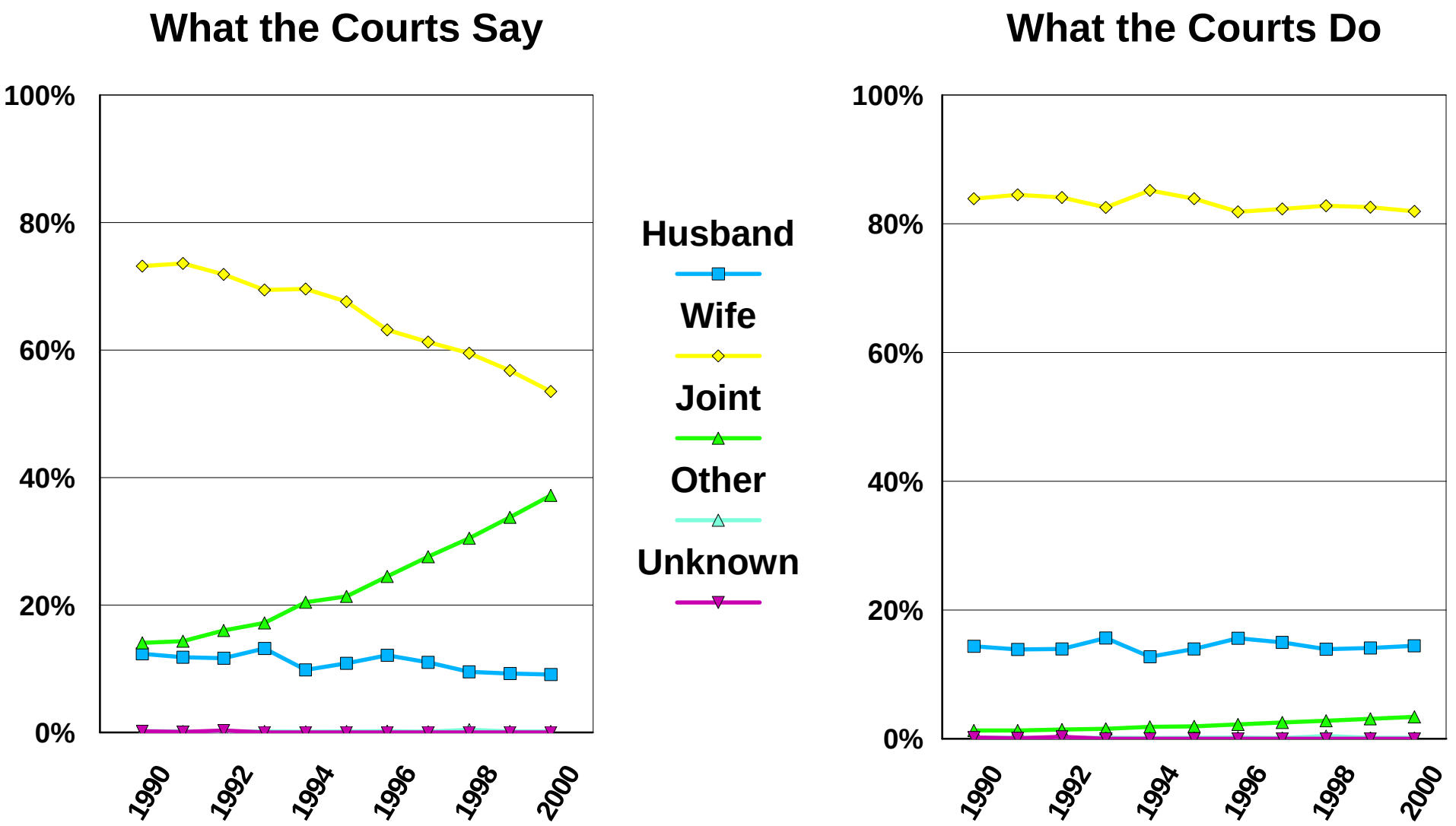
Custody Awards & Deceit



As a Matter of F.A.C.T.:
Spin versus Honesty in the Courts

George and Martha are celebrating their 50th wedding anniversary. One of the guests turns to George and asked him what the secret was to having a marriage that lasted so long. George recounted, "When we got married we decided that Martha would make all the day-to-day decisions and I would make all the major decisions. Well, it's been 50 years now, and we have not had a major decision yet."

— a traditional wedding reception joke

There was a time when Canadians felt that the judges had their interests at heart and that people could trust the courts. Family law in Canada now shows us just how misplaced this faith is now.

Over the last decades, families have changed radically. One substantial reason for the change was the introduction of "no fault" divorce — divorce without "punishing" the parents. However, it is clear that the children of divorce and separation are the ones who pay. The fact that divorce and separation is not in the best interests of their children is still not enough for adults to curb their problems.

So how do we mitigate the damage done to our children? Scientific study after scientific study show that children, irrespective of their age, do best after parental separation if they are not separated from either of their parents. The overwhelming majority of Canadians — by a factor in excess of 2 to 1 — know that this is true and have said so.[1]

Custody and access are now the jurisdiction of the family courts. Every divorce must now pass through the courts -- at a not insignificant cost to each couple -- and each arrangement is reviewed by a judge whether the parents agreed to the terms or not. The courts directly make custody decisions in roughly 50% of separations.[2] Almost all of those decisions are labeled "interim" or "interim interim" decisions, giving the false impression that they are temporary. However, what the label means is that there has not been a trial. Few family law cases from "motions court" are permitted to get to trial while the children are still young enough to be helped. Our experience is that less than 5% of the cases reach trial so these "interim" decisions are effectively permanent rulings. The other 50% of cases that don't get decided directly by the

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[1] Compas Poll, *Canadian Public Opinion on Families and Public Policy: Report to Southam News and NFFRE*, Monday, November 23, 1998. Pollara Poll, *Department of Justice: Child Support Ad Testing*, October 2000. Earnscliffe, *Results of Quantitative Research: Child Support Custody and Access Issues*, prepared for the federal Department of Justice and presented September, 2001.

[2] National Longitudinal Survey of Children and Youth: Changes in the family environment. *The Daily*. Statistics Canada - Cat. no. 11-001E, June 1, 1998.

courts are negotiated in the "shadow of the court." The parents know what will happen in front of a judge irrespective of the best interests of their children.

Canadians know that family law judges are supposed to be representing the best interests of the children of Canada. Canadians believe that the judges are up-to-date on the collected scientific and social data about the impact of divorce on the children, and that the courts meet the expectations of society. What are judges really doing?

Judges are not accountable in Canada. Judges call this "independence" making them, collectively, a branch of government answerable to no-one, especially the populace. Information on the judges' performance is not directly available. In most cases, the reasons for a judge's actions are not disclosed.

However, there are some sources of information on the behaviour of the courts in general.

The Courts, on granting a final divorce decree, report back to the federal Department of Justice, specifically to the Central Registry of Divorce Proceedings. The information reported includes the custody results under the decree issued, and information about the parents and children affected. Custody is tracked as being custody "to the wife", "to the husband", "custody to a person other than the husband or the wife", or a general "the husband and wife jointly." This information, without identifying the judge, is the information that we can access through Statistics Canada's reports and database.

Fifteen years ago, the tremendous lack of joint custody assignments caused much criticism of the courts. At that point, Canadians were well aware that joint custody, with the ongoing involvement of both parents, was the best for children. Did the judges get the message and grant more joint custody and ensuring that children benefit from both their parents?

Well, not exactly — the judges have instead taken a lesson from their fellow bureaucrats and invented a "new" type of custody to obfuscate matters. This new type of custody is called "joint custody with primary residency". The "final report" of the Federal, Provincial, Territorial Report on Custody and Access, entitled for some reason "Putting Children First" outlines the what the courts did:

> *In practice, court orders or agreements generally provide for custody, joint custody or joint custody with primary residency. The latter, "joint custody with primary residency" refers to joint decision making on the major issues but not on the day-to-day decisions. It clarifies the child's primary residence. Joint custody refers to joint physical custody with the child having no one primary residence and provides for joint decision making. Custody refers to residence and all decision making including major decisions and day-to-day decisions.*[3]

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[3] *Final Federal-Provincial-Territorial Report on Custody and Access and Child Support: Putting Children First*, Department of Justice, Ottawa, November, 2002.

Case law has shown that those "major decisions" do not include medical matters, schooling, and religion.[4] Seeing the non-residential parent or moving thousands of miles away are not decisions on which joint custody has an impact[5] -- residency is the only matter now. As with the groom in that standard wedding reception joke, there are no "major decisions" in a child's life. Non-residential parents are easily shut out. Do Canadians understand that "joint custody" does not "entitle" a parent, almost always the father, to even see their children?

"Joint custody with primary residency" is really "sole custody" hidden behind a name that infers something positive. The judges chose a name that helps them fill out the Department of Justice forms to hide the results. The result is an attempt to fool Canadians into thinking that the judges had the interests of children at heart in assigning what Canadians believe to be joint custody.

This type of a "sin of spin" has come under extreme criticism in Australia's family law. The Australian Parliament passed legislation that inserted new ideas into the legal system, and judges simply redefined them to be exactly what they always did.[6] The Chief Justice of the Family Courts of Australia travels the world reveling the manner by which the Australian courts overrode their Parliament in dealing with custody and access issues. Studies such as Rhoades, Greycar and Harrison (2002) showed that the children benefited not at all — but the family law lawyers made a lot more money.

Table 1: Custody Assignments reported by the Judiciary

Year	Sole Paternal Custody	Sole Maternal Custody	Joint Custody	Another person or agency has custody	Unknown custody arrangement
1990	12.34%	73.18%	14.06%	0.21%	0.21%
1991	11.82%	73.58%	14.32%	0.17%	0.10%
1992	11.67%	71.86%	16.01%	0.14%	0.31%
1993	13.18%	69.43%	17.19%	0.16%	0.03%
1994	9.83%	69.57%	20.46%	0.12%	0.02%
1995	10.88%	67.59%	21.35%	0.16%	0.01%
1996	12.12%	63.16%	24.51%	0.20%	0.01%
1997	11.02%	61.26%	27.59%	0.12%	0.02%
1998	9.53%	59.50%	30.50%	0.44%	0.03%
1999	9.26%	56.78%	33.79%	0.17%	0.01%
2000	9.10%	53.52%	37.20%	0.18%	0.01%

One can examine the various Statistics Canada annual compilations of the reported data [84-213-XPB and the Divorce Shelf Tables]. These were once easily available. From these

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

[5] *Luckhurst v. Luckhurst*, (1996-06-04) ONCA c22022, *Berrie v. Rollins*, (1996-05-14) BCSC F940760, *Wudy v. Wudy*, (1998-09-17) BCSC D107162, *Hamilton v. Hamilton*, 2001 BCSC 896, *Bjornson v. Creighton*, (2002-11-19) ONCA C35031.

[6] Rhoades, H, Greycar, R, Harrison, M. *Family Law Act: the first three years.* University of Sydney and Family Court of Australia. (November 2002).

reports we see how the judges claimed to have assigned custody in their reporting to the Department of Justice. We have summarised those custody assignments by the percentage of children impacted by a divorce decree by year in Table 1.

This table would lead any reasonable person to believe that there has been a tremendous growth of "joint custody" in Canada, with corresponding decreases in the assignment of sole maternal and sole paternal custody. However, we know that at least some of those joint custody assignments are really those secretive "joint custody with primary residency" assignments — "sole custody", in all but name. This table does not provide us with enough information to know the impact of this new form of custody.

F.A.C.T.'s individual members believe that this type of deceptive custody decision is very widespread in the courts. The decisions on case law sources like www.canlii.org also seem to indicate that this form of misnamed custody mandated frequently. Is there a credible data source to quantitatively identify the real impact of this new form of judicial custody?

A study called the *National Longitudinal Survey of Children and Youth* (the "NLSCY") is carried out jointly by Statistics Canada and Human Resource Development Canada. This longitudinal survey questioned parents (and I would note almost always mothers[7]) about the custody situations implemented in the 1994-1995 "wave" of data collection. The survey asked specific questions about the custody arrangements *and* where the children lived (i.e., their residence).

Table 2: Custody and Residency per the National Longitudinal Survey of Children and Youth (1994-1995)

Living Arrangement	Court Order	Joint Custody Residency Distribution
Sole custody of mother	80.8%	
Sole custody of father	6.6%	
Shared physical custody	12.6%	
Child lives with mother only		68.6%
Child lives with father only		10.5%
Shared, mainly mother		7.8%
Shared, mainly father		3.9%
Equally shared		9.2%
Total	**100.0%**	**100.0%**

[7] 98% is the proportion of the "persons most knowledgeable" who are the mother, despite less than this having custody of the children, at least by the judges terms. See, for example: Canadian Children in the 1990s: Canadian Children Selected Findings of the National Longitudinal Survey of Children and Youth. *Canadian Social Trends*, Statistics Canada, Catalogue 11-008-XPE (Spring 1997).

The results of the NLSCY were published in a special report on custody, access and child support to the federal Department of Justice. Specific results were provided[8] in the report [see Table 2].

We see from that table that the vast majority of joint custody cases (80%), despite being under a "joint custody" arrangement, the children really lived with “only” one of their parents. In fact, in over 90% of the cases "joint custody" there is a "primary residence" assigned negating what Canadians believe joint custody is all about.

Only in the “equally shared” case do we see what Canadians consider as true joint custody or shared parenting or equal parenting. The other custody assignments come back to “joint custody with primary residency” being assigned.

The NLSCY table above, based on mothers' reports, shows different proportions in the assignment of custody than those reported by the courts. The size of the samples suggest that this difference is *not* due to statistical fluctuations. However, our interest lies in the “joint custody” assignments.

The NLSCY report provides a distribution of the "joint custody" cases that are really "joint custody with primary residence". We can apply that distribution to the data that the judges reported to the Department of Justice as "joint custody", we can get a good idea of the impact of this new brand of custody. Most Canadians would consider only the 9.2% of “equally shared” to be joint custody and we have called that “joint custody”. The other residency based custody decisions we have distributed back into the appropriate category of sole custody. So what are the judges really doing? See Table 3.

Table 3: So What the Judges really doing?

Year	Sole Paternal Custody	Sole Maternal Custody	Joint Custody	Another person or agency has custody	Unknown custody arrangement
1990	14.37%	83.92%	1.29%	0.21%	0.21%
1991	13.89%	84.52%	1.32%	0.17%	0.10%
1992	13.98%	84.10%	1.47%	0.14%	0.31%
1993	15.66%	82.57%	1.58%	0.16%	0.03%
1994	12.77%	85.20%	1.88%	0.12%	0.02%
1995	13.96%	83.91%	1.96%	0.16%	0.01%
1996	15.65%	81.89%	2.26%	0.20%	0.01%
1997	14.99%	82.33%	2.54%	0.12%	0.02%
1998	13.93%	82.80%	2.81%	0.44%	0.03%
1999	14.13%	82.59%	3.11%	0.17%	0.01%
2000	14.45%	81.94%	3.42%	0.18%	0.01%

[8] Marcil-Gratton, N, Le Bourdais, C. *Custody, Access and Child Support: Findings from The National Longitudinal Survey of Children and Youth.* Child Support Team, Department of Justice Canada. CSR-1999-3E, Table 7, page 21. (1999)

Judges have not changed the true assignment of custody in the last 11 years despite playing with the words. The odds (chance of happening: change of not happening) of sole maternal custody over the period have averaged 5:1 and of sole paternal custody at about 1:5.9. The odds of real joint custody have averaged about 1:50. It doesn't take a betting person to realise what has happened is hidden behind a veil of misleading words.

The graph to which this report is attached shows clearly the incongruous reported custody rates and the corrected custody statistics. All the judges have changed is what they *say*, not what they have *done*.

It is worth noting that other Department of Justice statistical reports support these types of levels of sole maternal custody and, to a lesser degree, the limited amount of sole paternal and joint custody.

It becomes clear why so many Canadians believe that judges, especially family court judges, need to be held accountable. It is because the judges have decided to abuse their positions of trust and misrepresent what they are doing to Canadians.

Canadians should be offended at what these courts are doing to children across this land. These judges are not forthcoming on what they are doing. It is clearly necessary to protect the children that presumptions. Judges ignore what we all know is right and play with words instead.

If you go to family court, be careful. The truth is something you will not find on any side around you. You will likely be the only one worried about the interests of your children. Know that neither the judiciary nor the rest of government has shown any general level of desire to ensure the best outcomes for children.