-738 (C.S.); *Droit de la famille-2384*, (1996) R.J.Q. 912 (C.S.); *Droit de la famille-2678*, (1997) R.D.F. 354 (C.S.); *Droit de la famille-2330*, (1996) R.D.F. 76 (C.S.).

⁵⁵ The courts regularly reiterate the principle of joint exercise of parental authority: *Droit de la famille-3473*, (1996) R.D.F. 580 (C.S.); *Droit de la famille-2471*, (1996) R.D.F. 556 (C.S.) (“[TRANSLATION] While sole custody is awarded to Ms. P., the father retains all the attributes of parental authority concerning major issues that affect his child.”); *Droit de la famille-2487*, (1996) R.D.F. 617 (C.S.); *Droit de la famille-2199*, (1995) R.D.F. 415 (C.S.).

⁵⁶ The only difference between these two types of order is that a joint legal custody order gives both parents the right to participate in decisions on where the child will live.

⁵⁷ Formation permanente du Barreau du Québec, seminar on drafting separation and divorce agreements given by S. Anfousse, Montreal, Winter 1999, p. 11.

⁵⁸ *Droit de la famille-2962*, J.E. 98-1443 (C.A.), quoted by M. Tétrault, Sherbrooke legal aid, *Garde partagée. Opinions partagées.*, May 1999 (typed document; my thanks to the author for sending it to me).

The contradictions in the case law go a long way toward explaining the frequent use of this type of clause in agreements. Further, the growing popularity of family mediation is also contributing to the wider use of such clauses.

To summarize, it can be said that the perception among professionals of the effect of a sole custody order is not absolute and that it is precisely that ambivalence and the will to eliminate the uncertainty that are leading most professionals to try to clarify matters through consensus. The ambivalence stems primarily from their understanding of the division of parental responsibilities following separation and the real scope of the concept of joint exercise of parental authority.

D. TERMINOLOGY

Despite appearances, criticism of the terminology (“custody,” “access”) in the English-speaking provinces extends beyond mere concern about aggravating the debate in the courts and eliminating terms that to some reek of “custody.” The criticism of the current terminology is very specific. The fact is that it reflects the rejection of the traditional approach of concentrating parental authority in the hands of the custodial parent. The criticism underscores the importance of adopting some form of cooperation in raising children and therefore a division of parental responsibility despite the fact the couple is no longer together.

It is not true that the issue of terminology in the area of custody law has sparked a great deal of debate in Quebec. That is probably attributable to the fact that because it is only one element of the broader concept of parental authority, the notion of custody in Quebec law does not affect the essence of that authority and therefore is probably less fraught with emotion. The notion of “custody” and the notion of “access” (based on case law) are firmly established in the minds of the public and in the minds of family law professionals. Many lawyers believe that for many “non-custodial” fathers, the notion of custody can have a negative connotation. In reality, however, the problem is not so much the term used as the scope of its meaning: what exactly is the role of the non-custodial parent? That is the question facing the parties to custody cases. The confusion surrounding the legal effects of the awarding of exclusive custody, which we have discussed at length, is the main cause of any dissatisfaction that may exist with the terminology itself. The majority view in Quebec, however, is that changing the legal terminology will not change the substance of the matter and that the real problem is parental awareness and the social perception of parental roles. In this connection, I share the opinion of B. Cossman and R. Mykitiuk, who wrote:

There is, equally, reason to be concerned that the new language will become as loaded as the old, since it is not the language *per se* that is at issue, but rather, the restructuring of parent-child relationships.⁵⁹

If the terms are a problem because of their uncertain meaning, it follows that all it would take to eliminate most of the problem would be to clarify that meaning. That is precisely what a

⁵⁹ B. Cossman and R. Mykitiuk, “Reforming Child Custody and Access Law in Canada: A Discussion Paper,” (1998) 15 *Can. J. Fam. L.*, 13, p. 22.

growing number of lawyers attuned to the issue are doing in separation agreements. Analysis of standard clauses shows that the parties are increasingly turning to the notions of “joint legal custody” or “joint exercise of parental authority” not only to clarify the division of responsibilities, but also to avoid the disadvantages associated with the overly broad notion of “custody.” Moreover, these terms (especially “joint custody”), when clearly explained, eliminate any ambiguity in each parent’s dealings with third parties, be they schools, hospitals or daycare.

There is also evidence that more and more professionals are trying to avoid the word “custody,” opting instead for the notion of exercise of parental authority, coupled with phrases that make it possible to resolve the issue of the physical presence of the child. The terms “custody,” “access” and “visitation” are thus being replaced with phrases like “the child’s schedule,” “sharing of the child’s place of residence”, “the child is with *the father* from this date to that date and with *the mother* from this date to that date” and “custody time.” The use of this type of phrasing of course means that specific terms and conditions regarding the presence of the child and decisions affecting the child have to be set out. It is, therefore, not surprising to find that agreements are generally very detailed in this regard.

E. ADVANTAGES AND DISADVANTAGES OF THE QUEBEC SOLUTION

For the purpose of analysing the advantages and disadvantages of the notion of joint exercise of parental authority, I assume from this point on that the current state of Quebec law is such that where sole custody of a child is awarded to one parent, other aspects of parental authority are not affected. Parental authority, like tutorship, continues to be exercised jointly by the separated or divorced parents. Remember that the principle of joint exercise of parental authority means that the non-custodial parent is allowed not only to be kept informed of the child’s upbringing and development, but also to participate in major decisions about that upbringing.⁶⁰ According to that principle, the non-custodial parent cannot be relegated to the status of a passive witness to the child’s development and upbringing. On the contrary, despite the separation, the non-custodial parent remains an active participant in that upbringing.

The disadvantage of the current solution afforded by Quebec law is simply that it is not sufficiently clear in the minds of the public or within the legal community, as witnessed by the controversy over the authority of the non-custodial parent to participate *a priori* in major child-raising decisions. I myself have already suggested that the Quebec law should be amended to eliminate any uncertainty about the legal principle of the joint exercise of parental authority.⁶¹ As for the rest, people’s assessment of the advantages and disadvantages of this notion depends in large part on their concept of parental roles in a family that has broken apart. What strikes some as an advantage could well strike others as a disadvantage. For example, holding the view that a non-custodial father in principle has the right to help choose his child’s school may, depending on the circumstances, be good in some cases and bad in others.

⁶⁰ *Droit de la famille-1884*, J.E. 93-1848 (C.A.).

⁶¹ D. Goubau, “L’intérêt de l’enfant et les pouvoirs résiduels du parent non gardien,” (1996) *Can. J. Fam. L.*, 11-48.

For the purposes of this analysis, let us begin by assuming that the principle of some post-separation or post-divorce co-parenting is for the most part socially desirable. Based on that assumption, how can we assess the advantages of the solution afforded by Quebec law?

The most obvious advantage of the principle of maintaining joint exercise of parental authority where sole custody is awarded to one parent is that the non-custodial parent continues to share the responsibility of raising the child. This does not mean (and this is another advantage) that the parents are equal: joint exercise of parental authority following separation does not imply that an artificial way of life is being imposed or that the parents are being forced to be perfectly cooperative. Joint exercise of parental authority, coupled with joint exercise of tutorship, simply means that the parents have to cooperate in making *major* decisions concerning the children. In that regard, the law simply copies the way of life of most families *before* separation. In most united families, major decisions about the children are usually made by the parents together.

However, choice of residence, routine care and day-to-day decisions are left to the discretion of the custodial parent. The non-custodial parent has a right to be informed about such decisions and a right of supervision once the decisions have been made (that is, a right to challenge the decisions where a challenge is in the best interests of the child).

It must be remembered that the principle of joint exercise of parental authority is complemented by the rule whereby a parent acting alone with regard to third persons in good faith is presumed to act with the consent of the other parent. This basic principle makes it possible for the custodial parent to legally make decisions about the child, even major decisions (except, of course, if that parent is aware of the other parent's objection to the decision). What this means is that with regard to major decisions, cooperation is the rule, but if the non-custodial parent does not use that right, the custodial parent is not prevented from acting. It can, therefore, be said that "joint exercise of parental authority enables the two parents to together make decisions about the child, but without standing in the way of the custodial parent's freedom to act."⁶² In that sense, the notion of joint exercise of parental authority, coupled with the rule of presumption of shared responsibility with respect to third persons in good faith, is a very fair and practical solution.

Finally, remember that the rule of joint exercise of parental authority is not absolute. As we have seen, Quebec law does not preclude the court or the parties themselves coming up with a different arrangement of parental roles where joint exercise of parental authority is not the right co-parenting solution. The court and the parties can set aside the principle of co-parenting, or they can strengthen it (for example, by extending it to *all* decisions about the child, including decisions that cannot objectively be described as *major*).

For all these reasons, the solution afforded by Quebec law could in fact be an interesting option in the context of changes to the *Divorce Act* that would centre on the principle of a better balance between parental roles after divorce. All it would take would be to:

- introduce into the *Divorce Act* a distinction between the notion of custody and the notion of parental authority;

⁶² M. Giroux, *loc. cit.*, p. 377.

- affirm the principle of joint exercise of parental authority after divorce, except where the interests of the child warranted a different solution;
- establish the presumption whereby each parent acts with the consent of the other with respect to third persons in good faith.

I add in passing that the distinction between “custody” and “authority” is not completely foreign to the law of some Canadian provinces in which some legislation (in Ontario, for example) already makes a distinction between “custody” and “guardianship.” The latter in some ways is more akin to the civil law notion of parental authority.

F. COMPARATIVE LAW: IS THERE A CIVIL LAW APPROACH TO THE SHARING OF PARENTAL ROLES?

We have seen that, in Quebec, the legal arrangement of parental roles after a couple separates is essentially based on a philosophy of co-parenting. In that sense, it is accurate to say that Quebec law offers a radically different vision than the vision that generally prevails in the other provinces. Albert Mayrand captured that idea when he wrote, in reference to the principle of the custodial parent having a monopoly on authority that is found in the common law provinces, “[TRANSLATION] In Quebec, where the law is an important part of our distinct society, the *Civil Code* sets out a different principle: despite a divorce or separation, even the non-custodial parent retains, insofar as possible, the right to exercise his or her parental authority.”⁶³

There may be a distinct *Quebec* approach, but that does not necessarily mean there is a *civil law tradition* of co-parenting after separation. As we pointed out earlier, this idea is fairly new in Quebec, where the law has long concentrated parental authority in the hands of the *pater familias*. A quick look at the traditional law of other civil law jurisdictions shows that the principle of co-parenting after a couple separates has not always been the rule. France’s Civil Code has long upheld the principle of exclusive exercise of parental authority by the custodial parent in the event of divorce or judicial separation. The old article 273-2, paragraph 1, of the French Civil Code states that if the father and mother are divorced or judicially separated, parental authority is exercised by the parent to whom the court has awarded custody of the child, although the other parent has a right of access and a right of supervision. The *Civil Code of Québec*, however, has never included a similar provision.

Still, many civil law jurisdictions have in recent years made significant changes in this area and have firmly embraced the idea of co-parenting. It can thus be said that what we are witnessing is a strong trend in civil law jurisdictions toward a rebalancing of parental responsibilities in cases of separation and divorce. We now briefly illustrate this trend in light of recent legislative developments in France, Belgium, Germany and the Netherlands, which are all civil law jurisdictions.

⁶³ A. Mayrand, “La garde conjointe...,” *loc. cit.*, p. 38.

In France, the 1987 and 1993 reforms did away with the old rule of a monopoly on the exercise of parental authority and replaced it with the rule of joint exercise of parental authority. Article 287 of the French Civil Code currently reads:

[TRANSLATION] (L 93-22 of January 8, 1993, article 6) Parental authority is exercised jointly by the two parents. The judge determines, in the absence of an amicable agreement or where such agreement is in the judge's opinion contrary to the interests of the child, *the parent with whom the child will normally reside*. [emphasis added]

If the interests of the child so warrant, the judge may award the exercise of parental authority to one of the two parents.

The parents may, of their own volition or at the request of the judge, express their views on the terms under which parental authority is to be exercised.

The reforms also extend to terminology, as the word “custody” has been dropped in favour of the more neutral phrase “the parent with whom the child will normally reside.” In practice, it would appear that French jurists regularly use the terms “parent résidentiel” [parent with whom the child resides] and “parent non résidentiel” [parent with whom the child does not reside] to designate the custodial and non-custodial parents respectively.⁶⁴

Belgian law has undergone the same changes as French law. The Belgian statute of April 13, 1995, put an end to the principle of the custodial parent having exclusive authority and put forward the rule of joint exercise of parental authority continuing despite the breakup of the couple. The new legislation⁶⁵ states, however, that the court may set aside that rule where co-parenting is not the appropriate solution in a particular case. The judge can then order that parental authority be exercised in the manner he or she determines. In other words, while co-parenting is the rule, there can be exceptions, basically dictated by the best interests of the child. However, as author J. Sosson points out, in making such an exception, the judge has to “[TRANSLATION] respect the legally expressed priority inasmuch as possible and within the boundaries that are appropriate in each case.”⁶⁶ This shows that the legislator is clearly biased toward co-parenting. It is interesting to note that this change in Belgium was accompanied by a change in legal terminology. The Belgian Civil Code states that, in all cases, the judge determines the child's living arrangements and the place where the child is primarily entered in the population register.⁶⁷ This means that when authority is exercised jointly (which, we reiterate, is the rule), the notion of “custody” no longer comes into play, because there are “[TRANSLATION] two parents who continue to jointly exercise parental authority and who provide a home for the child at the time set out in the judgment or order.”⁶⁸ Some judges claim that the child's “primary accommodation” will be provided by one parent, while the other parent will provide “secondary or subsidiary accommodation”. The term “accommodation” rather than

⁶⁴ J. Sosson, “L'autorité parentale conjointe : Des vœux du législateur à la réalité,” (1996) 1 *Revue trimestrielle de Droit de Louvain*, 115, p. 148.

⁶⁵ Art. 374 and 376 of the new Belgian Civil Code.

⁶⁶ J. Sosson, *loc. cit.*, p. 147.

⁶⁷ Art. 374, para. 5, of the Belgian Civil Code.

⁶⁸ J. Sosson, *loc. cit.*, pp. 148 *et seq.*

“custody” takes on full meaning in a system of joint exercise of parental authority because the term clearly conveys the idea that regardless of the arrangements for the child’s physical presence, the right to raise the child is not affected in any way. The new terminology has not been embraced by all Belgian jurists, however, some of whom still prefer the traditional term “custody.”⁶⁹ In cases where the court decides to award exclusive exercise of parental authority to one parent, the law states that the judge can establish terms and conditions for the other parent’s right to a personal relationship.⁷⁰ Here again, the legislator changed the terminology, replacing the term “droit de visite” [access/visitation] with the more neutral and more contemporary notion of “relations personnelles” [personal relationship].

The German Civil Code also underwent substantial changes with the very recent reforms in family law. The *Parentage Law Reform Act*,⁷¹ which came into force on July 1, 1998, broke with the traditional position in German law and established the principle of co-parenting where parents separate. As Professor R. Frank points out, “Exclusive custody now represents the exception to the rule of joint custody.”⁷² This concept of custody implies, under the German Civil Code, that major decisions concerning the child must be made jointly by the parents.⁷³

Finally, the Netherlands recently made similar changes. On January 1, 1998, amendments to the Dutch civil code came into force, stipulating that in the event of divorce or separation, joint custody, in the sense of “joint exercise of parental authority”⁷⁴ is now the rule, exclusive custody the exception. Although some observers, C. Forder among them, contend that “it seems clear, given the fact that less than one in five couples requested joint custody under the old system, that the new provisions make joint custody a largely symbolic matter,”⁷⁵ the fact remains that here is another civil law country joining the ranks of jurisdictions that are advancing the idea of restoring balance in parental roles after separation or divorce so that one of the parents is no longer systematically shut out. The Dutch government was led to make these reforms by its desire to meddle as little as possible in family life and to avoid the old rule of exclusive custody becoming a stumbling block in mediation between the parents during separation or divorce proceedings.⁷⁶

To conclude this overview of comparative law, the argument could be made that these civil law countries, which traditionally favoured the principle of parental authority being concentrated in the hands of the custodial parent, have in recent years adopted a more modern vision of parental roles after divorce by restoring the non-custodial parent’s status as having shared responsibility

⁶⁹ J.-L. Renchon, “La nouvelle réforme législative de l’autorité parentale,” (1995) *Revue trimestrielle de droit familial* 380.

⁷⁰ Art. 374, para. 4, of the Belgian Civil Code.

⁷¹ Gesetz zur Reform des Kindschaftrechts (KindRG), BGBI.I 1997, No. 84, of December 19, 1997.

⁷² R. Frank, “Parentage Law Reform,” in *The International Survey of Family Law*, The Hague: Martinus Nijhoff Publ., 1999, pp. 170 *et seq.*

⁷³ Art. 1687I.1 of the German Civil Code (BGB).

⁷⁴ “Gezamenlijk ouderlijk gezag,” article 1:252, para. 2, of the new Dutch Civil Code.

⁷⁵ C. Forder, “An Undutchable Family Law: Partnership, Parenthood, Social Parenthood, Names and Some Article 8 ECHR Case Law,” in *The International Survey of Family Law*, The Hague: Martinus Nijhoff Publ., 1999, pp. 287-288.

⁷⁶ See J. De Boer, “Familie rechtelijke vernieuwingen,” (1998) 1 *NBJ*, p. 5.

for the upbringing of the children while affirming that the interests of the child must take precedence in decisions concerning the child, which may mean in some cases that parental authority can be exercised by the custodial parent alone.