

FATHERS' RIGHTS: ARE THERE ANY?

Presentation by Gene C. Colman for Webinar – June 3, 2020, 7 p.m.

SLIDE 7 INTRODUCTION OF GUEST PANELISTS – GCC TEAM

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INTRODUCTION: There are no international treaties or domestic statutes that grant to fathers, as *fathers*, any rights at all. Fathers may have rights as parents. Fathers may have rights as citizens. I maintain that ***when it comes to family breakdown, fathers do have rights only by virtue of their efforts to responsibly enforce their children's rights.***

But fathers have no stand-alone rights in Canadian law whether by virtue of statute or by virtue of the common law.

And here comes the real surprise: ***I do not believe that fathers should have any rights.***

But before you flame me on twitter and do other nasty things to me, I urge you to listen to me for just a few more minutes. If you listen to me right up until the end of my presentation, you will find out whose side I'm on. (**Hint:** I am squarely on the side of the disadvantaged and marginalized parent... who just happens most of the time to be ... The father.)

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Children's Rights derive from three main sources:

- Convention on the Rights of the Child ("CRC")
- Canadian Charter of Rights and Freedoms ("Charter")
- Application of *Parens Patriae* protective jurisdiction ("PP")

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PART 1: SOME HISTORY

The British court of Chancery became the resting place for all custodial rights relating to children as early as 1660. The British courts had already adopted the Roman law with its absolute power of the father in family matters. The common law solidly established that fathers had the legal right to determine these matters. In one 1836 case, even though the father was cruel to his children and lived with a woman who was not his wife, the Chief Justice returned the three girls, all under 6 years of age to their father. [*R. v. Greenhill*, 1836] When the mother was jailed for contempt there was a public outrage and this led to "Talfourd's Act" (1839) which established a custodial presumption for children under seven to mothers (provided of course that they had not committed adultery). An 1873 amendment extended seven years to 16 years. By the 1886

Guardianship of Infants Act, courts were directed to look at the “welfare of the infant”. In other words, “parental merits were to be subsumed under the interests of the child”.¹ These legislative amendments were followed shortly thereafter in Ontario.

The trend of the law until relatively recently has been that of a maternal presumption when it comes to custody of children. Such presumption has been dressed up under the guise of best interests of the child. On the other hand, legislation across Canada from the 80’s forward is generally expressed in gender neutral terms. But one thing is for certain: **There are no “fathers’ rights”**. To find “fathers’ rights” in Ontario and in Canada, you need to time travel back to the mid 1800’s but no further forward than that.

Since the mid 1980’s you will not find an outright expression of “mothers’ rights”. Rather, there has been a shift towards the best interests of children and even towards children’s rights. In such an atmosphere, there is **zero room for a discussion of “fathers’ rights”**.

SLIDE 12 For example, SCC Justice Sopinka writes in the 1997 *Eaton* decision that decisions affecting a child’s equality rights must be made from “ a subjective, child-centred perspective, one which attempts to make equality meaningful from the child’s point of view as opposed to that of the adults in his or her life ”. So we can see that now there is an emphasis on approaching legal issues from a child’s perspective as opposed to the father’s perspective or the mother’s perspective.

SLIDE 13 Parents have obligations to their children and not necessarily rights over them. We see that SCC Justice LaForest wrote in the 1992 *M.K.* decision: “It is intuitively apparent that the relationship between parent and child is fiduciary in nature [as] society has imposed upon parents the obligation to care for, protect and rear their children” (para 67). Finding that parents have a fiduciary obligation towards their children constitutes, in my view, a diminution of parental rights generally. For fathers’ rights to coexist with such expressions of duty is an impossibility.

According to one learned author², The SCC has essentially abolished parental custodial rights [*P.D.*, 1993; *Syl Apps*, 2007] by making them rights of the child. If that is accurate, then what room is left for any kind of parental rights when it comes to the law of custody and access? **SLIDE 14** And if there are no parental rights, then certainly there are no fathers’ rights.

So, now that we have established that legal history informs us that there are no fathers’ rights currently, to what sources may we turn to find derivative rights for parents when the parents, no matter what gender, are endeavouring to protect their children’s rights and in that process, essentially exercise their own rights?

¹ Anne McGillivray, “Children’s Rights, Paternal Power and Fiduciary Duty: From Roman law to the Supreme Court of Canada”, *The International Journal of Children’s Rights* 19(2011) 21 – 54 at p. 28.

² Anne McGillivray, “Children’s Rights, Paternal Power and Fiduciary Duty: From Roman law to the Supreme Court of Canada”, *The International Journal of Children’s Rights* 19(2011) 21 – 54 at p. 49

SLIDE 15 PART 2: CONVENTION ON THE RIGHTS OF THE CHILD (“CRC”)

Children are vulnerable members of society. International law and domestic law recognizes that they deserve special protection.

International conventions, agreements and treaties that impact and/or declare the rights of children - Listed in Appendix #26 in “Wilson on Children and the Law”. Rights are extensive and internationally recognized..

The International “Convention on the Rights of the Child” (CRC) is one of those international treaties to which Canada has signed on. There is an extensive list of “rights” that every child the world over should have.

Some of those rights are:

Article 3 *Best interests of the child*

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.**

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, **taking into account the rights and duties of his or her parents,** legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

SLIDE 16 Article 5 *Respect of the child’s parents, extended family and community*

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

SLIDE 17 Article 7 *The right of a name, registration following birth, nationality and to know and be cared for by the child’s parents, as far as possible*

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, **the right to know and be cared for by his or her parents.**

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

SLIDE 18 Article 8 *Preservation of identity, including nationality*

1. States Parties undertake to respect the right of the child to **preserve his or her identity, including nationality, name and family relations** as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

SLIDE 19 Article 9 The right not to be separated from parents against the child's will except by competent authorities subject to judicial review

1. States Parties shall ensure that a **child shall not be separated from his or her parents against their will**, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, **or one where the parents are living separately and a decision must be made as to the child's place of residence.**
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. **SLIDE 20** States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

SLIDE 21 Article 12 The Child's Right to be heard

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

SLIDE 22 Article 14 *The right to freedom of thought, conscience and religion*

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

SLIDE 23 Article 16 *The right to be protected from arbitrary or unlawful interference with privacy, family, honour or reputation*

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

SLIDE 24 Article 18 *“Best efforts” to ensure recognition of the principle of both parents’ common responsibilities for the child’s upbringing and development*

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

SLIDE 25 Implication in Canada’s law for the rights enumerated under the CRC

An international treaty to which Canada signs onto, becomes a part of Canadian law except to the extent that Canada deposits a reservation and except to the extent that a Canadian legislature specifically enacts a domestic law contrary to the CRC. Courts will assume that Canada’s laws are in compliance with the CRC. Courts do apply the CRC in their decisions.

For example: *A.S.K. v. M.A.B.K.* [2008] N.B.J. No. 332 (N.B.Q.B.): The court relied upon the CRC in support of granting the father's custody application of his four children where there was evidence of physical and psychological harm due to the mother's restrictions on the children. In another case, even where Crown Wardship was granted, the Court granted child/parent access in response to the child's views, as per section 12 of the CRC. *CAS of Toronto v. E.U.*, [2014] ONCJ 299 [other citations omitted – up to S.C.C. where leave to appeal dismissed]

SLIDE 26 PART 3: CHARTER RIGHTS AS A FOUNDATION OF CHILDREN'S RIGHTS

SCC has determined that Canada's international obligations influence Canada's Charter cases. SCC Justice Dickson stated: "...the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.). The U.N. CRC "was accepted as relevant to the construction and interpretation of Charter rights for youth." *R. v. D.B.* [2004] S. J. No. 185, at para 69 (S.C.C.)

It follows that children's rights in the Charter context tend to attract more the attention of the criminal law. The courts have addressed children's Charter rights in the context of non-criminal law areas such as child protection proceedings, child's refusal to consent to medical treatment and children's rights in the school setting.

SLIDE 27 I would argue that in an appropriate case that the right of the child to enjoy a relationship with his/her father is a value that should attract Charter protection as well as CRC protection. In the child protection context, children's rights are well recognized. *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 (S.C.C.) Where a state removes a child from the parents, the SCC held that the child's section 7 Charter rights were engaged.

SLIDE 28 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Also of importance is the Equality Rights section 15 of the CRC:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

SLIDE 29 There is *nothing specifically in the Charter that protects fathers*. Still, the list in section 15 is not exhaustive. If a law discriminates against someone because of their sex, then it cannot stand up to judicial scrutiny. One can easily argue that men and women as parents should be treated equally. But I don't think that you can extend this principle to state that men as fathers have rights that other parents (female, gay) don't have.

SLIDE 30 PART 4: APPLICATION OF PARENS PATRIAE PROTECTIVE JURISDICTION (“PP”)

Parens Patriae means “parent of the country”. The purpose of the doctrine is to protect those who cannot protect themselves. The court steps in where there otherwise would be no remedy.

A “gap in the legislation” is a common ground that is relied upon.

One court ordered counsel for a child in the parents’ divorce case since at that time, there was no legislative scheme that provided for this. The Ont. S.C.J. appointed counsel for a 21-year-old intellectually disabled women. Her age prevented an OCL appointment. *Perino v. Perino*, [2009] O.J. No. 5846.

SLIDE 31 Other courts have invoked PP jurisdiction in a very wide array of cases:

- protected an infant’s right to be breastfed;
- addressed withdrawal of medical care;
- have ordered provision of medical care over the parents’ objections;
- ordered parents into counselling;
- made a parentage order on behalf of a biological father who had assisted in conception of a child for a same-sex couple;
- interfered in the provincial birth registration process on behalf of a father;
- have ordered parents to talk nicely to each other during parenting time exchanges;
- have appointed parenting coordinators; and,

The emphasis in the case law is that courts will assist children and parents where there is no specific legislative protection.

Parens Patriae is a very wide and flexible power that can be used in appropriate cases. However, I do not see the PP power to afford “rights” to fathers specifically to the exclusion of mothers.

SLIDE 32 PART 5: EXISTING RIGHTS PREFERRED TO CREATING NEW RIGHTS

The foundations for FATHERS RIGHTS must derive from pre-existing rights and privileges that the law has already recognized in principle. It is far easier to have a court enforce an existing right than it is to ask the court to create a new right.

We have international law.

We have the Charter.

We have *Parens Patriae*.

These are the foundations for fathers' rights just as they are the foundations no less for mothers' rights and primarily for children's rights.

SLIDE 33 PART 6: ADDRESSING MISANDRY

About ten years ago I wrote an article where I maintained that "Fathers' Rights" was an emotionally laden term that we would be well advised to abandon in favour of the more neutral and truly accurate term, "Family Rights".

<https://www.complexfamilylaw.com/Featured-Articles/An-Introduction-to-Fathers-Rights.shtml>

I referred to some incendiary articles that excoriated the fathers' rights movement. In preparing for this webinar, I came across many more such articles. There is no lack of hate, mistrust, vilification and outright misandry when it comes to attacking fathers.

SLIDE 34 From Wikipedia on "misandry": Paul Nathanson and [Katherine K. Young](#) argued that "ideological feminism" as opposed to "egalitarian feminism" has imposed misandry on culture.^[20] Their 2001 book, *Spreading Misandry*, analyzed "pop cultural artifacts and productions from the 1990s" from movies to greeting cards for what they considered to be pervasive messages of hatred toward men.^[21] *Legalizing Misandry* (2005), the second in the series, gave similar attention to laws in North America.^[22]

SLIDE 35 So, there is a lot of father vilification out there. Fathers and others are oh so bold to stand up and say that children have a right to spend approximately equal time with each parent. Why does this sentiment provoke such a visceral backlash? Those of a misandrist tendency argue that "fathers' rights" as a movement is just plain stupid and anti – child to boot. The misandrists would summarily write off fathers. The misandrists essentially question - How dare those fathers express pain, anger, disappointment, frustration, even to the point of suicidal ideation?

SLIDE 36 PART 7: SUMMARIZING WHAT WE HAVE DISCUSSED

1. Fathers' Rights derive from their children's rights.

2. Children's Rights derive from (1) the international Convention of the Rights of the Child; (2) Canadian Charter of Rights and Freedoms; and, (3) *Parens Patriae* protective jurisdiction of the courts.
3. Fathers rights to control their children and assume custody on marriage breakdown reigned supreme in Great Britain and then in Canada until *Talfourd's Act* of 1839.
4. Then there was the maternal presumption for custody of children.
5. More recently, statutes and common law became gender neutral and "best interests of the child" has reigned supreme.
6. Both the CRC and the Canadian Charter enshrine important children's rights. We looked at some of those rights. Judicial interpretation has served to bolster children's' rights.
7. **SLIDE 37** Yet neither the CRC nor the Charter can be relied upon to be a foundation of rights of men as fathers. As parents? Yes. As fathers? No.
8. *Parens Patriae* jurisdiction of our courts will fill gaps in the legislation, where necessary. Canadian courts have made extensive use of that power. But the *parens patriae* principle does not provide a legal basis for "fathers' rights".
9. Misandry – father hatred – looms writ large in Canada to this day. It makes assertion of any rights specifically for fathers something that is politically inopportune. (But I would argue that assertion of "Fathers' Rights" has no legal basis and is not the correct way to bring about much needed law reform.)

So before we close out this part of the program, is Colman going to say anything encouraging for fathers? Please let me have just a few more minutes of your attention. I think that you will all like my closing arguments. Here we go....

SLIDE 38 PART 8: TOWARDS AN ENLIGHTENED CONCEPTUALIZATION OF FATHERS' RIGHTS

I argued back in 2010 and I still argue now, notwithstanding how fathers' issues get such short shrift from the establishment, the use of the term "fathers' rights" should really be a thing of the past. There should be no such things as "fathers' rights". ***Any rights that fathers actually do have must out of necessity and common sense arise from the rights that all parents have - regardless of gender.*** And I have argued here this evening that there is a very healthy legal basis, founded both in international law and in domestic law, to argue for parental rights as adjuncts of children's rights.

SLIDE 39 I therefore am taking this argument even one step further. We should not be concerned that much even about parental rights. ***As the caring parents that we all are, we need to be very concerned about children's rights, about family rights,***

about the integrity of the family unit no matter what iteration that family might reflect.

SLIDE 40 Children need to be **loved** – by both parents. Children need **security** – from both parents. Children need residential **time** – with both parents.

SLIDE 41 What is our job? What is our job as grandparents? As lawyers? As judges? As psychologists? As social workers? What is our job as parents? All of us. If we are to accomplish anything in this life, if we are to build a healthy successor generation, if we are to promote reform of our dispute resolution system so that it is fair, humane, and prioritizes the mental health of children – then what do we have to do?

SLIDE 42 We have **to protect children's rights**. In other words –

- the movement that protects the interests of fathers to enjoy a continuing relationship with their children....
- the movement that protects the rights of children to enjoy a continuing relationship with **both** their parents....

SLIDE 43 that movement needs to be called the “FAMILY RIGHTS” movement. It is that very important movement that will make a change in the laws and the courts.

SLIDE 44 Gender wars have no place here. There is no room for “fathers’ rights”. There is no room for “mothers’ rights”.

Our principal focus must be to preserve stability, love and family relationships via

SLIDE 45 ***a rebuttable presumption for equal shared parenting.*** I have been saying this for about thirty years now; I hope that someone is listening. Children desperately need both parents. Our legislation and our courts that operate within an archaic and conflict inducing system need to finally follow such jurisdictions as Kentucky and Arizona where the starting point is equal residential time and equal parental responsibility.

I hope that all of you this evening will appreciate now that my argument against “Fathers’ Rights” is actually the penultimate argument (ironically) strongly in favour of Fathers’ Rights and Mothers’ Rights combined together as **Parental Rights** but all **subordinate to** what has been proven to be best for children of separation and divorce, **SLIDE 46** in other words – I stand strongly for **Children’s Rights** – for their inalienable right to enjoy a decent relationship with both parents. **Children have the right to both parents.**

And don’t let anyone hood wink you to believe otherwise.

SLIDES 47 to 49 ,, Questions

Close with Slides 50 to end