

In the Best Interests of the Children

It's Time For Justice
Change Family Law In Canada. Now.
EDITION TWO – October 2014



FELDSTEIN FAMILY
LAW GROUP
PROFESSIONAL CORPORATION

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Toronto - Markham - Vaughan - Mississauga

Introducing *In the Best Interests of the Children*

Welcome to *In the Best Interests of the Children*, Edition Two of *It's Time For Justice*.

Since I published Edition One of *It's Time For Justice* last fall, lawyers, court officials, judges, parents, my clients, print and television journalists, and guests and hosts on radio phone-in shows, along with many other people, have all reinforced the idea that we need to improve access to family law.

And a theme that is repeated over and over by these people is that divorce hurts children.

Some associations, some government departments, and even the Supreme Court of Canada have been studying access to justice, sometimes for a couple of years or in some cases, for several decades. They create “big picture” reports that inform us all – if we are willing to read to the end – but may also frighten us at the magnitude of the problems.

Family law decisions should always be in the best interests of the children.

I see problems every day. The problems are well known to those inside the legal world, but less known to the politicians responsible for our laws, and the journalists responsible for explaining just about everything to just about everyone. It is only when Canadians go through the process of separation and divorce that gaps, cracks and disconnects become obvious.

Statistics Canada tells us about 40 out of 100 marriages in Canada will end in divorce, somewhere over the first 30 years of the marriage.

It's Time For Justice tells politicians and journalists, and regular Canadians who vote for the politicians and learn from the journalists, about the reality of the Canadian family law system.

It's Time For Justice is intended:

- To prompt politicians to review laws and make new ones.
- To cause change.
- To encourage journalists to hold family law stakeholders, and especially politicians, to account.

It's Time For Justice is based on my two decades of experience in Ontario, primarily practising family law.

It's Time For Justice often deals in broad strokes and generalities, and there are always exceptions to the rules. The examples are not the only way a situation may unfold, and *It's Time For Justice* is not intended to be legal advice. Laws vary from province to province.

In *It's Time For Justice*, for the most part, the names, titles, and circumstances used are real, especially when referring to professionals in family law. For the privacy of some individuals, and especially children, modified initials and pseudonyms may be used and circumstances may be altered.

Many aspects of family law are emotional. Canada is a pioneer in formal and informal same-sex relationships, including marriage, and more often than not, rules for same-sex relationships are the same as for heterosexual couples. When circumstances warrant, we will explain differences.

As far as common-law marriages are concerned, rules about child access, child custody, child support and spousal support are the same, or very similar to, rules regarding conventional marriage.

Quebec has some unique rules.

Comments and reaction to *It's Time For Justice* are particularly welcome.

This is Edition Two of a six-edition series, intended to be published over the next year or so.

Andrew Feldstein

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It is also published on the *It's Time For Justice* web site, at www.itstimeforjustice.ca

Andrew Feldstein

Andrew Feldstein is the Managing Partner of Feldstein Family Law Group, with offices in Mississauga, Vaughan, Toronto, and headquarters in Markham.



Mr. Feldstein graduated from Osgoode Hall Law School in 1992. Prior to focusing exclusively on family law, Mr. Feldstein had a general legal practice.

One of Mr. Feldstein's fundamental objectives at Feldstein Family Law Group is to help his clients separate and divorce smoothly, efficiently, and fairly; meeting goals mutually set out by him and his clients.

Mr. Feldstein's overall philosophy is to help his clients get on with their lives with a minimum of animosity and bad feelings.

He was honoured in 2010 with an inaugural appointment to the pro-bono Dispute Resolution Officer (DRO) Panel for Newmarket Family Court. This appointment was made by the then-Senior Family Justice for Ontario, The Honourable Madame Justice Mary J. Hatton, and the Regional Senior Judge for the Central East Judicial Region of Ontario, The Honourable Mr. Justice Michael Brown. This panel supports the family law court process by aiding couples in attempts to resolve their issues before their case proceeds before a Judge. Mr. Feldstein was selected for this appointment because of his vast experience with and suc-

cessful ability to resolve complex family law issues using alternatives to the traditional court methods, including the collaborative family law process.

Mr. Feldstein actively supports students, education and the profession by volunteering for the Osgoode Hall Law School Mentor Program. His dedication to Osgoode Hall Law School students has resulted in extremely positive student feedback. He is the Chair of the Articling Committee at Feldstein Family Law Group.

Many media outlets have interviewed Andrew Feldstein. He believes it's important for the public to understand the impact of family law, because all Canadians have all been touched by the effects of separation and divorce.

Mr. Feldstein is a member of:

- The Law Society of Upper Canada
- The Ontario Bar Association (OBA)
- The Canadian Bar Association National Council 2008-2012
- An OBA committee on family law reform, which made submissions to the Law Reform-Commission of Ontario (2009)
- The Canadian Bar Association
- The Association of Family and Conciliation Courts (AFCC)
- The AFCC Public Information Forum Working Group (2009)
- The AFCC Partnership Subcommittee of the Public Information Forum Working Group (2009, chair)
- The York Region Law Association
- The Newmarket working committee to improve the court process

Mr. Feldstein enjoys an active lifestyle, which includes time with his children, skiing, and playing tennis. He loves attending a variety of live sporting events, especially professional tennis and the Toronto Maple Leafs.

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Damaging our children through dysfunctional divorce

When parents separate and divorce, almost always children are hurt the most. The divorce of their parents is almost always horrible for children to go through.

The comforts of their lives will likely be harmed by reduced finances. There's no getting around the fact that two homes cost more than one, and in almost all divorces, both parties find they are living in reduced circumstances.

And it is not only the material things of life most children will miss. A lap to sit on while watching cartoons is going to be scheduled by people inside a courthouse.

To children, the unnecessary time it takes to cope with the system today takes up a major portion of their life. A year in the life of a 7-year-old seems like forever. Two years of watching parents wrangle seems never-ending to a 14-year-old who becomes a 16-year-old.

Children are in emotional turmoil watching their parents split up. Often the children are asked by each parent to support "their side." Not only do some spouses try to prevent kids from seeing their other parent, but loving grandparents, aunts, uncles and cousins may be cut off, too.

In many situations, the pain, the turmoil and the financial consequences of divorces that take too long, and thus cost too much, follow a child well into adulthood.

The unnecessary money often wasted in divorce court because adults won't grow up and make

reasonable decisions not only harms the health and education of the children, it can result in parents losing the respect of their children. Kids from the pre-teen years up realize how silly it is to spend money on two lawyers to fight about some used snow tires.

In Edition One of *It's Time For Justice*, I

“The divorce of their parents is almost always horrible for children to go through.”

asked every federal Member of Parliament, every senator, every Ontario Member of the Provincial Parliament, and several hundred

selected politicians and public servants from other parts of Canada to think about how they would change divorce in our country.

I also asked hundreds of journalists for their ideas. I asked the journalists to report on the thoughts of the politicians.

The first call I received from a reporter asked about this sentence in Edition One: "Just because 9-year-olds can't vote doesn't mean the local MP, MPP, or MLA does not represent them when laws about their parents' split and their futures are being improved, or stalled."

Children matter, and that's why this edition is called *In the Best Interests of the Children*.

If only divorcing spouses shared this view more often than they do.

It is not hard to find true stories of dysfunctional families. I report on some of what the courts and the children themselves must overcome, starting on page 8.

The principle of “the best interests of the child”

One of the principles of Canadian family law is a concept known as “the best interests of the child.” You can separate and live apart from your spouse or common-law partner, but you cannot divorce your children.

Once you are a parent, you are a parent for life.

The “best interests of the child” is a principle grounded in legislation and case law, resulting in both a right of the child and obligation upon the parent. Therefore, once children are in the picture, the court wants to ensure that separating spouses or partners make provisions for their children by way of custody, access, and child support.

When parents are separating, they negotiate a separation agreement, and if both parents agree on its content in regard to child custody, access, and support, and if it follows the guidelines of the *Divorce Act*, it is likely to be approved by the court. It is not necessary for a judge to probe deeply into a couple’s circumstances, if the agreement meets the rules. Judges are wary of circumstances where there might be an unfair agreement based on coercion or pressure.

In making an order for custody or access under either the *Divorce Act* (federal legislation, for

married parents pursuing a divorce) or the *Children’s Law Reform Act* (Ontario legislation applying to parents who are not married, or who are not pursuing a divorce), the court will consider only the best interests of the child.

“...resulting in both a right of the child and obligation upon the parent.”

What exactly is in a child’s best interests is often a matter of individual opinion or interpretation. Section 16 of the *Divorce Act* specifies that maximum contact between the child and both parents is in the child’s best interests, and that a parent’s past conduct is NOT relevant, unless that

conduct is relevant to that person’s ability to act as a parent. Otherwise, the court is to determine the child’s best interests “by reference to the condition, means, needs and other circumstances of the child.”

This open-ended description of the best interests of the child leaves the court with considerable discretion to determine what is in any given child’s best interests, and to make a determination accordingly.

In Ontario, the *Children’s Law Reform Act*, s. 24(2), provides more specific criteria that a court should consider in determining the best interests of a child. It states that the court shall consider all the child’s needs and circumstances, including:

- the love, affection and emotional ties between the child and each person entitled to or claiming custody of or access to the child;
- other members of the child's family who reside with the child;
- persons involved in the child's care and upbringing;
- the child's views and preferences, if they can reasonably be ascertained;
- the length of time the child has lived in a stable home environment;
- the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
- the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
- the permanence and stability of the family with which it is proposed that the child will live;
- the ability of each person applying for custody of or access to the child to act as a parent; and
- the relationship by blood or through an adoption order between the child and each person who is a party to the application.

**“Love your children
more than you hate
your spouse.”**

- Adapted from Golda Meir

Courts will consider any acts of domestic violence or issues relating to substance abuse when making an order for custody or access. For example, behaviours including spousal abuse, child abuse or alcohol dependence may be used to determine a parent's ability to act as a parent.

The “best interests of the child” principle is most before the courts in a custody or access dispute, but in reality this principle impacts several areas of family law, and will be considered by the courts when making any order that pertains to a child.

For example, the best interests of the child are taken into account when seeking: custody; access; a change in custody or access arrangements; greater or less contact between a parent and child; exclusive possession of the matrimonial

home; enforcement of marriage contracts and/or separation agreements; and mobility.

Where parties are unable to agree upon the best outcome for their children, a court may appoint a professional to assist and understand the child's views and preferences. To determine the best interest of the child, courts may rely upon interventions by the Office of the Children's Lawyer, social workers, or counseling professionals.

True stories of dysfunctional divorce

Acrimonious divorces with high levels of conflict constitute about a third of all separations (Ayoub, Deutsch, & Maraganore, 1999; McIntosh, 2003). However, for most families, conflict diminishes during the first few years after separation.

Researchers generally conclude that approximately 10 per cent of couples remain at an impasse, with unremitting hostility that will endure over the span of the growing-up years of the children involved

(Johnston & Roseby, 1997). Most clinicians working in the field would concur with Neff and Cooper (2003) that these families take up 90 per cent of practitioner [social workers, psychologists, etc.] time.

Most importantly, parents engaged in high-conflict separation have difficulty focusing on their children's needs as separate from their own, and are unable to protect their children from their own distress.

Being unreasonable

There are a myriad of ways that separating spouses and partners behave in unreasonable ways. Here are just three: trying to monopolize all the child's time; arguing in front of the children; and not wanting to compromise on any issue during the separation process.

There was a mother who, even though she was the primary caregiver, did not want her ex-husband to have overnight access to her child. Her reason? It interfered with "mommy's time." In other words, she did not think that her child spending time with the father was a good idea, and she was prepared to try to prevent it from happening. People who cannot put their child's interest first, put themselves first.

Many separating spouses and partners argue in front of the children, in an attempt to get the other spouse to look bad in front of the children. And they dredge up all kinds of things from the past, in some cases from decades ago.

Frequently in a particularly contentious and drawn-out separation, many people feel that they gave, gave, gave, and gave. And then something snaps—and they can give no longer. At that point, people spend hundreds and thousands of dollars fight over things like snow tires and Christmas ornaments. People argue over anything and everything.

There was one time where neither side could agree on how the contents of the house were to be divided. There were two lawyers involved, one on either side, plus a mediator. Instead, the separating couple opted for rolling dice.

Using children as pawns

Some separating spouses will confide in their children, as they would confide in their closest friends and confidants. They discuss inappropriate subjects with children, especially very young children, and plant malicious information. They try to get the child to take mommy's or daddy's "side."

Sometimes, one spouse or the other actually show the court documents to the children. Or, the mother says to the child, "We can't afford that because daddy doesn't give us enough money. So, go ask daddy if you can have a pony, or go to summer camp for a month, or go to Europe to study."

Public shaming, divorce pranks

Sometimes, people air their divorce troubles on Facebook. What they forget is that when you have a lot of Facebook "friends," this is not a good idea. And, when those Facebook "friends" include your children's friends, it is definitely not a good idea to talk about the divorce on social media, let alone get into all the details.

As the separation drags on, people's nerves start to fray. Divorce pranks seem like a good idea at the time, in an attempt to vent or "get even." One man ordered a 20-ton boulder from a local quarry and delivered it in the dead of night to his ex's driveway. It was spray-painted fluorescent orange, topped with a pink bow with her name on it. Trouble was, she could not get her car out of the driveway to get to work.

"She never had a rock big enough for her taste, now she has one," said the divorcing man. The

Harry: "Right now everything is great, everyone is happy, everyone is in love and that is wonderful. But you gotta know that sooner or later you're gonna be screaming at each other about who's gonna get this dish. This eight dollar dish will cost you a thousand dollars in phone calls to the legal firm of That's Mine, This Is Yours."

Harry: "Please, Jess, Marie. Do me a favor, for your own good, put your name in your books right now before they get mixed up and you won't know whose is whose. 'Cause someday, believe it or not, you'll go 15 rounds over who's gonna get this coffee table. This stupid, wagon wheel, Roy Rogers, garage sale COFFEE TABLE!"

Jess: "I thought you liked it?"

Harry: "I was being nice!"

*"When Harry Met Sally,"
Nora Ephron, 1989.*

police didn't see it that way.

Another time, a woman had a truckload of manure delivered to her ex's office.

Because websites are now so easy to set up, one man set up a website with his ex-wife's annoying emails and voicemails, for all to listen to.

Playing games with child access

Sometimes, one spouse or partner decides to play games with child access and says things like: "The child is sick and cannot come," or "The child doesn't want to see you..." or "I don't know what I'm going to do without you this weekend, I will miss my little darling..."

Or, they try to get the child angry at the

other parent by booking a vacation and then changing the plan: "We're going to Disneyland, but daddy has to say it's OK. But if he says you can't go, we have to cancel it." So, they're making the other spouse to be the Bad Guy.

New partner

Some people want to erase their previous partner from their lives. One of the triggers for this is when mommy gets a new boyfriend or daddy gets a new girlfriend. So, they try to convince the child to take on the surname of the new partner, change the surname at school, change the surname on hockey jerseys, and so on. And, the former spouse doesn't fit into the new family.

Wanting large child support

Many people think if their children went to private school before separation, that should continue. Parents forget the financial picture will look different after the separation. Before, a couple shared a residence and utility bills; post-separation there will be two residences and two sets of utility bills.

Religion

It happens that one spouse or the other says that the children are going to the wrong church or synagogue. Or, they are taking the children at a time that's not permitted. Or, you have two Jewish people and one is orthodox; the other is not. One person is kosher; the other one isn't. One goes to synagogue every week; the other doesn't.

Spouses try to impose rules on what should happen to the child when the child is with the other parent. That creates conflict.

Couples who continue fighting post-separation

There are very dysfunctional couples who continue to argue over anything and everything, even when their separation has been finalized. It's their last way to stick together; they cannot let go because fighting has become so familiar—the "new normal." Some people can never give up.

Parental Alienation Syndrome (PAS)

The fundamental principle in separation and divorce in Canada is that children should not be involved in their parents' conflict. That's the legal principle.

Legal and psychological experts agree that what children of divorce need is to continue healthy parent-child relationships. This means a healthy relationship with both the mother and the father. During separation and divorce, a parent must be prepared to promote the other parent as an important part of the children's lives and refrain from denigrating, minimizing, or alienating the other parent. That's the mental health and emotional well-being of the child principle.

Contrary to both the legal and mental health principles is a behaviour known as Parental Alienation Syndrome (PAS), where one parent undermines an intact parent-child relationship, turning the child or children against the other parent. Alienation occurs when one parent manipulates a child to reject the other parent, whether out of hatred, fear, or spite of the other parent. Other terms to describe Parental Alienation Syndrome are

undermining, programming, and even brainwashing. Parental alienation was first introduced as a syndrome by Richard Gardner in the mid-1980s.

Unfortunately, parental alienation is a phenomenon that arises in child custody disputes and especially high conflict divorces.

There are many forms of alienating behaviour, ranging from denigrating the other parent, to interfering with or denying child access. In the most extreme cases, the alienating parent has fabricated allegations of abuse, causing the child to withdraw out of fear.

In 2007, Dr. Amy J.L. Baker conducted an in-depth study with 40 adults who experienced Parental Alienation Syndrome as children. The results of this study are set out in her book: *Adult Children of Parental Alienation Syndrome: Breaking the Ties that Bind*.

Giving expert testimony in an Ontario trial, Dr. Baker described seventeen alienating strategies used by the alienating parent to manipulate children. Dr. Baker's opinion is that parental alienation is established if a parent engages in many of these

17 Alienating behaviours

These behaviours are used in different combinations and in varying degrees to alienate children from the other parent:

1. Badmouthing
2. Limiting contact
3. Interfering with communication
4. Limiting mention and photographs of the targeted parent
5. Withdrawal of love / expressions of anger
6. Telling the child that the targeted parent does not love him or her
7. Forcing the child to choose
8. Creating the impression that the targeted parent is dangerous
9. Confiding in the child personal, adult, financial, or litigation information
10. Forcing the child to reject the targeted parent
11. Asking the child to spy on the targeted parent
12. Asking the child to keep secrets from the targeted parent
13. Referring to the targeted parent by their first name
14. Referring to a step-parent as mom or dad and encouraging the child to do the same
15. Withholding medical, social, academic information from the targeted parent and keeping his/her name off the records
16. Changing the child's name to remove association with the targeted parent
17. Cultivating dependency on self / undermining authority of the targeted parent

SOURCE: *Fielding v. Fielding*, 2013 CarswellOnt 2619 (S.C.J.) Expert testimony of Dr. Amy J.L. Baker.

behaviours and strategies on a consistent basis.

The judiciary values all beneficial parent-child relationships and will take measures in an attempt to undo any alienation.

The *Divorce Act* stipulates a “maximum contact” principle, designed to ensure every child has access to both parents so long as it is in that child’s best interests. Further, a parent who ignores an access schedule outlined in a court order can be subject to penalties, including fines or a loss of custody.

The courts repeatedly noted the harmful psychological effects of interfering with an intact parent-child relationship. In *Gordon v. Goertz* (a 1996 Supreme Court decision) the court stated,

“The importance of preserving the child’s relationship with his or her psychological parent has long been recognized by this Court ... There is a growing body of evidence that this relationship may well be the most determinative factor on the child’s long-term welfare.”

Likely one of the more infamous parental alienation cases is *Bruni v. Bruni*, a 2010 Ontario decision. In this case, a mother damaged a father-child relationship beyond repair and was punished by having her spousal support amount reduced to \$1.00 per month. The court condemned the mother’s actions, calling the parental alienation behaviour “evil.”

Emotional damage inflicted on children by parental alienation

Parental alienation is damaging to a child’s emotional and mental health—it’s just that simple.

Children, especially young children, are vulnerable to parental pressure and manipulation. Many victims of parental alienation no longer want to spend time with the access parent and will withdraw from contact. Children may also reject all forms of affection or use derogatory language that is not typical for their age. Other emotional responses include anxiety, fear, or upset associated with visits to the access parent.

It is never a good idea to tell children that “Mommy is bad and you should not have anything to do with her” or “Daddy is bad and you should not have anything to do with him.” Because children are made up of 50 per cent mother’s genetics and 50 per cent father’s genetics, telling them that one parent or the other is bad can spark a particularly dark cycle of self-doubt and self-loathing: “I must be bad, too...”

At a minimum, children of Parental Alienation Syndrome learn a shocking lack of empathy. They also learn that it is alright to disrespect and even ignore their parent.

At a maximum, children of Parental Alienation Syndrome become anxious, openly hostile, and sometimes have tendencies to hurt themselves and/or their household pets. This is the stuff of the popular television show *Criminal Minds*.

As adults, victims of parental alienation

may have emotional scars which can affect how they relate to their own children and grandchildren. Those feelings include loss, profound sadness, and abandonment.

It is important to remember that while parental alienation syndrome affects children, the driving force behind the behaviour is a parent’s misconduct. Lately, some experts wonder if parental alienation is actually a form of child abuse.

Not only is parental alienation extremely damaging to children, it is also a very time-consuming, energy-draining, and expensive process to try to rectify. It can take two years, or more of back-and-forth between lawyers and the court. There are many specialists that are typically involved in PAS cases, ranging from social workers, to psychologists, to the Office of the Children’s Lawyer, a Children’s Aid Society, and counselling to the alienator parent.

Remedies include supervised access to a child, interim orders for custody, appeals, and in extreme cases awarding sole custody of the child to the non-alienating parent. Both mothers and fathers engage in parental alienation behaviours. As several family law lawyers have observed, alienators are very persistent.

Court delays and the current backlog in the family law court system are not helping to resolve, intervene and course-correct parental alienation behaviour to prevent psychological damage to our children.

Parental child abduction

Parental child abduction is a form of “vigilante justice”—parents take the law into their own hands. One parent “snaps” and takes the child or children and they disappear, whether under new identities in Canada or are taken to other countries.

For the other parent, there are few things as terrifying as the very real prospect of never seeing your children again.

Child abduction is the removal or detainment of a child contrary to an access or custody provision in a court order or agreement. Frequently, child abduction is triggered during the process of separation and divorce when parents are in dispute over matters of child custody and child access.

Each year, hundreds of children in Canada are abducted by a parent. Ontario accounts for about one-third of Canada’s parental abduction cases. A few cases make the news; most don’t get national or even local publicity.

The parental abductions reports, both custody and non-custody, totalled 300. The majority of children are between three and seven years of age. In the majority of the cases, a custody order was in place. Forty-two per cent of the children were under the age of 5, 30 per cent between ages of 6 and 11, and 28 per cent between the ages of 12 and 17.

Statistically, mothers abduct children after a court order is made while fathers tend to

abduct before a court order.

Children tend to be taken during weekends, or summer or winter holidays. About three-quarters were last seen at their family or foster home residence.

The majority of parental abductions are short-term and resolved within seven days.

SOURCES: http://www.canadiancrc.com/Canada_Child_Abduction_Statistics_RCMP/RCMP_Missing_Abducted_Children_Report_2008.pdf

<http://www.rcmp-grc.gc.ca/pubs/omc-ned/parent-eng.htm>

Canadian family law sees no justification for unilaterally forfeiting a child’s right to see a parent; it conflicts with the “best interests of the child” (see page 6). The unauthorized removal of a child is no longer viewed as simply a custody dispute between parents. Recent attention to the issue of child abduction has helped in recognizing the act as a criminal offence.

There are many subjective reasons a parent may resort to child abduction including: real, perceived or confabulated threats of family violence or danger as well as cultural differences in how children should be brought up are just two reasons why children are abducted. Confabulation is when a person does not like their current reality and instead, invents the life they would like.

Current process to return children to habitual residence

In Canada, both provincial and federal legislation address custody and access matters. If parents have formally divorced or are in the process of obtaining a divorce order, the *Divorce Act* upholds the validity of parental rights contained in a court order or judgment. The *Divorce Act* does not specifically mention child abduction, but orders for custody and access obtained during the process of a divorce are enforceable throughout Canada under section 20 of the *Act*.

If parents are not legally married, or if divorce proceedings have not been initiated, Ontario’s *Children’s Law Reform Act* (sections 36 and 37) governs child custody violations. If a parent has an

order under Ontario’s *Children’s Law Reform Act*, but your child has been removed to another province, you may need to file that agreement with a family court in that province in order to have local authorities enforce your parental rights.

For parents who do not have a formal agreement in place and who fear their child is about to be abducted, or discover their child has already been abducted, a family law lawyer can help with obtaining an ex parte order for interim custody, and a provision in the order stipulating that the child is not to be removed from the jurisdiction without that parent’s consent. “Ex parte” means going to court without providing notice to the other party.

International parental child abduction

In addition to domestic legislation, Canada is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, a multi-country agreement addressing international child abductions. The purpose of the treaty is to return children to their habitual residence, whatever the country may be. The Hague Convention has been in place since late 1983.

Out of 193 countries, 91 have signed on. This means that half of the world's countries are still not signatories.

Under the Convention, parents have one year following the date of the wrongful removal or retention to apply for their child's return, and to have the Convention's return mechanism applied. After the one-year period, a parent may still apply for the return of the child; however, the abducting parent has the opportunity to prove that the child has become settled in the new environment.

If children are taken out of Canada to a country that is a non-signatory of the Hague Convention, the chances of parents being reunited with their abducted children are only about 10 per cent—slim indeed.

“Half of the world’s countries are still not signatories to the Hague Convention on the Civil Aspects of International Child Abduction.”

If a child has been abducted to a non-signatory jurisdiction, the Convention does not apply. Parents instead must work with the RCMP and Consular Services. The RCMP will work with foreign authorities (such as INTERPOL) to locate abducted children.

Consular Services will help parents connect with the consulate in the foreign jurisdiction to initiate proceedings abroad.

In addition to government institutions, there are many non-government organizations that can help parents locate wrongfully removed children. In Ontario, missingkids.ca is devoted to assisting parents to locate an abducted child and to coordinate recovery services.

International court backlog adds to frustration

At the end of the day, child abduction is about both disrespect for and frustration with the current processes of Canadian family law. Delays in the family law system merely add to parents' frustration while they fight over child custody and access.

Once abducted, getting children back is nerve-racking and time-consuming. It is also bureaucratic, slow and expensive. Frequently, there is international travel involved needing full-fare airline tickets and time off work.

Parents whose children have been abducted to non-signatory countries are in an especially tough position: dealing with foreign governments, international police forces, language barriers, and the additional burden of engaging a foreign lawyer.

The cost of trying to recover children who have been taken to other countries is prohibitive. This is simply beyond the means of many Canadian parents.

The range of dysfunctional behaviours in children as a result of divorce trauma

In her white paper titled *Divorce: Facts, Causes & Consequences*, (3rd edition, 2009) Dr. Anne-Marie Ambert outlines the range of dysfunctional behaviours affecting children whose parents are undergoing divorce.

Dr. Ambert states that although most children do adjust reasonably well to divorce, some children experience a range of behaviours that cannot be described as positive in any way. Dr. Ambert cautions that it is a good idea to look at pre-existing conditions and behaviours of children. Problems the children had before the divorce process started tend to get exacerbated during separation and divorce.

Where these behaviours stop being mere statistics is through these stories and anecdotes that we have seen during two decades at Feldstein Family Law Group.

1. Effects of reduced income.

Money is very often an issue in separation. When a couple separates, there is less money than when the couple was together. The main reason for this is that the existing pool of income must now provide for two households rather than one shared household. Where a couple could manage hockey or dance lessons for their children before separation, the budgets for operating two separate households will no longer stretch that far.

In separation cases where there is animosity or high conflict, and one spouse or partner makes significantly more money, the higher income earner may use money to control the other parent, or seek revenge on the other parent.

In some cases where the lower income earner has initiated the separation and the couple is well off, the higher income earner will sometimes use money to seek retribution—payback of sorts. Specifically, the higher income earner will withhold spousal support, child support, and not agree

to Section 7 expenses. During this time, the lower income earner feels dependent and beholden.

In one case, a father refused to sign the RESP certificate so the RESP funds could be released, allowing his son to attend university. The mother had to take out a loan so the son could attend university. And, that particular father drew the child into the parents' conflict, and explained that it was the mother who was being difficult.

“Children of ages 4 to 8 tend to take the blame for the separation, thinking they are somehow responsible.”

2. Anxiety, depression, loneliness, avoidance, and self-esteem issues of children from divorced couples at twice the rate of married family children.

The separation may not be the start of difficulties and emotional problems of the child. A child's problem behaviour frequent-

ly starts years before the parents separate because the child has been living in a home where there has been conflict—friction, arguing, and perhaps family violence. This conflict escalates during separation, adding to the child's behavioural problems.

In children of ages 4 to 8, regression is common. Children may start having temper tantrums or wetting their bed. Or, they start having nightmares. Children of this age tend to take the blame for the separation, thinking they are somehow responsible.

In children of ages 8 to 12, anxiety, depression, or anti-social behaviour are common. Because they understand more, children of this age get caught in the cross-fire of their parents' conflict. Or, they may stop doing sports or dance, or develop phobias. Sexual acting out is not uncommon with teenage children.

Children of ages 4 to 8 and 8 to 12 may take sides with one parent, or the other. “Mom/dad had

a boyfriend/girlfriend, so the other parent got the raw end of the deal,” is the child’s thinking. Sometimes, children choose sides and prefer one parent over the other, identifying one parent as the perpetrator and the other parent as the victim. Other times, the child is pressured by one parent to take his or her side in the conflict.

Another type of anxiety is the timid child who then refuses to have overnight visits with the non-custodial parent. In one situation a dad had a history of being volatile. This one particular child was afraid of the father. Even when the child sees a therapist, they may not want to talk about their situation, or even be able to articulate what is troubling them. They may be guarded and protective of each parent in spite of severe problems.

3. Exhibit behavioral problems including hyperactivity, aggressiveness, fighting, and hostility.

Behavioural problems manifest themselves differently in boys and girls. Some children, particularly girls, internalize anxiety, while boys often externalize it. Where it is externalized, it is more noticeable

because it translates to behaviour. Behavioural problems are symptomatic of what is wrong in the child’s life; the behaviour is the child’s way of expressing the problem.

Some of the worst cases are where one parent or the other has psychiatric or mental health issues.

One 5-year old girl was fearful of spending time with her mother who had a history of psychiatric problems. When the child visited the mother, the child had difficulty with routines, like bedtime, and had temper tantrums. Or these children take out their hostility on siblings or friends at school.

4. Become young offenders, with behaviour like bullying and delinquency.

With a certain population, we see young offenders.

There was one case where the separating parents had a history of illicit and illegal activities. Parents were aggressive with their children to start, so the kids got the idea that yelling and screaming and no routine was normal. Further, the father had been in jail. The two children of this relationship learned that it was alright to disregard the law.

This couple had a 14-year-old son, who had some learning disabilities as well as poor social skills. Because of his learning disability, he was also challenged to verbalize his own needs and wants. While his parents were undergoing separation, the son became anti-social and started to assault kids

in the neighbourhood. The police were called. In addition, he had temper tantrums where he would trash the house, just destroying it. The police were called numerous times.

This same couple also had a younger daughter, who became depressed.

Here’s the important point: when parents are poor role models for their children, children come to believe that dysfunctional behaviour is, in fact, normal behaviour. Children

learn that aggression is an acceptable way to solve problems.

5. Changes in behaviour in school.

With a sizable portion of children, doing poorly in school is one of the first signs that they are not coping well with their parents’ divorce. Many children become distracted, losing concentration in school.

For other children, school becomes a refuge from the chaos of family life. School is the one place where the parents are not fighting, so there is no fear of mom and dad hurting each other—or the children.

“Children of ages 8 to 12 tend to get caught in the cross-fire of their parents’ conflict.”

6. More problems with peers, authority figures.

Having problems with peers as well as authority figures is, for the most part, a temporary situation for children whose parents are undergoing divorce, but it is also contingent on the age of the child. Because as children get older, they spend more time with their peers, the conflict may well be with peers rather than authority figures.

For other children, authority figures can be a refuge: the hockey coach, the band leader, the gym teacher. That said, children also have problems with authority figures they trust and look up to—a symptom of their feelings about their parents' divorce.

7. Experience more relationship problems, in part due to their behavioral problems. Children of divorce leave the house sooner than children from married families.

Children of high-conflict divorce leave the house sooner; going to a university or college out-of-town can be very good thing for these children. Leaving home to go to university is a very common and socially acceptable practice in our society. It also serves to remove older children/young adults, from their parents' high conflict separation because they are no longer living amidst the volatile home situation. Advanced studies give these children a socially acceptable way to extract themselves from the high conflict situation.

For children who don't go to university or college, there is a higher drop-out rate. In many cases, children prefer to flee a high-conflict home sooner.

In the cases of parental alienation, (whether perpetrated by the mother to hate the father, or by the father to hate the mother), because these children find alienation unbearable, they want to escape it. And, so they leave home sooner.

8. More alcohol, marijuana use and other drugs.

Tolerance for alcohol and other drugs before a divorce varies in families; some are more tolerant while other families are less tolerant. So, the degree to which drugs and alcohol are accepted has great bearing on the tendency to abuse both during any periods of great stress, such as during separation and divorce.

Some children—and parents—use drugs and alcohol to “self-medicate” in an attempt to nullify the effects of divorce stress on the family.

9. Children of high-conflict divorce are more likely to experience relationship difficulties themselves.

High-conflict divorces tend to become the focal point of life of children, even for adult children. Important milestones for children such as graduation from school, getting the first car, getting the first apartment, and so on, become secondary because the adult child is busy keeping mom and dad in their respective

corners, or sorting out yet another argument.

In many high-conflict divorces, parenting skills of the spouses or partners frequently suffer because they are focused on themselves and their own needs to argue rather than on attending to the needs of their children. This is particularly true if there has been an event triggering the separation, which has been interpreted as shameful by either spouse or partner, such as having an affair or declaring that you're gay or lesbian.

Sometimes in these situations, older siblings look after younger siblings. Or, a role reversal happens where the children parent their own parents.

“High-conflict divorces tend to become the focal point of life of children, even adult children”

The Feldstein Family Law Group gratefully acknowledges the assistance and support of Howard Hurwitz, MWS, RSW, with this section. www.HowardHurwitz.com

Some ways to improve access to justice for the sake of our children

It's reasonable to assume that the more assets a family has to divide between spouses at the end of the divorce process, the better off the children will be.

There are lots of ways to improve access to justice today, many of which are for the benefit of our children. In the first edition of *It's Time For Justice* (www.ItsTimeForJustice.ca) on page 7-8 are some true stories about ways to improve access.

Here are several enhanced ideas for improved access.

Realize there are no winners and no losers, usually.

No-fault divorce means that a couple can be divorced simply by living "separate and apart" for a year. Add on 31 days for final processing, and each former spouse can now get married again.

There is no point in arguing over who misbehaved when, and how, and perhaps with whom. The court is not going to punish anyone for past behaviour. Why spend time making accusations, or answering accusations and then making more yourself? It just runs up the bill.

And trying to become the "winner" in a fight over a \$3,000 rug while each spouse spends \$4,000 on lawyer bills means there is no winner.

There's a 30-foot Sea Ray boat with no engine, no seats, no steering wheel, no rudder, no anything sitting in a repair garage in Oakville. At the end of the divorce, (not one on which we worked) the wife thought she had "won" the boat. But she does not have enough money left to return to court and argue that "the boat" should include the gas

tank and the toilet stripped out by the husband. And the husband does not have his beloved boat.

There are federal and provincial guidelines for most of the financial aspects of a divorce, so arguing over the amount of support payments for children or a spouse is generally pointless, too.

Be honest; set a good example for your children.

Be honest in your financial disclosures to the court, because you set a good example for your family. And besides, you'll probably get caught if you lie. While I'm prepared to argue that spouses should be honest in court simply because showing respect for court is a paramount Canadian value, I can be more pragmatic, too. Being dishonest comes with penalties.

In my experience as a divorce lawyer, I've seen dozens of cases where the owners of businesses provide financial information they know is wrong. Usually they try to low-ball their own income, in hopes of paying less in child support.

Leaving aside the morality of misleading the courts to cheat their own children out of the support money the law says they are entitled to, there's the practical matter of the judge catching on. Judges probably will, and then order new financial statements and valuations, to be paid for by the dishonest spouse. The case will drag on, the bills will climb, and if children learn of the scheme, you'll alienate them, perhaps forever. If you are caught then no judge hearing your case will believe what you said regarding your financial position.

Electronic documents can improve court efficiency

If politicians wanted a divorce law project to take on next week, and finish almost immediately, they could change laws to allow more computers in family courts. Computers are used to good advantage in other Canadian courts, but family courts lag behind.

The *Divorce Act* itself is older than the personal computer, so no wonder computers were not included. Over the last half century, the politicians in Ottawa have made two major sets of changes to The *Divorce Act*. The changes to the *Divorce Act* were almost immediately reflected in divorce statistics. The *Divorce Act* was established in 1968, introducing the concept of permanent marriage breakdown. Prior to 1968, there was no federal divorce law in Canada and only some jurisdictions enacted divorce legislation.

The *Divorce Act* was reformed in 1985—establishing marital breakdown as the only grounds for divorce and reducing the separation period from three years to one. There were very few divorces in Canada in the decades leading up to the mid-1960s, while spikes were seen in the number of divorces in both 1970 and 1987, reflecting these legislative changes.

Those dates were before the rise of personal computers, and the original 1968 and 1985 law requires most documents to be on paper, and personally signed.

When financial records come to court, they need to be on paper, signed by someone who could be called to testify that the signature is real. If I want to ask for a case meeting, I need to write letters to the court so there's a real trail of real paper.

There is some light at the end of this tunnel.

On our separation.ca web site at <http://blog.separation.ca/family-law-electronic-age-by-using-document-exchange/> I write about the *Fehervari v. Kiss* case, where I say family law is ushered into the electronic age by Justice Craig Perkins allowing the use of SIX document exchange.

The documents involved are being sent from lawyer to lawyer, not into and out of the court itself. It seems that under these circumstances, document service through SIX is secure and saves both time and money throughout an inherently stressful and expensive process. Currently, the majority of family lawyers in

Ontario are not using of this method of document exchange.

As more family lawyers become aware of SIX and its many benefits, it is likely that they will take advantage of this interface and that other similar document exchange websites will be developed.

***“The Divorce Act was created before computers were in common use. So, our divorce laws are still paper-based.*”**

Divorce laws should take advantage of computers and electronic documents.”

What access to justice means

It's Time For Justice is mostly about access to justice in family law, especially from the perspective of children.

This includes the processes of separation and divorce, which involve child custody, child access and child support, spousal support, division of assets, and similar rights and obligations under the laws of Canada and the provinces and territories. These are the main aspects of family law in Canada.

By improving access to justice in family law, I mean enhancing eight interwoven concepts that I outlined in Edition One of *It's Time For Justice*, and summarize below:

- 1/ Everyone deserves legal representation
- 2/ Children come first
- 3/ Cases take too long
- 4/ Show Canadians that justice is being done
- 5/ Don't inspire criminal behaviour
- 6/ Don't inspire emotional abuse
- 7/ End the winner / loser mentality
- 8/ Canadian culture is changing

These eight concepts should be examined, re-thought, and revised, all with the goal of making it easier for Canadians to feel justice is being served.

For decades, progress in family law has been slow, notwithstanding the best of intentions. Judges, social workers, court officials and lawyers have been trying to improve family law, especially in the interests of children.

As we think about improvements, we must not grasp at the unrealistic, nor should we be tempted by the unfair or misleading quick fix.

Reports on access to justice usually have a recommendation that millions of dollars be spent. It is usually not spelled out that way – instead it may say “... appoint five judges” or “expand the

number of courthouses.”

But it is still millions.

I think I can predict accurately that millions of dollars will not flow from legislative assemblies or parliament buildings.

And I warn against letting paralegals encroach on the territory that remains so challenging to fully trained lawyers. The decisions made in family court follow the spouses and more especially the children, for decades.

Everyone deserves skilled and comprehensive professional advice and guidance.

In Canada, everyone is allowed to have their day in court.

In the family law courts, we refer to people who choose to skip a lawyer as Self-Represented Litigants.

It is almost always a guarantee that procedures will be drawn out, no matter how seriously the self-represented litigant prepares.

And while a judge, another court official, or even the lawyer from the other side, helps the self-represented litigant

understand some statement in legalese, or a process or timeline, the spouse with a lawyer charging by the hour is getting hit by increasing bills.

There will be an *It's Time For Justice* edition on Self-Represented Litigants and how it can be combined with a concept called unbundling. Unbundling is a technique where lawyers are engaged by clients to perform some tasks and provide some advice, and a divorcing spouse handles other aspects personally.

While unbundling is possible today, it needs greater clarity in order to encourage more lawyers to participate.

More judges are not the answer. More courthouses are not the answer. We should not expect millions of dollars.

We are the stakeholders

The complete list of stakeholders in the world of family law is long, and includes everyone from the couples themselves and their children to lawyers, judges, civil servants, immigration lawyers, accountants, employers, social workers, police officers, friends and neighbours, the teachers of children involved in divorce, mediators, uncles, aunts, cousins, grandparents, and step-parents.

Particularly important stakeholders are federal and provincial politicians, and journalists in the parts of Canada represented by these politicians.

Electronic copies of *In the Best Interests of the Children - It's Time For Justice* have been sent to:

- All Members of Parliament
- All Members of the Senate of Canada
- All Members of the Ontario Provincial Parliament, the province where I practise
- The Premiers of all other provinces and territories
- A selection of the leaders of the Association of Family and Conciliation Courts, the inter-disciplinary and international association of professionals dedicated to the resolution of family conflict
- Selected executives of the Canadian Bar Association, the Ontario Bar Association and the Advocates Society
- A selection of editors, producers, hosts, reporters and columnists in a wide range of Canadian media, across the country, including those I have met in interviews
- A selection of social workers, mediators, expert witnesses and others with whom I've worked
- Selected colleagues who practise family law, and some educators teaching family law
- Some of the people who contributed to this spring's Supreme Court of Canada study on Family Law

- Some of the people who contributed to the Canadian Bar Association's Envisioning Equal Justice Summit in Vancouver in April 2013
- People I think can make a difference, from a list we've been compiling for months

Statistics Canada supplies some 30 year divorce rate statistics, from 2008

Canada	40.7
Newfoundland & Labrador	25.0
Prince Edward Island	31.7
Nova Scotia	31.1
New Brunswick	29.7
Quebec	47.4
Ontario	42.1
Manitoba	31.5
Saskatchewan	30.3
Alberta	46.0
British Columbia	37.1
Yukon	59.7
Northwest Ter & Nunavut	35.1

The 30-year total divorce rate (TDR-30) represents the proportion of married couples who are expected to divorce before their 30th wedding anniversary. For example, a TDR-30 of 40.7 per 100 marriages for Canada in 2008 indicates that 40.7 per cent of marriages are expected to end in divorce before the 30th year of marriage (if the duration-specific divorce rates calculated for 2008 remain stable).

The role of politicians and journalists

In each edition of *It's Time For Justice* I put forward my own ideas and I ask for ideas from people inside and outside the legal world.

With respect, I urge politicians and journalists to get involved here, even though we do not normally think of politicians and journalists as being “family law stakeholders.”

Politicians and journalists who want to make Canada a better place in which to live are key to successfully improving access to justice.

Part of the job of politicians is to think of improvements in how Canada is governed. I'm nudging you towards thinking of better family law governance.

Family law is a big story. Family law should be party policy for every political party.

Everyone in Canada is affected directly or indirectly by family law. Imagine how many children are affected by these divorces. Other statistics tell us that the children of divorce are more likely to get divorced themselves.

The children and the adults have friends and relatives concerned about them. Teachers and clergy often take special steps when dealing with the world of divorce.

Journalists are not just people who write down the ideas of others. Part of the job of journalists is to think up ways Canadian life can be improved. The news pages, the feature pages, the comment pages, and the editorial pages, whether print, broadcast or web pages, are all involved.

Second, Canada needs new or revamped laws. In order for a lot of my ideas from *It's Time For Justice* to come into play, laws must be changed,

and that's where politicians come in.

I urge politicians to come into this discussion not as “whipped members” told to ignore family law or with a yea or nay as ordered by a party leader. Instead, please act as the elected representative, federal or provincial, of the men and women, and the children, of your ridings and of the entire country.

Canadian children are very big stakeholders; they just don't vote.

A dragged-out divorce damages our next generation of Canadians.

There are ways to fix the divorce process that don't require tons of money.

Actions I would like you to take

If you are a **politician**, please put *It's Time For Justice* on your agenda as a discussion item for meetings with other politicians and public servants. Read the federal *Divorce Act*, and your provincial act covering division of property.

Talk with your constituents.

Politicians should invite a family law lawyer to host a meeting with your community.

Everyone, please write down what you learn.

Then send to us, to your party colleagues, to your friends in other parties, and to the journalists you know, your suggestions to improve access to justice, especially in family law.

Please don't stand back. Rather, stand up, please, and be counted.

If you are a **journalist**, please think about the opportunities to do stories about separation and divorce.

Are you a **real estate writer**? There's a story waiting for you on the dynamics and economics of moving a family from one home to two.

Are you an **education reporter**? Should teachers with students of divorce receive special training? What should classmates be told, if anything?

Business writer? What impact does divorce have on an owner-operated business, or a partnership?

Any other kind of **journalist or producer**? Please report on *It's Time For Justice*.

What are your own thoughts?

Coming up in future editions

EDITION THREE –

The good, bad and ugly of self-representation and unbundling

- The range of roles of a lawyer today
- Cross-border and inter-provincial issues in family law and access to justice
- The separation team in mediation, case meetings, conciliation
- Rebuild, revise and revamp of *It's Time For Justice* based on reaction to Edition One and Edition Two

EDITION FOUR –

The steps and stages from thinking about separation to actual separation, to finalized divorce, and then into the future

- Overview
- Child custody
- Child access
- Child support
- Spousal support
- Division of property

EDITION FIVE –

How lawyers charge, fees to be expected from other legal industry professionals, administrative charges, and more

- Legal system and court process charges that lead to billing “inside the system”
- Arrangements that you need now
- Arrangements that can be changed later
- The monitoring process

EDITION SIX –

Privacy, lack of privacy, and the impact on personal life

- Privacy, lack of privacy, and the opportunities for crime through current loopholes
- How emotions affect access to justice
- Family law and its connection to wills and estates, real estate, criminal, labour, and other law

**EDITION ONE is available at
www.ItsTimeForJustice.ca**

Comments welcome

The content of each edition is likely to change, as we learn more of the specific interests and needs of the readers of *It's Time For Justice*.

Please write to us with your comments and suggestions for topics to cover.

Comments@itstimeforjustice.ca



FELDSTEIN FAMILY
LAW GROUP
PROFESSIONAL CORPORATION

In the Best Interests of the Children

It's Time For Justice
EDITION TWO - October 2014

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