TOWARD CHILD-CENTRED SUPPORT

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The private/public dichotomy has different meanings depending on the context and focus of the inquiry. For the purpose of the following discussion, this inquiry is the extent to which society should participate in the provision of child support.[1] In this context, I will use the term "public" to refer to matters which are considered by society to require formal intervention by the legal system. I will use the term "private" to refer to those matters that society considers properly left to the discretion of the family, without formal public intervention other than to protect that discretion.

The focus for possible public intervention will not be the *level* of support to which the child should be entitled. Accepting the public standard set for child support, the focus will be to determine whether the child actually receives that support. It is in this sense that a support system must be tested to determine whether it is truly child-centred. In applying this test, it is important to speak in terms of the "child's right" to receive support and not simply in terms of the custodial parent's right to receive contribution towards support of the child. This tends to avoid focusing attention on the issue of equity between the parents while forgetting the consequences to the child who does not receive support in accordance with the public standard.

In this paper, I suggest that a true child-centred support strategy must treat the custodial parent's support obligation primarily as a public matter and not a private matter. In addition to the direct benefit that the child would receive from such a change, I will also suggest that it would tend to maintain equity between the spouses. Such an approach could remove disincentives for a non-custodial parent to pay child support. Society will benefit financially through lower social assistance payments and a reduction in the cost of operating government support enforcement programs.

I will first briefly review the common law obligation of a parent to support a child prior to separation. The support obligation of parents under the *Family Services*

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[1]Many of these issues have been raised by Professor Harry D. Krause in an article which considers the American child support experience. The scope of this presentation does not allow for a full review of these issues. Much more would be required to assess the extent to which changes might be made to the current system. See H.D. Krause, "Child Support Reassessed: Limits of Private Responsibility and the Public Interest" (1990-91) 24 Fam. L.Q. 1.

Act will then be considered.[2] First, the legislation will be assessed to determine whether, prior to family breakdown, child support is "child-centred" or "parent-centred".[3] Second, the *Family Services Act* will be considered to determine what changes, if any, occur upon the breakdown of the family. Finally, the proposed *Federal Child Support Guidelines* will be reviewed to determine if they are truly child-centred.

1. Traditional Child Support

Prior to the breakup of the family unit, society has generally considered issues relating to the support and upbringing of children to be private matters. The law continues to reflect a primary concern for the rights of parents. For example, the *Guardianship of Children Act*[4] provides that parents, as guardians, have custody of their child and the right to control the child's education and upbringing.[5] Aside from legislation such as the *Family Services Act*, the child has a right to support at a level determined at the discretion of the parents. This follows from the concept of custody and the parents' right to control the upbringing of the child.

It is difficult to speak of the rights of the child at common law since they are limited and dependent on parental discretion. The common law even goes so far as to give the parent the right to claim the earnings of the child in exchange for provision of support, even though the parent did not use or require those earnings in order to support the child.[6]

One could characterize a parent's right to set the level of child support as a private right. Of course, society has long set minimum standards of support through criminal sanctions and child protection laws enacted by the provinces.[7] While the right of a child to support is a public matter, child support is a private matter since it is provided by the parents in a manner and at a level left to their discretion . In fact, one could argue that the law is parent-centred in that it appears more interested

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[2]R.S.N.B. 1973, c. F-2.2 (hereinafter the *FSA*).

[3]I have used the term "parent-centred" in contrast to the term "child-centred" which has been used to describe the proposed *Federal Guidelines*. The distinction will be discussed in the next part of this paper.

[4]R.S.N.B. 1973, c. G-8, ss. 2(1), 5(a).

[5]The *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 2(1) defines custody to include "... care, upbringing and any other incidents of custody".

[6]At common law, this right was limited to the father who was responsible for the support of the mother and the children. See *e.g. Haas* v. *Nylhom*, [1923] 3 W.W.R. 921 (Sask. D.C.). Section 9 of the *Married Women's Property Act* (R.S.N.B. 1973 c. M-4) provides that the mother may acquire the same right in certain limited circumstances.

[7]See *e.g. Criminal Code*, R.S.C. 1985, c. C-46, s. 215; and, the *FSA*, *supra* note 2, Part III.

in the parent's rights to control the upbringing of the child, as long as the child is not starving and has sufficient clothing to withstand the elements, than it is in the rights of the child.

Aside from statutes such as the *Family Services Act*, a child does not have a right to support beyond necessaries while the parents are cohabiting and certainly does not have a right to a level of support commensurate with the family's standard of living.

2. The *Family Services Act*

i. Pre-Family Breakdown

The obligation of a parent under the *Family Services Act* to support his or her child is currently found in s. 113: "Every parent has the obligation, to the extent the parent is capable of doing so, to provide support, in accordance with need, for his or her child".[8] It is important to note that this provision is not limited to cases of a breakdown of the family unit. Section 115 of the *FSA* provides a procedure whereby the child or a parent on behalf of the child may apply to the court for an order pursuant to s. 116.[9] If granted, the order would require the parent to provide support in accordance with the statutory standard.

While this provision confirms the existence of an obligation to provide support and makes it clear that it is an obligation of both parents, is the obligation parent centred or child-centred? The answer appears to be child-centred since the level of support is based on the needs of the child. These needs are defined in s. 115(6) of the *Family Services Act* and are certainly not limited to the bare necessities. For example, in determining the needs of the child, the court is directed to take into consideration education reasonably within the ability of the child.[10] These needs are to be met "... to the extent that the parent is capable of doing so."[11] In summary, the level of support is to be determined by the court in accordance with a public standard and not left to the discretion of the parents. In theory, a child's right to support is child-centred to that extent.

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[8] *FSA, supra* note 2.

[9] While a parent can apply pursuant to s. 115 for an order under s. 116 on behalf of the child, the provision clearly grants the child the right to apply directly. Whether the court would require a *guardian ad litem* is an open question. See *e.g.* the cases referred in J. MacDonald & A. Wilton, *1996 Annotated Ontario Family Law Act* (Toronto: Carswell, 1995) at 212 (hereinafter MacDonald & Wilton).

[10] *FSA, supra* note 2, s. 115(6)(l).

[11] *Ibid.* s. 113.

This raises interesting possibilities. For example, suppose that a seventeen year old child has just been accepted into university. She asks her parents for tuition to attend first year engineering.[12] Both parents are professionals and certainly have the ability to provide this support. However, they refuse to do so since both came from poor backgrounds and had to work to put themselves through university. They believe that it will build character if she has to put herself through school.

If the child applies under s. 116 for an order requiring her parents to provide the necessary financial support, what might the decision of the court be? One would not be surprised to find the court concluding that the parent's right to control the child's upbringing is paramount to the child's right to receive support at the level set by s. 113 of the *Family Services Act*. One can see this attitude in cases that allow parents to reduce their support payments based on the ability of the child to earn income to assist in his or her own support.[13] Perhaps we have not progressed as far from the common law right of a parent to claim the earnings of a child as we would think. We at least hope that, if this were the result of the application, the parents' decision was based on a true desire to build character and not in order to pay for their annual trip to Florida.

Notwithstanding the apparently clear statutory obligation to support a child in accordance with ability to pay, as a practical matter, the law continues to consider the means and level of support to be within the discretion of the parents. Both the *Family Services Act* and judicial attitudes reflect a deference to the right of a parent to control the child's upbringing. In addition, the reality is that a child living at home will simply not make the application with respect to parents who are cohabiting.[14]

Therefore, prior to a breakdown of the family unit, it is difficult to identify a "child's right" to support since support will be provided in a manner and at a level determined by the parents.

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[12]For this example, the child resides with her parents who are cohabiting.

[13]See *FSA*, *supra* note 2, s. 115(6)(b). See also cases noted in MacDonald & Wilton, *supra* note 9 at 225-226. One case indicated that a student in full time attendance at a university is expected to make reasonable efforts to assist in financing his or her education (*Regan* v. *Regan*, (Ont. Gen. Div.) Doc. No. 118/90, 25 July, 1991). Another case was summarized as finding that "where children are being brought up to be responsible for themselves and can make some contribution to their own support they should do so." (*Mahony* v. *Mahony* (1986), 3 R.F.L. (3d) 36 (Ont. H.C.)).

[14]Where a child has left the parents' home and is living with a relative, an application against cohabiting parents is possible. However, where the child has demonstrated an intention to be independent, section 115(6)(n) of the *FSA* (*supra* note 2) provides that this is a consideration in determining the amount of support to which the child is entitled. See cases noted in MacDonald & Wilton, *supra* note 9 at 212 and 227-228.

ii. Family Breakdown

What effect will the parents' separation have on the child's right to support? This question will be discussed in the context of a situation in which one parent, usually the mother, is given custody of the child.[15] The consequences of separation will be considered first from the perspective of the non-custodial parent and then by examining the effect separation has on the child's right to receive support from either parent.

From the non-custodial parent's perspective, what is the appropriate level of contribution for support of the child? Even if the non-custodial parent is only ordered to pay support equal to the contributions made prior to separation, one might question the underlying basis for such an order. While the parent/child relationship certainly continues where one parent is granted custody of the child, there is invariably some diminishment in that relationship.[16] If a link exists between the parent/child relationship and the obligation to support a child, an anomalous circumstance would arguably be created if the parent/child relationship diminishes while the obligation stays the same or increases.

Does the law link the obligation to support a child with the existence of a parent/child relationship? The answer is an unequivocal yes. The principle of *in loco parentis* has long been recognized as a basis for requiring a person who is neither the biological nor legal parent of a child to support that child.[17] Yet, while the obligation is created on the basis of that relationship, when that relationship terminates or is at least diminished, the parent's legal obligation continues unabated. This appears to be somewhat anomalous and might be reason to inquire as to the treatment of non-custodial parents.

It should be noted that the issue of the level of child support is sometimes linked to the financial contribution of the custodial parent. The custodial parent may argue that his or her financial contribution should be reduced to reflect the non-financial support services that he or she provides. The Federal/Provincial Committee on Child Support considered this argument in developing the proposed *Federal Child Support Guidelines*. After concluding that the custodial parent should be expected to contribute equally with the non-custodial parent, the Committee took the following position:

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[15]While custody may be joint, the issues discussed herein are highlighted in sole custody situations where the non-custodial parent is ordered to pay support. Joint custody may reduce some of the disincentives to the payment of support that are inherent in the sole custody situations.

[16]Certainly visitation rights allow for this as well as the co-operation of the custodial spouse.

[17]*FSA*, *supra* note 2, s. 1 defines "parent" to include "a person with whom the child ordinarily resides who has demonstrated a settled intention to treat the child as a child of his or her family". See also the *Divorce Act*, *supra* note 5, s. 2(2)(b) to the same effect.

> Some arguments could be made against this position. For example, some might say that the custodial parent also gives time, and therefore should not be required to contribute as much money. On the other hand, because the non-custodial parent may also spend money directly on the child, and does not enjoy the benefits of living with the child, a lower payment could be more appropriate. These issues are probably impossible to resolve and are ignored here.[18]

The issue may or may not be possible to resolve, but there should be a recognition that the problem exists and an attempt made to deal with it openly.

Even if one accepts that the required level of support is appropriate, there are other significant consequences of separation from the non-custodial parent's perspective. These consequences may indirectly affect the support that the child actually receives. First, the non-custodial parent has lost the right to participate in the upbringing of the child. Section 5(a) of the *Guardianship of Children Act* provides that a parent/guardian's right to control a child's upbringing is "subject to an order of custody issued by a court of competent jurisdiction".[19] Therefore, from the perspective of the non-custodial parent, the custodial parent will control the means and the level to which support will in fact be provided to the child.

Second, the non-custodial parent will be ordered to pay support determined in accordance with the public standard set by the *Family Services Act*. This will reflect the court's determination of the needs of the child and the ability of the non-custodial parent to pay. The amount of support could be equal to or higher than the amount that the parent was contributing before separation. In the example of the child requesting tuition to attend university, the parent could at least say "no" prior to separation. After separation, a non-custodial parent would probably be required to pay if the custodial parent so wished.[20]

Turning to the child's perspective, what effect does the separation and support order against the non-custodial parent have on the child's right to support? Very little since the child's right to support is still essentially a private matter. There are two reasons why one might reach such a conclusion. First, with respect to support paid by the non-custodial parent, the payments are usually ordered to be made to the custodial parent directly. Decisions as to the means and the extent to which the payments will be used to support the child are left to the custodial parent. The

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[18] *An Overview of the Research Program to Develop a Canadian Child Support Strategy* (Ottawa: Department of Justice Canada, 1995) at 27, footnote 36.

[19] *Supra* note 4.

[20] It is acknowledged that the custodial parent's ability to contribute may be relevant as well as the possibility that the child would be expected to make reasonable efforts to contribute. However, the issue would now be determined in a public forum and, as a practical matter, it is far more likely that the non-custodial parent would be required to pay for this educational expense than would be the case prior to separation.

custodial parent is not required to account for the expenditure of the support payments received. Second, with respect to the financial contribution of the custodial parent, his or her position is for the most part unchanged.[21] These consequences also affect the non-custodial parent and can create disincentives to pay the support as ordered. For the benefit of the child, a pragmatic approach may be required. Rather than focusing on enforcing compliance and balancing the equities between the spouses, understanding why non-custodial parents are not paying and dealing with those reasons may result in greater compliance. Greater compliance in turn means that more funds will be available for support of the child. Increasing compliance can also be a strategy for a truly child-centred support system.

3. Public Intervention Required

i. The Case for Intervention

Aside from issues related to the diminishment of the parent/child relationship, the above discussion points to two areas of concern: first, that custodial parents continue to be in the private sphere with respect to both the support payments received and the contributions that they are expected to make; and second, that there exist disincentives for non-custodial parents to pay support in accordance with the order. The result is that the child's right to support at the level reflected in the *Family Services Act* is lost in a dispute that involves issues of parents' rights and equity between the parents.

Public intervention is required in order to further the objective of creating a true child-centred support system. This could include the following:

— direct payments: the support order could provide that payments be made directly to a third party for the benefit of the child rather than require that all payments be funnelled through the custodial parent;

— accounting: minimum requirements to account, at least sufficient to indicate that the support payments received were in fact expended to support the child, could be imposed on the custodial parent;

— enforcement of the custodial parent's obligation: the custodial parent could be required to contribute to the support of the child in accordance with the same public standards to which the non-custodial parent is subject.

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[21]The *Family Services Act* does not appear to take non-financial contributions into account for the purpose of determining the financial contribution of the custodial parent. However, see cases noted by MacDonald & Wilton, *supra* note 9 at 215.

These initiatives might be incorporated into a child-centred support system. A comprehensive legislative scheme that recognizes the objective of creating and enforcing the child's right to support would be the preferred option. However, some changes might be possible within the parameters of the current system. A few possibilities that might be considered under the present *Family Services Act* are noted below. These suggestions require a change in judicial attitudes towards the custodial parents' right to control the upbringing of the child.

ii. Greater Use of Direct Payment

Cases indicate that the non-custodial parent cannot receive credit for payments made directly to a third party for the benefit of the child.[22] To permit such credit could undermine the rights of the custodial parent to control the upbringing of the child. However, the *Family Services Act* contemplates that direct payments to third parties could be ordered.[23] It may be appropriate to expand the use of such orders in an effort to maintain the involvement and commitment of the non-custodial parent. This would only be feasible where relatively large or regular payments are required for the benefit of the child. Also, care would have to be taken so that it would not appear to the child that the non-custodial parent is really in control.

Where there is a real concern that the support payments are generally not being expended for the benefit of the child, other options should be contemplated. The *Family Services Act* provides that payments can be paid into court or to a suitable person or agency.[24] The child would then be protected and the non-custodial parent would very likely be more comfortable making the payments. The court should not assume that the parent most suited to have custody is necessarily the best parent to deliver child support in a responsible manner.

iii. Accountability

The court could include a condition in the support order itself that would require (in the appropriate case) the custodial parent to provide some minimal accounting of the expenditure of the payments received. The jurisdiction of the court on such an application under s. 115(1) and s. 116(1) would appear to leave this possibility open.

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[22]See cases noted in MacDonald & Wilton, *supra* note 9 at 226.

[23]*FSA*, *supra* note 2, s. 115(1), 116(1)(h). The courts' jurisdiction is to order a person to provide support. The method of providing support is not stated. The jurisdiction to issue an order under s. 116 is not limited to payments to the custodial parent. Section 116(1)(h) authorizes payments to an appropriate person on behalf of the child. If necessary, this could be the basis of a payment directly to a third party for the benefit of the child.

[24]*FSA*, *supra* note 2, s. 116(1)(h).

A minimal level of accountability could raise the comfort level for the non-custodial parent who is concerned about the expenditure of the support.

In cases of misapplication of support payments, further controls would be required. The custodial parent would appear to be the "suitable person" within s. 116(1)(h) and be receiving the payments on that basis. Support payments are therefore made to the custodial parent on behalf of the child and not the parent who may have made the application. They are property beneficially owned by the child and not the parent. The *Guardianship of Children Act* could be utilized with respect to misappropriated payments in the same manner as with any other property of the child.[25] The non-custodial parent could perhaps initiate a proceeding under that Act as a guardian to determine the issue. General principles of trust law perhaps could also be invoked in the appropriate case. The court would have to be vigilant to ensure that such procedures were not used as a means of harassing the custodial parent.

iv. The Custodial Parent's Contribution

The custodial parent may have income and be able to contribute to the support of the child. Once the needs of the child are determined, the contributions will be allocated between the parents. The current approach to support tends to treat the needs of the child as more or less static and not relative to the combined income of the parents.

Where it appears that the custodial parent is not contributing as assumed and that the total needs of the child are not being met, what should the response be? In one case, the court was of the view that a custodial parent was not exerting herself in contributing to the support of the child.[26] While there is a legitimate concern that the custodial parent contribute, the solution focuses on equity between the parents and not on the child. Using this approach, the child suffers.

A better response can be illustrated by returning to the example of the child requesting tuition to attend university. Assume the custodial parent applies on behalf of the child for an order that the non-custodial parent pay the full tuition. If the court determines that both parents have an equal ability to contribute, the court would probably order the non-custodial parent to pay one half of the tuition. The needs of the child are met in accordance with the ability of the parents to provide support. However, the custodial parent may then decide that in order to build character, the child should work to help put herself through university. This highlights the discrepancy between the child-centred public level of support to which the non-

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[25] *Supra* note 4, ss. 2(1), 5(b).

[26] In MacDonald & Wilton, *supra* note 9 at 224.

custodial parent is subject and the parent-centred private level of support to which the custodial parent is subject.

Could the non-custodial parent apply for an order against the custodial parent to the effect that he or she pay the other half of the tuition? Section 115 of the *Family Services Act* allows a parent to apply for a support order on behalf of a child and is not limited to custodial parents. If there was a concern as to who would receive the payment, this could easily be resolved by an order that each parent pay his or her share directly to the university.

While this possibility may appear extreme, it ensures that a child receives the support to which he or she *prima facie* has a right. It would restore equity between the parents and thereby reduce what might otherwise be a disincentive for the non-custodial parent to make the payments as ordered.

4. The *Federal Child Support Guidelines*

The *Federal Child Support Guidelines* were presented by the Government of Canada as a child-centred support strategy.[27] Its stated objective is that the child receive the benefit of the income of both parents.[28] The assumption underlying the *Guidelines* is that the parents will contribute equally to the support of the child. The level of support expected from the non-custodial parent will be a portion of his or her income. The portion to be paid will reflect the normal or average contribution to the support of a child expected of a parent earning that amount of income. In setting this contribution, the *Guidelines* assume that the custodial parent is earning and contributing an equal amount.[29] Based on these assumptions, one might expect that the amount of support ordered under the *Guidelines* would be less than that currently being ordered. However, the impression is that the amount of support ordered will generally increase under the *Guidelines*.

The child-centred aspect of the *Guidelines* is that the child will receive the benefit of the combined income of both parents. This re-defines the child's right to support as relative, not static. However, the proposed *Guidelines* are deficient in some respects and raise concerns in the context of the previous discussion. First, there are no provisions to ensure that the custodial parent will in fact contribute as assumed. Thus, while this approach is certainly child-centred, there is still only public

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[27]"Federal Child Support Guidelines" in *Budget 1996: The New Child Support Package* (Government of Canada, 6 March 1996). An explanation of the proposed changes to the *Divorce Act* to implement a new child support strategy.

[28]*Ibid.* at 6.

[29]*Supra* note 18 at 27.

intervention with respect to the non-custodial parent's contributions. To the extent that these *Guidelines* are not accompanied by mechanisms to ensure the requisite level of support from the custodial parent, the system remains a parent centred system.

The second result of the proposed *Guidelines* may be to create disincentives for the non-custodial parent to pay the support as ordered. This can be traced to two consequences of the approach taken under the *Guidelines*: the expected increase in the amount of support orders; and the fact that the support order will not be reduced based on the income of the custodial parent. The first issue raises concerns previously discussed: whether the parent/child relationship has been diminished; the need for direct payments; and increased accountability. The second issue relates to the assumption that the custodial parent will in fact be contributing. When the non-custodial parent asks for an explanation of why the payments are not being reduced, it will be of little satisfaction to hear the rationale if the perception is that the custodial parent is not in fact contributing.

While it is not clear how this is to be accomplished, the federal government intends to encourage the provinces to apply these *Guidelines* in cases governed by provincial law. This might be difficult in provinces, such as New Brunswick, where support is ordered based on the ability and needs test found in the *Family Services Act*. The needs of the child are calculated in a manner which results in a relatively static amount of support. This amount may even be reduced where the child contributes or has the ability to contribute towards his or her own support. The net cost is then divided between the parents based on their relative ability to contribute. The *Guidelines* are based on assumptions that are inconsistent with the current provincial system. The child's right to support is not based on needs but on a portion of the parent's income. There is no calculation of the cost of support. Further, under the *Guidelines*, the non-custodial parent's contribution will not be reduced notwithstanding the ability of either the child or the custodial parent to contribute. Without amendments to the provincial legislation, it is questionable whether the *Guidelines* could be applied or implemented other than as a general starting point for the court.[30]

While the approach adopted in the *Guidelines* is child-centred, it does not go far enough and as a consequence may increase enforcement problems. The net result for the child may be less support rather than more.

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[30]Section 113 would have to be amended to refer to the *Guidelines* which would become a Schedule to the *FSA*. Section 115(6) would have to be amended so as not to apply to child support.

5. Conclusions

A truly child-centred support system must set an appropriate level of support and ensure that the child actually receives that level of support. Thus, a child-centred support system cannot focus solely on the enforcement of support orders and characterize the problem as one of "deadbeat dads". It appears that greater public intervention in the provision of support by the custodial parent might be a part of a truly child-centred support system. This is not an issue of equity between the spouses, but a question of the child's right to receive support.

Even if public intervention in the provision of support may not be desirable prior to the separation of the parents, there are pragmatic reasons why it might be considered after separation. An anomaly appears to exist when one spouse is subject to a public standard and the other is not. This is particularly a concern when, as is the case under the proposed *Federal Guidelines*, the non-custodial parent's obligation is premised on the assumption that the custodial parent is contributing his or her share. Equity between the spouses becomes relevant to the issue of child support to the extent that inequity, or perceived inequity, results in a reduced compliance with the support order.

Changes relating to accountability and direct payment might ensure that the child receives the requisite level of support and increase compliance with support orders. Some of these changes could be incorporated with a change in judicial attitudes. To be properly implemented they should be considered as possibilities in a legislative reform package after full consideration.

While the proposed *Federal Child Support Guidelines* reflect a child-centred support system, they continue to focus on the obligations of the non-custodial spouse. The problem cannot be defined solely in terms of "deadbeat dads". This turns the attention from the public responsibility to provide for the welfare of children and attempts to make it a private responsibility. Government responsibility to deal with child poverty cannot be avoided in this manner. The right of a child to support is a matter that is properly in the public sphere. However, the tendency to focus on the responsibility of "dads" also diverts attention from the responsibility of "moms". This in turn tends to keep their responsibility in the private sphere.

There are no easy solutions to ensure that children receive the support to which they are entitled. This paper attempts to raise questions that must be addressed openly in order to develop a system that is truly child-centred.