June 6, 2019

Speaking Notes and Reference Materials
Presentation to the Senate Committee on Legal and Constitutional Affairs
Re: Bill C-78 (An Act to Amend the Divorce Act, et al)

on behalf of:

CAFE       Canadian Association for Equality
L4SP       Lawyers for Shared Parenting
ANCQ   Action des Nouvelles Conjointes et des Nouveaux Conjoints du Quebec
CEPC       Canadian Equal Parenting Council
LW4SP       Leading Women for Shared Parenting
R.E.A.L.   Real Women of Canada

Presented by Brian Ludmer, B.COMM., LLB.
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| Tab 1 |
EXECUTIVE SUMMARY

Introducing a rebuttable presumption of equal shared parenting would reform the current dysfunctional and arbitrary litigation-based system which, despite it stated goals, in fact fails to advance the long-term best interests of the affected children and in fact exposes them to conflict, uncertainty and parental pressure.

A rebuttable presumption of equal shared parenting does not impose that solution for all families. It merely recognizes public opinion (i.e. the actual consumers and clients of the current dysfunctional system) and the applicable science to indicate that there must be persuasive evidence that the needs of the children must be “substantially enhanced” for a departure from an equal parenting solution. In other words, a rebuttable presumption of ESP is just the starting point for the analysis.

Support for this initiative is overwhelming across all Canadian demographics, according to decades of public opinion polling – the public’s actual experience is that the current litigation-based system is failing families. Overwhelming science supports a rebuttable presumption of equal shared parenting as a means to protect children from the conflict inherent in the current system. Opposition submissions on this issue are vague and based entirely on rhetoric and lacking in substance and are generally not evidence-based assertions. In the face of overwhelming public opinion and science, the current system is founded on a set of material incorrect assumptions and myths, which are sequentially addressed and refuted below.

REFUTING THE MYTHS WITH LOGIC AND FACTS

1. Myth: The current system is actually working to advance the best interests of the children.

Facts:

   I. The current system is built to foster litigation for those couples unable to successfully restructure on their own. The current system, even supplemented with a long list of criteria for Courts to consider, provides too broad a range of discretion for actual results in Court. As a result, the actual results in Court are dependant upon and influenced by, many factors that do not advance the best interests of the children. These include:

       a) The personal background, assumptions, biases and life experience of the particular Judge;

       b) Whether one or both parties are self-represented, in which case the proper data presented in a legally admissible and persuasive manner are not available to the Trial Judge. The importance of this factor is underscored by the fact that at least 50% of Family Law litigants are self-represented and self-represented litigants fare quite poorly in Court generally, but particularly when the other side of the case is represented by counsel;
c) Relatedly, a wealthy or well-funded (friends and family support) litigant will have an inherent advantage and the parent with less financial resources may have to fold and accept a marginalized role in the children’s lives because of the prohibitive cost of Trials.

d) The thoroughness (and related cost) of presentation of the case, including whether the client in question is represented and whether they have the budget for multiple witnesses and a lengthy Trial and up-to-date research on Court decisions involving maximum contact and equal shared parenting – this produces inconsistent results in the jurisprudence itself;

e) Undue reliance in Court decisions on contested assertions of relative parenting time prior to separation and on artificial status quos created post-separation;

f) Whether the narrative before the Court has been influenced by false allegations and whether the defendant is represented or is otherwise able to demonstrate the falsity of the allegation;

g) Whether a particular litigant’s extended family lives in another province or country and therefore is less able to provide supportive collateral information;

h) Whether a party wishing to introduce the latest social science research has the funds to afford this expert evidence or expert evidence to refute a parental alienation dynamic;

i) Most litigants do not have the financial capacity to endure a one-to-two-week (or longer) Trial. Their cases are decided at Motions based solely on affidavit evidence or on abbreviated proceedings of a couple of days. In all such cases, the full detailed family history and the full understanding of children’s needs and the ability and willingness of the parents to meet those needs, with all of their nuances, cannot be determined with precision. The Court applies “models” and unstated presumptions in determining a parenting plan. There is no ability in such forums for robust fact-finding.

II. As a result of these and other factors, there is a material arbitrariness in the actual outcomes of contested family law adjudications. Many worthy parents are unjustly marginalized and the children miss out on what they had and what they might benefit from in future. Despite robust jurisprudence supporting equal shared parenting, and despite the current “maximum contact principle” in Section 16(9) of the current Divorce Act, there is no predictability, nor any consistency in where, when and how certain children benefit from two primary parents while others have a parent marginalized. The arbitrariness of the current system manifests itself because of the following factors, amongst others:

a. The personal background, assumptions, biases and life experience of the particular Judge;
b. Whether the case takes place in an urban centre or a rural centre (less diversity of Judges in the locale and less evolution of the jurisprudence);

c. Whether the case takes place in a Province with more developed “maximum contact” and equal parenting jurisprudence;

d. Whether the local Judge has been trained in the latest social science research on children’s outcomes, which overwhelmingly support equal shared parenting; and

e. Whether one or both parties are self-represented, in which case the proper data presented in a legally admissible and persuasive manner are not available to the Trial Judge.

III. The current system (regardless of the length of listed criteria) provides no structure or guidance to parents at the time of separation. It can take up to six months (or longer) after separation to get into Court for a contested Motion on an initial interim parenting plan. Chaos, self-help and power dynamics apply during the period from separation until the first contested Motion, with the more powerful parent dictating terms of access to the children to the less powerful parent. Only a starting point – such as a rebuttable presumption of equal parenting that can be addressed at the first Motion, can save families from the current chaos that exists at the time of separation, where perfectly normal parents are being marginalized by the dictates of the other parent, with the children used as possessions.

2. Myth: It is necessary to make a custom inquiry into the best interests of a child without any guidance, other than a list of criteria; a rebuttable presumption detracts from this necessary custom solution.

Facts:

I. Judges themselves will indicate that they do the best they can with limited information (and they are particularly limited in their fact-finding ability at a Motion based solely on affidavit evidence). Judges admit that they will never actually get to know the people involved or actually know who is telling the truth about various matters and therefore they do not actually know whether they are making a decision in the best interests of the children. Judges are usually quite candid about their own understanding about the limitations of the current system.

II. There are no retrospective studies of the jurisprudence and families who have gone through an adjudication under the current system which would substantiate that a “custom” solution produces better outcomes, as opposed to following the overwhelming science which suggests that the closer you get to two primary/equal parents the better the outcomes. The science is supported by Meta-Analyses by Professor Linda Nielsen of Wake Forest University, Professor William Fabricious of Arizona State University (a witness before the House of Commons Committee on November 26, 2018) and Canadian peer-review journal experts Professor Edward Kruk of UBC (also a witness) and Professor Paul Millar of Nipissing University. The science is supported by an
international body of research available through various organizations, including the
International Council for Shared Parenting.

III. With two normal parents it is unnecessary and indeed problematic to search for which
parent is “better”, when each has their own respective positive and negative attributes.
A broad range of parenting styles and interests can produce healthy child-rearing. The
types of parenting impairments that are relevant to a parenting plan are quite obvious,
and relatively rare. A granular review of minutiae of the family history and prior
parenting issues is not required to advance children’s future best interests. Accordingly,
litigation and a departure from shared parenting should be reserved for only the most
extreme cases of impaired parenting practices.

IV. The current system encourages parents to try to introduce as much negative material
about the other parent as possible and provides incentives for false allegations and
exaggerated claims about the other parent. The current system provides incentives to
pressure and influence children against the other parent. In midst of all of this “smoke”,
it is frequently the case that Judges do not get to the right answer.

V. Science supports the view that it is the perpetuated conflict fostered by the current
system, as opposed to not getting the precise customized plan, that is most damaging
to children. There is no science behind a determination that post-separation a parent
who interacted with the children daily should see them 37.2% of the time after
separation.

VI. The parenting schedule itself is rarely an adequate solution to concerns about a
particular parent’s logistical or parenting challenges. It is usually the case that equal
parenting supported by driving assistance, after-school care, a parenting or other
course or the addition of a parenting coordinator can more granularly and effectively
resolve the particular concern and therefore permit the scientifically supported benefits
of two primary parents. Even a parent reduced to 1/3 of the time (if they have logistical
or parenting impairments) can still create the same issues and therefore the parenting
schedule is not the right tool to deal with the vast majority of concerns in assisting a
family in restructuring post-separation.

VII. The leading social science research clearly concludes that the amount of time spent is
crucial in fostering and maintaining parent-child relationships. There is no substitute for
actual time spent together and sharing life’s experiences together in supporting parent-
child bonding.

VIII. The vast majority of parents, due to the cost of litigation, cannot afford the detailed
granular review of issues that is theorized by the proponents of the current system.
Their search of “best interests” with merely a list of criteria is simply aspirational – in
practice it rarely happens, due to cost, delay, and the overwhelming impact of the
continuing conflict during the time that the case is proceeding on its laborious path.
Meanwhile the children are necessarily being triangulated into the dispute as both
parents lobby for their loyalty.
IX. Surveys of children and of parents who have experienced separation refute this myth

3. **Myth:** Equal shared parenting is not appropriate for all families.

**Facts:**

I. According to the science, and decades of polls of public opinion across North America, equal shared parenting is appropriate for most, if not the vast majority of, families. By preventing undue litigation concerning families contesting parenting plans within a narrow band of 70/30 to 50/50 (where both parents are typically of normal skill set and aptitude), the very expensive family law system can devote its resources to the families with significant issues.

II. Many who contest equal shared parenting as the appropriate outcome for most families usually have a vested stake in the current litigious system, either because they feel that if that favours their constituency or because they are remunerated from the current system as a service provider or academic in some fashion.

III. For decades, public opinion in Canada and across North America has been very strongly in favour of a presumption of equal shared parenting. Canadian polling has consistently indicated that over 70% of the population (notably measured across all demographics – age, gender, political affiliation and region) support ESP. Support is over 80% once undecided responses are factored out. Opposition is typically less than 10%. The public, who have directly experienced (the divorce rate is approaching 50%) the current litigious system or who have immediate family members or close friends who have directly experienced the current system uniformly is of the view that it is costly, wasteful and harmful to children and that the results do not advance children’s best interests and the perpetuation of the conflict is itself a palpable harm.

IV. Science supports the view that the conflict itself, as opposed to the particular parenting plan, is the greatest risk to children. The science is clear that the closer you get to two equal primary parents, the better the long-term outcomes for children of separated families.

V. The overwhelming scientific consensus in favour of equal parenting for most families as a means of enhancing child outcomes is widely published and summarized in Professor Fabricius’ presentation. It is accessible on various websites that compile this including those of the Canadian Equal Parenting Coalition, Lawyers for Shared Parenting, Leading Women for Shared Parenting, National Parents Organization and the International Council on Shared Parenting. Meta Analyses by Professor Linda Nielsen and by Professor Edward Kruk of UBC and Professor Paul Millar of Nipissing University demonstrate that the only published studies which do not support ESP were biased and/or poorly structured and/or of limited sample size or not even peer-reviewed in a leading Journal.

VI. The public’s extremely negative experience with the current dysfunctional system – it does not advance children’s best interests – is so pervasive, that this informed
experience trumps the views of those who make their living off of the current system. Millions of Canadians’ collective experience (representing millions of affected children) cannot be wrong. Rather this experience should inform those charged with considering reforms to the system and updating the legislation for today’s realities.

VII. A rebuttable presumption of equal shared parenting does not impose that solution for all families. It merely recognizes public opinion (i.e. the actual consumers and clients of the current dysfunctional system) and the applicable science to indicate that the needs of the children must be “substantially enhanced” for a departure from an equal parenting solution. In other words, a rebuttable presumption of ESP is just the starting point for the analysis. Courts are now recognizing that parenting coordinators and more granular directives and remedies (therapy, parenting courses) are the appropriate solution to perceived issues, particularly if they are transitory, as opposed to crafting an unbalanced parenting plan, which leaves the issue unresolved.

VIII. In intact families the state does not intervene in the parenting dynamic unless there are child protection issues. That should be the similar standard post-separation – parents who are “normal” in that their parenting knowledge, skill set, attitude and aptitude is within a broad range of normality should have equal parenting, since the science does not support any precise parenting plan other than equal parenting in such circumstances. There is no “science” in a determination that a particular parent should have the children in their care 37.2% of the time.

4. Myth: Equal parenting initiatives have been attempted and the results have not been favourable and there has been a move to undo the reforms.

Facts:

I. This is entirely untrue. The Australian experience was actually well received by the public with a noted decrease in litigation and increased satisfaction with post-separation arrangements. Any further legislative changes thereafter were simply a result of political lobbying. After the passage of the 2006 shared parenting amendments in Australia, the Australian Government commissioned a study by the Australian Institute of Family Studies. Amongst the findings were that an increased number of parents were able to sort out their post separation arrangements with minimal engagement of the formal family law system and that the majority of parents in shared care time arrangements reported that the arrangements worked well for them and their children. The 2012 changes (primarily focused on domestic abuse cases) were the result of a politically-driven process and were not based on the actual experience of the public with family law dispute resolution during the period of time between 2006 and 2012. Prior to the implementation of the 2006 Australian reforms, 77% of Australians supported shared parenting. Five years after implementation, the figure had risen to 81%. Australia did not revoke the shared parenting provisions.

I. Kentucky became the first state of the United States to introduce a rebuttable presumption of equal parenting. All of the public opinion polls since then have indicated
broad based satisfaction with the reforms in practice and similar supportive experience reported from professionals advising family law litigants.

II. Arizona several years ago instituted a broadly worded maximum contact provision. All of the public opinion polls since have ratified the positive developments that resulted therefrom and the fact that, in practice, de facto equal shared parenting now exists in Arizona. A further follow-up study by Professor William Fabricius, who was a witness before the House of Commons Committee on November 26, 2018, reported broad-based satisfaction with the Arizona reforms.

III. Legislative proposals to introduce equal parenting are pending in at least half of the states of the United States, according to Leading Women for Shared Parenting and National Parents Organization. Professor Fabricius corrected an erroneous assertion by another witness – there has never been an equal parenting law in the US which was subsequently withdrawn.

IV. Broad-based international initiatives under the auspices of the International Council on Shared Parenting are also creating traction throughout the developed world.

5. **Myth:** Equal parenting is not suitable in situations where the parents do not get along and cannot make decisions jointly.

**Facts:**

I. Overwhelming science exists supportive of the fact that equal parenting reduces conflict, obviously particularly where unbalanced parenting proposals are the primary source of the conflict, but generally as well.

II. Equal parenting allows for fewer transitions between houses and supports children’s adjustment after separation by maintaining two primary parent relationships. Children experience a loss from a family separation regardless of post-separation family structure. By maintaining two primary parents the loss is lessened.

III. Decision making on major topics such as health, education and religion can be dealt with differently than the parenting time schedule. Therefore, conflict is irrelevant to the parenting time schedule. Parental coordination is a further answer to any issues over conflict. The British Columbia Provincial Legislation allows a Court to impose parental coordination. This should be an addition to the Divorce Act amendments.

6. **Myth:** Equal parenting supports the rights of child or spousal abusers or parents with addictions or other parenting impairments.

**Facts:**

I. The rebuttable presumption of equal parenting does not overcome the other considerations in the legislation and where material abuse or material parenting
impairments relevant to future child care have been substantiated, the presumption will be rebutted.

II. The current maximum contact principle exists harmoniously with the provisions of the statute and provincial legislation and jurisprudence which address these concerns. There is no reason why a rebuttable presumption of equal shared parenting cannot live harmoniously with additional provisions meant to address these concerns.

III. The current system is about “parental rights” – the right to litigate to have yourself declared the primary parent. A rebuttable presumption of equal shared parenting constrains litigation and is therefore child-focused and about children’s rights to a primary relationship with both parents and children’s rights to not have one parent marginalized from their lives.

7. **Myth:** A Rebuttable presumption of equal shared parenting does not reflect parents’ and children’s expectations based on prior child care arrangements before separation.

**Facts:**

I. The mental health literature and jurisprudence makes it clear that families restructure after separation and prior child care arrangements are not necessarily determinative of an optimal post-separation arrangement. Parents make post-separation adjustments to their work life and other interests in order to step up and fulfill their role as a primary parent. Children universally want both parents to remain involved as primary parents after separation according to numerous surveys and studies.

II. Parental roles prior to separation are a mix and even when there is a stay-at-home parent, the other parent is usually substantially involved in the evenings and on weekends. As a societal value, if parenting arrangements prior to separation were determinative, couples would be well advised to insist on nannies and daycare as opposed to a stay-at-home parent when children are young and parents would avoid contributing to the children’s welfare through working in order to maintain a tactical advantage by being a “stay at home parent”. The needs of working women need to be respected and merely because they are working (in order to help the entire family budget) this should not impact on post-separation parenting decisions.

8. **Myth:** A rebuttable presumption of equal shared parenting is not appropriate for infants and toddlers.

**Facts:**

I. The science is overwhelmingly in favour of equal parenting arrangements for infants and toddlers and has recently been revalidated through an international consensus. There are ways to support equal parenting of infants and toddlers in order to achieve that goal – the practical impediments can overcome with a proper judicially imposed structure and logistics.
II. Science has proven that infants and toddlers are capable of multiple primary attachments and that their outcomes are better as a result i.e. the more caregivers the better, such a grandparents, new partners as well as their biological parents. The old adage of “it takes a village to raise a child” applies equally well after separation and there is no benefit in searching for a “primary” parent – indeed the science is strongly against that. Objections to equal shared parenting for infants and toddlers are based on outdated and unsupported assumptions that have been refuted by the current science.

9. **Myth:** A rebuttable presumption of equal shared parenting would impact on child support for stay at home mothers.

**Facts:**

I. Under the current child support paradigm shared parenting resulting in off-setting support would have a negligible impact on the net amount of child support paid to a stay-at-home parent. While a family is intact the children are supported by the joint resources and incomes of both parents. There is no reason why that should not continue to be the case post-separation.

II. Appropriate allowance for the overhead (food, shelter, clothing) provided by the payor parent is a social justice issue and enhances the children’s experience during the time they are with that parent. There is social injustice and an impaired ability to support the children in situations where a payor parent who has less than 40% of the time with the children is paying child support to a parent who earns way more.

III. The best interest of the children trump any concern over child support, which is a separate issue that could be addressed, however, there is a settled policy in this regard under section 9 of the *Child Support Guidelines* (minimal offset support) and the related jurisprudence. There is no empirical or jurisprudential evidence that shared parenting child support arrangements do not work, financially, today.

10. **Myth:** Alternative Dispute Resolution proposals can solve the current litigation issues.

**Facts:**

I. The types of families who would benefit from ADR are doing so today, with broadly-based resources. The types of families who are litigating today are not amenable to the influence of a mediator or not eligible due to power imbalances.
Myths and Facts Concerning a Rebuttable Presumption of Equal Shared Parenting

Myth: The massive cost of the current system (Courts, administration, mediators, Judges, lawyers, therapists and disruption to parents during the litigation process) is justified in terms of the need for customized solutions for each family and no “principles or presumptions” to guide the process.

Facts:

I. The current system is built to foster litigation for those couples unable to successfully restructure on their own. The current system, even supplemented with a long list of criteria for Courts to consider, provides too broad a range of discretion for most families.

II. There is no evidence that the supposed aspirational goals of a customized solution justify the immense cost and damage due to the conflict.

III. Post-separation experience in Scandinavian countries and other jurisdictions where equal parenting applies provides a model for better outcomes for children.

11. Myth: There should not be any principles or presumptions in the Divorce Act

Facts:

I. For decades jurisprudence has relied on the existing maximum contact principle in the Divorce Act. It has gone some way, but only in an inconsistent fashion, to preserve children’s relationships against the wishes of a parent seeking to marginalize the other parent.

II. The maximum contact principle reflects Canadian value systems and understanding that children need two primary parents as opposed to one primary parent and someone they go to “visit” from time to time.

III. Accordingly, the maximum contact principle for 25 years has been a hallmark of the goals of the Act and lives harmoniously within the broader context of “best interests”, as would a rebuttable presumption of equal shared parenting.

IV. Experience with the inconsistent application of the maximum contact principle has demonstrated that the maximum contact principle does not go far enough to serve its purpose. That is why a rebuttable presumption of equal shared parenting as a starting point is required to cure the current inability of the system to actually protect the best interests of children after separation.

V. The proposed changes in Bill C-78 at least seek to preserve this core principle that Courts have, albeit inconsistently, used as a boundary issue in an otherwise overly-broad discretion. The “friendly parent” principle currently contained in Section 16(9) has been moved elsewhere and should be reinserted as a core principle in the proposed Section 16.2(1).
VI. Statements that the current maximum contact principle (in place for decades) is meaningless are patently false and betray a political agenda. There are three decades of jurisprudence interpreting and relying in the maximum contact principle.

VII. The proposal of the Canadian Bar Association to weaken the maximum contact principle to the point that it is meaningless should be rejected. It is a regressive proposal that will be a set-back in helping families restructure in a healthy manner and it will overturn decades of jurisprudence which has been used to help protect relationships and to provide a background to encourage settlements. Maximum contact was deemed by previous Parliaments and decades of jurisprudence to be consistent with children’s best interests. It remains so today.

VIII. Both the title and the content of proposed Section 16.2(1) should be retained, to be applied even if there is a rebuttable presumption of equal shared parenting.

IX. There is going to be some sort of presumption in the proposed mobility provision – so it is inconsistent to state there should not be any presumptions or principles elsewhere.

Respectfully submitted, June 6, 2019

THE CANADIAN ASSOCIATION FOR EQUALITY
201-2 Homewood Avenue
Toronto, Ontario M4Y 2J9
Tab 2
consideration and safeguards that are noted in the UNCRC, both broadly and specifically, in the articles and in the comments.

Thank you for the opportunity to present our perspective, and we welcome any questions.

The Chair:

Anthony Housefather  
Caucus: Liberal  
Constituency: Mount Royal  
Province/Territory: Quebec

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Thank you very much.  

Now we'll go to Mr. Ludmer.

Mr. Brian Ludmer (Advisory Counsel, Canadian Association for Equality):

Thank you very much, and thanks for having me.

I'm a co-founder with Mr. Colman of Lawyers for Shared Parenting, and I'm here today on behalf of the Canadian Association for Equality.

In 2014, I participated in the drafting of Bill C-560. I was the one who came up with the operative language of a presumption, unless it could be established on evidence that the needs of the children would be substantially enhanced by a different parenting plan. That remains, in my view and the view of many you're hearing from, how to advance the best interests of children.

The fact of the matter is that adding a list of other criteria and continuing to hear about a unique and individualized approach in each case will subject the children of this country to a continuation of the litigious environment that results in the conflict that all the studies say is the principle damage to the children. They won't be damaged by equal parenting. They're damaged by the conflict over two parents, one of whom wishes to be the primary parent, hence the litigation, and the other one who is willing to share the child and co-parent.

In a sense, while you've heard from an organization representing 36,000 lawyers, you should hear from your constituents.

For over 20 years, public opinion poll after public opinion poll has reiterated that the Canadian public has a terrible experience with the current system, and that is on par with public opinion polls across North America. The current system does not work to advance the best interests of children. It says that's the goal, but in practice, if you're a family lawyer seeing what happens
out there, the current system damages children. It forces parents to triangulate the children. It causes conflict. It is maintained at immense cost, billions and billions of dollars.

There is no science that substantiates that anybody, including a judge, can say that a particular parent should see the children 37.2% of the time. The only science...and I'll differ from Ms. Landau on this. Peer-reviewed journal research, very robust, almost indisputable, and ratified by experts from around the world, substantiates that the closer you get to two primary parents after separation, the better the outcome for children. That research is thorough and cannot be minimized on sample sizes. You have to see it yourself.

The committee is getting submissions from Professor Fabricius, who drafted Arizona's legislation, from Professor Kruk and from Professor Nielsen. The joint submission of which CAFE is a part also highlights some of the leading research.

The current system is built on a series of assumptions that don't play out in real life. It produces arbitrary results depending on what judge you get, what their background is, and the day. Are they young? Are they from an urban centre? Is your case being litigated in the countryside? Which province is your case being litigated in? Those produce arbitrary results that are contrary to the goals of the legislation.

The legislation is premised, and you can tell that from the presentations you've heard today, on all the facts getting before the court and a judge somehow having the ability, in a three-day trial or a four-day trial, to figure it out.

In practice, it's not what happens. Budgets are limited. Over half of family law litigants are self-represented. When people represent themselves against a lawyer, the true family saga will never make it to the judge. Judges themselves, when they are polled and when commissions and studies are done, say they also doubt about whether they're getting it right. There are no retrospective studies of families coming through the system to determine whether today's system is working or not. Look at child outcomes three years out or five years out. The only science that there supports equal shared parenting.

In terms of public opinion, over half or close to half of families today will get separated, so you're talking over 10 million people who will be affected, and millions and millions of children. Their actual experience with today's system trumps the experience of 36,000 lawyers.

(1605)

For 20 years the public has been telling us it's not working. You're either going through a separation yourself, or a sibling or a cousin or a best friend is. No one is satisfied with the current system.

The proposed changes in Bill C-78—the technical ones—are pretty good. You can't argue with a lot of the stuff that's there, but it was put forward as a means of advancing the best interests of children, and it fails to make any fundamental change. If you start with a system that's broken, because it's built on a series of failed assumptions, you can't rescue it with technical language. You have to try to understand the better way to do it.

If you have a rebuttable presumption of equal shared parenting.... Domestic violence issues live harmoniously today with the maximum contact principle. It doesn't stand in the way and doesn't impact on that. Same with equal shared parenting—it can live harmoniously with provisions designed to capture and separate situations where that's a concern, like alcoholism or absenteeism or a parent who is an investment banker travelling all the time.
Equal shared parenting is not for everyone, but it is for about 90% to 95% of the families who litigate. When you look at what they're asking for, they're close, but one wants to be the primary parent. We taxpayers of Canada are all paying for that. It's a very expensive system with no science to determine that it produces optimum results or even results that can justify the cost. The only science and the views of the public who live with the system... The true experts are the public. They really don't like it and they don't like it right across North America.

There are currently proposals for equal shared parenting in at least half the States. Kentucky has introduced the first true rebuttable presumption of equal parenting. The public opinion polls and the experiences are great. Arizona had something similar about four or five years ago, and from all their polling and the results since, everybody's happy with it. Australia has been put forward as an example but maybe that's not the case. That's not what happened there. There was no problem with the equal parenting. There was a political dynamic.

No matter how you look at it, there's no meat, no evidence behind the objections to equal parenting, and there's so much for it. It will save our children from conflict, it will accord with the will of the public—that's why we're here—and it will fit the science.

I will have a printed presentation. It will be filed within the next day or two, and then I know it has to be translated, but I'll respect the time allotment today and any questions you have.

(1610)

[Collapse]

The Chair:

Anthony Housefather
Caucus: Liberal
Constituency: Mount Royal
Province/Territory: Quebec

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Thank you very much.

It's a pleasure to hear from all the witnesses. All of you were very helpful, and I appreciate the recommendations you offered, which is what we really want to hear.

We'll now go to Mr. Cooper.

[Collapse]

Mr. Michael Cooper (St. Albert—Edmonton, CPC):

Michael Cooper
Caucus: Conservative
Constituency: St. Albert—Edmonton

Mr. Ludmer, I’m interested in the comments you made about the arbitrary decisions that are made from judge to judge, from province to province. Are you able to elaborate on some of the differences that you see from jurisdiction to jurisdiction? In other words, perhaps in Alberta you might be more likely to have a shared parenting arrangement than in British Columbia. I don’t know. Could you comment on that?

Mr. Brian Ludmer:

Brian Ludmer

Certainly. Thank you for that.

Canada has some fairly robust jurisprudence because the provinces will look at other provinces’ jurisprudence, but there is no doubt that certain provinces like Ontario have a much more well-developed body of law on equal parenting, with the application of the maximum contact principle to its ultimate end. In other provinces, it’s very thin.

It shouldn’t depend on where the family lives to get that benefit. Urban centres versus rural centres—in rural centres, sometimes there’s only one or two judges in a centre, and you don’t get diversity of views. They may be of a prior generation, prior to the latest social science research, or they haven’t been trained in what we now know today.

Ultimately, the biggest arbitrariness is whether you’re represented or not.
Mr. Michael Cooper:

Michael Cooper  
Caucus: Conservative  
Constituency: St. Albert—Edmonton  
Province/Territory: Alberta

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Thank you for that.

Ms. Landau and Ms.—

Dr. Barbara Landau:

Barbara Landau  
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It's Dr. Landau.

Mr. Michael Cooper:

In any event, I'll be sure to refer to you by that.

Both of those witnesses made references to a lack of an individual assessment based upon a rebuttable presumption.

Could you comment on that? To me, it seems to not make a lot of sense.
Discussed Topics

Families and children  Marriage and divorce

There still is an individual assessment, but it's put in proper context.

The state doesn't get involved with families, absent child protection concerns, when the family is intact. When a family separates, you don't have to micromanage it and do a whole university thesis on the family for the purposes of studying everything. The evidence, the public's views and the social science world tell us that if you have a normal parent who loves their children and is prepared to devote the time, that's basically all you need. You don't have to micromanage it and, as I say, get down to that detail. If there's anything material, if there's a child who has special needs, that's why it's a rebuttable presumption. A particular parent may have to go and get some training, maybe it's a health need.

Those cases, where there's something of individual focus, present themselves quite easily and are dealt with quite easily.

[Collapse]

Mr. Michael Cooper:

Michael Cooper
Caucus: Conservative
Constituency: St. Albert—Edmonton
Province/Territory: Alberta

Could you address the concern that was raised—and I think you did touch on it a bit—about weeding out instances where domestic violence is at play? The suggestion was made that the rebuttable presumption would somehow result in overlooking domestic violence. Can you comment on that?

You did rightfully point out that under the current bill and the current Divorce Act, in fact, there is maximum parenting time that the court is required to consider. But surely you're not ordering maximum parenting time to parents who are unfit.
Mr. Brian Ludmer:

Brian Ludmer
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Discussed Topics
Families and children  Marriage and divorce

You're correct, Mr. Cooper.

You've effectively answered the question. One has nothing to do with the other. That's why the presumption is rebuttable. If there's some meat, if there's some proven allegation that has concerns for the future, that family won't have equal parenting. It's no different from today, where, instead of a presumption of equal parenting, it's a maximum contact presumption.

(1615)

Mr. Michael Cooper:

Michael Cooper
Caucus: Conservative
Constituency: St. Albert—Edmonton
Province/Territory: Alberta

Discussed Topics
Families and children  Marriage and divorce

Dr. Landau made reference to social science data that she said was incomplete, had small samples, is biased and isn't reliable.

You made general reference to some of the social science evidence, but I would invite you to put on the record some of the social science evidence that you suggest supports the rebuttable presumption.
Mr. Brian Ludmer:

Brian Ludmer

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Discussed Topics

- Families and children
- Marriage and divorce

Sure.

Professor Linda Nielsen at Wake Forest University has done a series of meta-analyses for many years—studies of studies—and those are now up to about 60 that she tracks from peer-reviewed journals around the world. The overwhelming majority, and I mean something like 55-plus of the 60 peer-reviewed studies, support equal parenting scientifically.

Richard Warshak of Texas, a well-known psychologist, has a study that he did in 2014, updated in 2018, that 110 leading psychologists from around the world have concurred in.

Professor William Fabricius of Arizona State University, who I mentioned, has written 30 peer-reviewed papers, speaks around the world, and is involved with the International Council on Shared Parenting. He has drafted Arizona's legislation, and then was hired to do the follow-up study.

These are people of international reputation and it's all high-level, peer-reviewed journals. I don't accept any assertion that there is not robust science about equal parenting.

Mr. Michael Cooper:

Michael Cooper

Caucus: Conservative
Constituency: St. Albert—Edmonton
Province/Territory: Alberta

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Thank you.
Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.):

Thank you, Chair.

I guess I’ll stick with Mr. Ludmer for the moment.

You mentioned peer-reviewed studies that cite that if the child can have two parents the better off the child will be, and that many studies speak of the virtue of shared parenting. I wouldn’t disagree with that, but it’s a far cry from that to presume in any given case that there is a circumstance of equal parenting.

This bill is founded on the principle of the best interests of the child. What’s wrong with starting from that point and evaluating the circumstances as they play out?
Because you’ll have a continuation of the current system of non-stop litigation bankrupting families, continuing to drain tens of billions of dollars of taxpayer money to fund a system for people to litigate over children.

The point of a rebuttable presumption is the flip. You start with the scientific view and the view of the public. Remember what the public wants. You start with that view and say, unless it’s disproved, we can be pretty comfortable that it will be okay. It'll be in the children’s best interests. That’s what the science tells us.

We don’t need to worry and do these huge expensive studies. The average family can’t afford a two-week trial. The public can’t afford all these conflictual families to have two-week trials, so we say we know they’re going to be fine. We can’t do any damage with equal shared parenting for a normal family.

I guess that’s the problem with that hypothesis. We don’t know that it’s a normal family. If it’s not, it seems to be a harmful presumption.

If you could answer that quickly, then I’d like to pass it over to Dr. Landau and—
Brian Ludmer

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Discussed Topics
Families and children  Marriage and divorce

I'll rephrase the question. How do we know it's a normal family? How can we be comfortable?

The types of abnormalities that would impact on parenting time are starkly obvious. A very broad range of parenting produces healthy children. Your average person, if they love their children, if they try hard, if they're there for their children, do a little reading, they're normal. Any abnormalities will stick out like a sore thumb. It is that group of people—the vast majority of our population—that we say the exercise, the cost, the conflict, the stress on the children, is not worth the upside, because the end result might be that you don't get 50% but you get 37.2%. However, if you're not normal, you'll still damage the children.

(1620)

Mr. Ron McKinnon:

Ron McKinnon
Caucus: Liberal
Constituency: Coquitlam—Port Coquitlam
Province/Territory: British Columbia

Thank you.

We'll let Dr. Landau, Ms. Rauch and Ms. Del Rizzo respond, if they would.

Dr. Barbara Landau:

Barbara Landau

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My understanding is that in Australia and in all the states that tried the presumption of shared parenting, they withdrew it. Only Kentucky continues to have that presumption.

Since the last time we reformed the Divorce Act, we've had a lot more encouragement of alternative dispute resolution and of professionals to screen for domestic violence. The result has been a tremendous increase in shared parenting, co-operatively among parents. There is nothing to prevent parents from working out an arrangement of equal parenting if that makes sense to them in their circumstances. Parents have gone from almost a minimal involvement of fathers to a far greater increase in fathers’ involvement in the last 30 years. That’s been a good thing, and it’s largely been the result of consensual dispute resolution in cases that warrant it.

When we talk about the idea of all these trials, only 1% to 2% of family cases end up in trials, but they do spend an awfully long time and a lot of wasted money working their way through the court system. What I really like about this legislation is that it does put a focus on concern about safety and if you manage to get over that hurdle, encouraging people to use consensual dispute resolution results in lots of sharing, but sharing based on the unique circumstances of the family. What’s the availability of both parents, based on their work schedule? What’s the age of the children? Do they have mental health or addiction issues that need to be addressed? Do they have special needs children? It works out a parenting plan that is unique for the family.

What’s wrong with the idea of presuming equal parenting, shared parenting, and having to prove otherwise?
Dr. Barbara Landau:

Barbara Landau
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Discussed Topics
Families and children  Marriage and divorce

I think we have sufficient.... I think the very fact that this legislation has encouraged so much of a focus on safety and well-being shows we have some serious concerns.

Some 20 to 30 years ago in the House of Commons, they laughed at the issue of domestic violence. We don't laugh anymore. We take it seriously, and we also take seriously the experience and the ability and the motivation of people to parent, and encourage them to work out their own plans. I would emphasize mandatory information sessions for parents early on where they learn what a parenting plan is, how to address the different topics that are now in this legislation and about things that will reduce their conflict. Then I think the outcome will be far more sharing of parenting, of responsibilities, not the fighting over labels, which you've gotten rid of in this bill.

Mr. Ron McKinnon:

Ron McKinnon
Caucus: Liberal
Constituency: Coquitlam—Port Coquitlam
Province/Territory: British Columbia

Discussed Topics
Families and children  Marriage and divorce

Could we get a quick answer from the CBA?

Ms. Melanie Del Rizzo:
Tab 3
SUBMISSION
TO THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS
RE: BILL C-78 (An Act to Amend the Divorce Act, et al)

BEST INTERESTS = PRESUMPTIVE EQUAL SHARED PARENTING

SUBMITTED JOINTLY BY:

ANCQ  Action des nouvelles conjointes et des nouveaux conjoints du Québec
CAFE  Canadian Association for Equality
CEPC  Canadian Equal Parenting Council (Conseil Canadien Pour Le Rôle Parental Égal)
L4SP  Lawyers for Shared Parenting
LW4SP  Leading Women For Shared Parenting (Canada)
R.E.A.L  Real Women of Canada

2018-11-01
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I INTRODUCTION

We commend the government for its commitment to harmonize federal and provincial legislation, incorporate international Hague obligations and to improve the effectiveness and efficiency of inter-jurisdictional procedures.

However laudable these changes may be, we submit that they are an inadequate response to an antiquated and conflict promoting family justice system that has for years been routinely described as being “broken” or in “crisis” by Canadians, jurists, academics and parliamentarians alike. The 33-year-old federal divorce regime, despite some changes over the years, has been rendered out-of-date both by social science research findings regarding the “best interests of the child” and changes in societal norms and attitudes. We recognize that making required root-and-branch legislative, structural and funding changes in a coordinated manner for divorce/separation matters involves federal/provincial/territorial cooperation. While we encourage the government to pursue these longer-term changes beyond Bill C-78, we submit that the government can and should use this generational opportunity of Bill C-78 to make overdue changes to the Divorce Act, particularly with reference to how we define “best interests of the child”.

Our primary recommendation is to adopt a rebuttable presumption of equal shared parenting (ESP). Sometimes simply referred to as “Shared Parenting”, the concept is:

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1 Law Commission of Ontario, Voices from a broken family justice system: sharing consultations results - Highlights. September 2010. (2010); Report says access to justice in Canada “abysmal,” calls for change by 2030 CTV News.htm (“The civil justice system is too badly broken for a quick fix”; “Access to justice in Canada is being described as “abysmal” in a new report from the Canadian Bar Association, which also calls for much more than “quick fix” solutions.”); Makin, Kirk, “A program to fix our ailing family courts”, Globe Mail (11 March 2011) (Former Chief Justice of Ontario Winkler: “Everywhere I go, there is a constant refrain: The family-law system is broken and it’s too expensive.”).

2 “Best interests of the Child” criteria were added to the Divorce Act in 1985. In 1997, Child Support Guidelines were created with a statutory requirement to report to Parliament in 5 years. The most ambitious change was the modernization of family law via Bill C-22 attempted in 2002. The Bill was heavily criticized for failing to include shared parenting recommendations of the 1998 “For the Sake of the Children Report” authored by the Joint Select Committee on Custody and Access and died on the order paper. Bill C-78 contains many structural similarities and omissions to Bill C-22.
1) fully justified by social science research as the preferred child arrangement post-dissolution barring issues of abuse, neglect or violence;
2) overwhelmingly and consistently supported by Canadians regardless of gender, age, geographical region or party affiliation;
3) was recommended by the Special Joint Committee on Child Custody and Access as far back as 1998 (but not a rebuttable presumption);
4) has been successfully implemented in numerous jurisdictions; and,
5) has been tabled in 20 states in the U.S.A. in 2018.

Canadians have increasingly given up on the family justice system as an independent arbiter, resorting to their own shared parenting arrangements outside the “shadow of the law”. Even the bar associations, as perhaps the most strident opponents of equal shared parenting, are faced with the incontrovertible social science consensus (which they tend to ignore). They have now been reduced largely to arguing the supposed demerits of a “rebuttable presumption” mechanism – an ironic rearguard proposition given its regular use in other areas of family and civil law.

We have spoken with many MPs over the last ten to fifteen years. We believe that in your hearts you actually support the concept of equal shared parenting. In a sample informal statistical poll of MPs that we conducted during a previous parliamentary session, we determined that equal shared parenting would pass in a free vote unhindered by political positioning. Since then, shared parenting has been included in policy platforms of both the Conservative and Green parties. For the Liberal party, former leader Michael Ignatieff is on record supporting shared parenting, as is Prime Minister Justin Trudeau.

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3 Ignatieff M, *The Rights Revolution* (House of Anansi Press Toronto, 2000) at 106 (" These groups demanded that the ‘custody and access’ regime created by the Divorce Act of 1985 be replaced with a ‘shared parent’ regime in which both parents are given equal rights to bring up their children. These are sensible and overdue suggestions, and the fact they are being made shows that men and women are struggling to correct the rights revolution, so that equality works for everyone... In facing up to these issues, Liberals also need to face up to their responsibilities. Let us acknowledge that the rights revolution must shoulder some share of blame for family break up and its consequences in our society.").

4 Response by Prime Minister Trudeau in parliament, [https://youtu.be/zlKhsqJhLL0](https://youtu.be/zlKhsqJhLL0) at 0.55 mark (... ”we can continue to ... lay a solid foundation for our children’s future by ... supporting equal parenting...”).
Our simple message on equal shared parenting is: “It’s time...indeed, it’s past time.”

We define equal shared parenting along the following parameters:

Equal Shared Parenting is:

a) joint legal custody (parental responsibility) and
b) joint physical custody (parenting time)
c) with maximum practicable child time with each parent
   (approximately 50%)
d) as the highest embodiment of the best interests of the child
   standard
e) subject to evidence-based consideration of child safety.

The challenge is to translate these general principles into workable legislation that will be easily understandable to all. We hope that our proposed amendments (See Appendix “A”) will achieve that goal.

We propose amendments only in two areas:

1. “Best Interests of the Child” (BIOC) definition. BIOC has been indeterminate and arbitrary,\(^5\) lacking concrete definitional criteria to guide judicial decision-making. Consistent with social science findings and incorporating UNCRC criteria to the proposed ‘Primary Considerations” clause of Bill C-78, we propose that a rebuttable presumption for Equal Shared Parenting should anchor the BIOC test. We support the recitation of the sundry factors in the current Bill. The starting point, however, should be Equal Shared Parenting.

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\(^5\) Scott ES & Emery RE, “Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard” (2014) 77 Law Contemp Probs 69 at 69 (vague, indeterminate); Rodham Clinton H, “Children Under the Law” (1973) Harv Educ Rev at 21 (empty vessel); Charlow A, “Awarding Custody: The Best Interests of the Child and Other Fictions” (1987) 5 Policy Rev 25 at 1 (Because the “best interests of the child” standard is more a vague platitude than a legal or scientific standard, it is subject to abuse both by judges who administer it and parents who use it to further their own interests.); Bala, N, “A Report From Canada’s ‘Gender War Zone’: Reforming The Child-Related Provisions Of The Divorce” 67 at 199 (concept of the “best interests of the child” is highly malleable and advocates for almost any position in this area can usually cast their arguments in terms of promoting this objective.); Bala, N, “Bringing Canada’s Divorce Act into the new millennium: enacting a child-focused parenting law” (2014) 40 Queens LJ 425 at 470 (vague).
2. **Relocation/mobility.** The proposed amendment that extends presumptive rights to a “primary” parent where the child enjoys but minimal time with the other parent, shifts the focus from the best interests of the child to the interests of the primary parent and, arguably, judicial expediency. We recommend that the onus should always be on the relocating parent to establish that the move is in the best interests of the child, regardless of the parenting time that the child currently enjoys with the other parent.

We expand on our recommendations in the following sections and include proposed legislative text in Annex “A”.

II SHARED PARENTING

To state that a child benefits from having both parents actively involved in either an intact or divorced/separated family is not controversial. Canada has increasingly become an outlier with its continued scientifically unsubstantiated judicial preference for the standard single parent custody regime (e.g. one weeknight and every second weekend) – more recently recast as “Joint (legal) Custody” but with the same effect. As a nation, we decry the separation of a child from its migrant parent at an international border not far from us, yet we routinely separate children from a fit parent in divorce proceedings and deem it “best interests”.

Shared Parenting is defined in modern research as joint legal custody (shared parental responsibility) and joint physical custody (parenting time) where children live with each parent at least 35% of the time. However, research clearly demonstrates that the closer to 50% of the time that the children enjoy with each parent, the better the outcomes.

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6 Shared parenting researchers have generally agreed that 35% is the minimum “average” threshold for shared parenting as a technical term for research and policy discussions. It is not intended to imply a cliff threshold below which no benefits of shared parenting are received as the effects of similar parenting time vary by individual child and context.

1. Social Science Evidence

The evidence for shared parenting is not new. As far back as the mid-1970s, researchers were documenting the benefits of increased father time over the then standard sole

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– at page 8 of the manuscript:

The findings of many studies in many Western countries now clearly show that **more parenting time is related to greater divorced father-child relationship security** (for reviews of these studies, see Fabricius et al., 2010, pp. 225 to 227; Fabricius et al., 2012, Table 7.2; and Fabricius et al., 2016, Table 4.1).

At manuscript, p. 11:

Only one review (of 19 studies; Baude, Pearson & Drapeau, 2016) compared sole physical custody to two cutoffs for joint physical custody; i.e., 30% to 35% parenting time with fathers, versus 40% to 50%. **The children who had almost equal parenting time (40% to 50%) had better behavioral adjustment (e.g., aggressiveness, conduct problems) and social adjustment (e.g., social skills, social acceptance) than children in sole physical custody, whereas those with 30% to 35% parenting time did not.**

At manuscript, p. 15:

However, **at essentially equal parenting time (45%), insecurity about parent conflict was not greater in high-conflict families than in low-conflict families.**

At manuscript, pp. 15 – 16:

In contrast, at equal parenting time, while the change in circumstance would be greater than at 35% time, there is less room for insecurity about the father’s commitment to continued presence because it is concretized in his provision of an equal home for the child. Thus, **equal parenting time, in and of itself, likely carries meaning to protect the child against insecurity about parent conflict.**

At manuscript, p. 16:

Several lines of research suggest that reduced parenting time with fathers threatens emotional security by preventing children from having sufficient daily interactions to reassure them that they matter to their fathers. The correlational findings of many studies show that **more parenting time with fathers up to and including equal parenting time is associated with improved emotional security in the father-child relationship.** None of these studies found that mother-child relationship security decreased with increasing parenting time with fathers. **This means that the children of divorce with the best long-term relationships with both parents are those who had equal parenting time.**

At manuscript, pp. 16 - 17:

**Equal parenting time appears to protect children from insecurity about parent conflict. This evidence has only recently become available because only recently have we been able to study larger samples of high conflict families with equal parenting.**
maternal custody model setting the basis for increased paternal involvement in U.S. and European custody legislation.

However, based on some 40 years of research, the strong scientific consensus that has emerged\(^8\) is that *shared parenting provides better outcomes\(^9\) for children than single parenting on almost every measure of well-being*: academic and cognitive development; depression, anxiety, overall satisfaction, self-esteem; peer behaviour, substance abuse, hyperactivity; health and psychosomatic problems, parent-child or other family relationships. Moreover - and contrary to assertions made by opponents over the years that shared parenting is only warranted under limited, special or even ideal conditions - joint physical custody (JPC) produces superior outcomes to sole physical custody (SPC) independent of:

- the quality of the parent-child relationship (i.e. even marginal fit parents are beneficial),
- Parental incomes (i.e. JPC benefits are not tied to standard of living),
- Level of conflict (low to high but not extreme conflict situations warrant JPC)

\(^8\) *Ibid*; Nielsen L, “Joint Versus Sole Physical Custody: Children’s Outcomes Independent of Parent–Child Relationships, Income, and Conflict in 60 Studies” (2018) 59:4 J Divorce Remarriage 247, online: <https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1454204> (meta-analysis of 60 studies. “...in 34 of the 60 studies JPC children had better outcomes on all measures of well-being than SPC children. In 14 studies JPC children had better outcomes on some measures and equal outcomes on others. In six studies JPC and SPC children were not significantly different on any measure in the study. In six other studies, JPC children had worse outcomes on one of the measures, but equal or better outcomes on all other measures. In none of the 60 studies were the outcomes worse for JPC children on all measures of well-being.”).

Likewise, shared parenting, including overnights, has been scientifically proven to be beneficial to infants and toddlers (even under 1 year), even when parents disagree\textsuperscript{10}.

The issue of shared parenting has seen its share of controversy, misrepresentation and misinformation over the years, but any reasonable doubt should have been cast aside with the publication of the “Warshak Consensus”\textsuperscript{11} in 2014 on shared parenting and overnighting endorsed by 110 eminent researchers and practitioners. The seven recommendations of the consensus endorse shared parenting as the superior arrangement for normal circumstances, even for infants and toddlers, and even in situations of moderate conflict; shared parenting may be contraindicated in situations of prolonged or extreme conflict, abuse, neglect, or gross deficiency in parenting skills, but even here where some form of protection is indicated, this “should not be used to deprive the majority of children who were raised by two loving parents from continuing to have that care after their parents separate”\textsuperscript{12}

The “Warshak Consensus” represents the gold standard on shared parenting research. Nearly four years after its publication, the paper has been translated into 18 languages, remains one of the most downloaded papers from the journal, and has informed legislative deliberation in several countries. Even more significantly, “no article, including the only critique of the consensus report, by McIntosh et al\textsuperscript{13}, has


\textsuperscript{12} Ibid at 203.


explicitly identified any errors in the report or disputed any of its conclusions and recommendations”

The social science community has rapidly evolved its position on presumptions in shared parenting. Shared parenting was supported at the January 2013 Association for Family & Conciliation Courts (AFCC) Think Tank and a majority of convened experts supported a presumption of joint decision-making but not parenting time. The remaining step to a presumption of shared parenting including parenting time was made just three years later by a convened panel of experts at the 2017 International Conference on Shared Parenting (SP):

The evidence is now sufficiently deep and consistent to permit social scientists to provisionally recommend presumptive SP to policy-makers … these statements are explicitly made guardedly … [We] expect researchers will keep studying the matter … consumers of this research need to be alert to new findings that continue to affirm the conclusions here—or perhaps that oppose it. We might aptly characterize the current state of the evidence as “the preponderance of the evidence” (i.e., substantially more evidence for the presumption than against it). A great many studies, with various inferential strengths, suggest that SP will bestow benefits on children on average, and few if any studies show that it harms them.

(2015) 56:8 J Divorce Remarriage 595, online:
<http://www.tandfonline.com/doi/full/10.1080/10502556.2015.1092349> (Virtually the entire paper constitutes a very perceptive and striking critical analysis of the work of McIntosh, demonstrating her faulty methodology and suspect findings).

14 Warshak RA, supra note 11 at 207.

15 Pruett MK & DiFonzo JH, “Closing the Gap: Research, Policy, Practice, and Shared Parenting: Closing the Gap” (2014) 52:2 Fam Court Rev 152, online:
<http://doi.wiley.com/10.1111/fcre.12078> at 174 (“We believe that, when all potential hazards are addressed, shared parenting offers unparalleled opportunities for families to reorganize and sustain their better selves after separation to ensure that children continue to be nurtured by parents whose collaboration sets a path for a strong family future.”).

16 Pruett MK & DiFonzo JH, supra note 15 See Consensus point 11: “In lieu of a parenting time presumption, a detailed list of factors bears consideration in each case”.

The panel of experts went on to say:\textsuperscript{18}

All panelists were, however, appropriately wary of a one-size-fits-all standard, cautioning that exceptions to an SP presumption need to be recognized as appropriate bases for rebuttal. Among the factors that should lead to such exceptions are credible risks to the child of abuse or neglect, too great a distance between the parents’ homes, threat of abduction by a parent, and unreasonable or excessive gate-keeping. Furthermore, some children with special needs might require the care of a single parent.

An additional potential rebuttal factor was the topic of more extended discussion: the mere existence of intimate partner violence (IPV). It was noted that there is increasingly sophisticated understanding of IPV, due primarily to the writing of Johnson ... He distinguished among four distinct patterns of IPV, only one of which, coercive controlling violence (the stereotypical male battering pattern), should preclude SP ... Researchers, custody evaluators, and courts must explore not simply whether there is evidence of IPV, but also its nature, when considering implications for parenting plans.

The case for a rebuttable presumption for shared parenting rests on extensive research surpassing by far\textsuperscript{19} the basis used to justify the adoption of the sole parental custody standard. We submit that the case has been made via empirical research.

2. Adoption by Other Jurisdictions

Shared Parenting where children live at least one third of the time with one parent has become common in Europe and increasingly so in the US.

In Europe, it has risen to nearly 50\% in Sweden, 30 \% in Norway and Holland, 20\% in Germany and Denmark, 37\% in Belgium, 28 \% in Spain (40 \% in the Catalonia region),

\textsuperscript{18} Ibid at 9.

\textsuperscript{19} Kelly J, “Examining resistance to joint custody” in Jt Custody Shar Parent (Guilford, 1991) 55 at 56 (As early as 1991, the researcher noteded:”, “It is ironic, and of some interest, that we have subjected joint custody to a level and intensity of scrutiny that was never directed toward the traditional post-divorce arrangement [sole legal and physical custody to the mother and two weekends each month of visiting to the father] ... despite mounting evidence that traditional sole custody arrangements were less nurturing and stabilizing for children and families.”).
11% in Slovakia, 17% in France. In the US, the known rate is 35% in Wisconsin, 46% in Washington State, 30% in Arizona, 27% in California.\textsuperscript{20}

Kentucky was the first state to pass an explicit rebuttable presumption of shared parenting in April, 2018\textsuperscript{21}; in addition, five American jurisdictions (New Mexico, Iowa, Florida, DC and Arizona\textsuperscript{22}) express a preference for shared physical custody\textsuperscript{23}. Furthermore, 20 states currently have active shared parenting Bills in one or both legislatures\textsuperscript{24}. As of February 2018, twenty U.S. states were considering legislation related to equal shared parenting.\textsuperscript{25}

Canadian statistics on shared parenting are relatively spotty and difficult to compare to international norms due to the higher 40% parenting time threshold that section 9 of the \textit{Federal Child Support Guidelines} has mandated (albeit support is a different context).

\textsuperscript{20} Nielsen L, supra note 8 Also “Petição Em Prol Da Presunção Jurídica Da Residência Alternada Para Crianças De Pais E Mães Separados Ou Divorciados”, online: <https://igualdadeparental.org/peticao/>.

\textsuperscript{21} HB 528. Online:< http://www.lrc.ky.gov/record/18RS/HB528.htm>

\textsuperscript{22} Fabricius WV et al, “What Happens When There Is Presumptive 50/50 Parenting Time? An Evaluation of Arizona’s New Child Custody Statute” (2018) 59:5 J Divorce Remarriage 414, online: <https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1454196> (statutes direct courts to "maximize" the child’s parenting time with each parent not unlike Bill C-78. Unlike Canada, the passage of the legislation in 2013 was preceded by 10 years of educational sessions to legislators, professionals, courts. The study indicates the law functions as a rebuttable presumption of equal parenting time in practice). Aside from a handful of outlier cases, Canada’s current s. 16(10) has not prompted any significant type of preference for shared physical custody. For an exception, see: Justice Price in \textit{Folahan v. Folahan}, 2013 CarswellOnt 7094, 2013 ONSC 2966, [2013] O.J. No. 2450 (Ont. S.C.J.) who stated:

Contact with both parents is the children’s, not the parents’ right. Where, as in this case, a parent argues for unequal contact between the children and each of their parents, the onus is on that parent to rebut the presumption.


\textsuperscript{25} http://lw4sp.org/definition-of-equally-shared-parenting/ - Resources – 2018 Legislative PDF
With about 95% of cases settled outside of court, statistics indicate that Canadians are increasingly gravitating to shared parenting arrangements with a national rate estimated at 22% with high regional variation\textsuperscript{26}: BC-30\%, AB, 9\%, ON: 5-14\% and QC\textsuperscript{27}:22-26%.

3. Public Support

Canadians, like citizens in other jurisdictions, strongly support equal shared parenting. As early as 2000, a survey commissioned by the Department of Justice found:

There is overwhelming agreement with the idea that the Government should encourage joint or shared custody arrangements. Overall, 71\% of Canadians agree with that. Interestingly, there is no gender divide on this point – woman and men agree in equal numbers\textsuperscript{28}.

Indeed, subsequent surveys indicate Canadians are relatively uniform in their support for shared parenting regardless of gender, age, geographical region or political affiliation.

\textit{Not only that, as summarized in the table below, Canadians have been consistently strong proponents for a rebuttable presumption of shared parenting in surveys conducted over the past decade with 74\% in support (87\% among the decided) - a 6.4 to 1 ratio rarely seen in social surveys.}

\textsuperscript{26} Bala, N et al, “Shared Parenting in Canada: Increasing Use But Continued Controversy: Shared Parenting in Canada” (2017) 55:4 Fam Court Rev 513, online: <http://doi.wiley.com/10.1111/fcre.12301>; Nielsen L, supra note 8 at 1 (For example, in Wisconsin JPC increased from 5\% in 1986 to more than 35\% in 2012 [Meyer, Cancian, & Cook, 2017]. As far back as 2008, 46\% of the parents in Washington State [George, 2008] and 30\% in Arizona [Venohr & Kaunelis, 2008] had JPC arrangements. JPC has risen to nearly 50\% in Sweden [Bergstrom et al., 2013], 30\% in Norway [Kitterod & Wiik, 2017] and the Netherlands [Poortman & Gaalen, 2017], 37\% in Belgium [Vanassche, Sodeman, DeClerck, & Matthijs, 2017], 26\% in Quebec and 40\% in British Columbia [Bala et al., 2017], and 40\% in the Catalonia region of Spain [Flaguer, 2017]. At least 20 states in the United States are considering revising their custody laws to be more supportive of JPC [Chandler, 2017]).

\textsuperscript{27} Anecdotal evidence from Quebec practitioners indicates equal shared parenting is already the practice there for children over three years old, and also for younger children if the infant is no longer nursing and parents were already equal care providers.

\textsuperscript{28} Pollara Report, 2000 (Commissioned by federal government and obtained under Freedom of Information request. Copy made available to authors.).
Here is a more detailed view using the same question wording as above for two Canadian polls broken down by region, gender, age and for 2014, party voted:

### Canada (2007-2017): Presumptive Shared Parenting Polls

**Question:** Do you strongly support, somewhat support, somewhat oppose or strongly oppose federal and provincial legislation to create a presumption of equal parenting in child custody cases?

<table>
<thead>
<tr>
<th>Year</th>
<th>Strongly/Somewhat Support</th>
<th>Strongly/Somewhat Oppose</th>
<th>Unsure</th>
<th>Support among Decided</th>
<th>Ratio Support/Oppose</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>79.1%</td>
<td>14.1%</td>
<td>6.9%</td>
<td>85.0%</td>
<td>5.6</td>
</tr>
<tr>
<td>2009</td>
<td>78.0%</td>
<td>9.7%</td>
<td>12.3%</td>
<td>88.9%</td>
<td>8.0</td>
</tr>
<tr>
<td>2017</td>
<td>69.5%</td>
<td>13.2%</td>
<td>17.3%</td>
<td>84.0%</td>
<td>5.3</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>73.8%</strong></td>
<td><strong>11.5%</strong></td>
<td><strong>14.8%</strong></td>
<td><strong>86.6%</strong></td>
<td><strong>6.4</strong></td>
</tr>
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</table>

#### 2017 (Nanos)

<table>
<thead>
<tr>
<th>BY REGION</th>
<th>BY GENDER</th>
<th>BY AGE</th>
<th>BY PARTY VOTED</th>
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<tbody>
<tr>
<td>Atlantic</td>
<td>Male</td>
<td>18-34</td>
<td>Liberal</td>
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<tr>
<td>Quebec</td>
<td>Female</td>
<td>35-54</td>
<td>Conservative</td>
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<tr>
<td>Ontario</td>
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<td>55 plus</td>
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<tr>
<td>West</td>
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<td>(undecided)</td>
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<td>Green</td>
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<tr>
<td>CANADA</td>
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#### 2014 (Omnipoll)

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<th>BY REGION</th>
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<th>BY AGE</th>
<th>BY PARTY VOTED</th>
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<tr>
<td>Atlantic</td>
<td>Male</td>
<td>18-34</td>
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<td>Quebec</td>
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<td>35-54</td>
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<tr>
<td>Ontario</td>
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<tr>
<td>West</td>
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<tr>
<td>(undecided)</td>
<td>(undecided)</td>
<td></td>
<td>Green</td>
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<tr>
<td>CANADA</td>
<td>CANADA</td>
<td>CANADA</td>
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</tbody>
</table>
Here is a partial extract of polling done worldwide:\(^{29}\)

<table>
<thead>
<tr>
<th>Region</th>
<th>Country</th>
<th>Poll Results</th>
</tr>
</thead>
<tbody>
<tr>
<td>Europe</td>
<td>Belgium 2012</td>
<td>70 % favour SP</td>
</tr>
<tr>
<td></td>
<td>Holland 2012</td>
<td>71 % favour SP</td>
</tr>
<tr>
<td></td>
<td>UK 2013</td>
<td>84 % favour SP</td>
</tr>
<tr>
<td>USA</td>
<td>Massachusetts 2004</td>
<td>86 % favour SP</td>
</tr>
<tr>
<td></td>
<td>North Dakota</td>
<td>43 % (2006) 66 % (2012) 60 % (2014) w. 26% undecided</td>
</tr>
<tr>
<td></td>
<td>Maryland 2016</td>
<td>63% favour SP</td>
</tr>
<tr>
<td>CANADA</td>
<td>Pollara 2000</td>
<td>71 % favour SP</td>
</tr>
<tr>
<td></td>
<td>Omnipoll 2014</td>
<td>72 % favour SP</td>
</tr>
<tr>
<td></td>
<td>Nanos 2017</td>
<td>70 % favour SP</td>
</tr>
</tbody>
</table>

4. **Opposing Arguments**\(^{30}\)

Opponents of shared parenting - notably the legal establishment - have over the years raised several arguments that tend to espouse myths and stereotypes. These arguments have been either refuted or narrowly qualified through extensive research. This section summarizes the leading arguments.

The tenor of the first wave of arguments was to question the need or validity of shared parenting:

a. Bowlby’s outdated “**Single Attachment**” theory was used as a basis to discredit the need for both parents to be involved post-separation. Bowlby himself acknowledged his theory was wrong.

---

\(^{29}\) All results extracted from Leading Women 4 Shared Parenting (http://lw4sp.org/polling-voting/#USAND2017_V ). Also results from commissioned surveys- Pollara by the federal government and the others by private organizations.


15
b. Fathers pursue shared parenting only to reduce child support obligations. Research showed paternal and maternal instincts are equally strong refuting this. In addition, proponents asserted child support savings based on reduced child support transfers but failed to include direct costs of maintaining a second child residence as offsetting cost factor. The argument was fatally flawed from the outset as out-of-pocket child costs (transfers plus direct household costs) for child support are higher for shared parenting due to the fixed costs of maintaining an additional child residence.

c. The “Yo-Yo” argument asserted that children would be psychologically harmed by “bouncing” between two households. This was refuted by research showing most children adjusted easily and had equal or superior outcomes in a dual residence environment.

d. While acknowledging shared parenting may be beneficial in some circumstances, opponents argue it is not appropriate for young children. As mentioned above, there is now strong consensus that shared parenting is not only appropriate but provides a protective factor for infants, toddlers and young children 31.

Second wave arguments generally start with a blanket proposition that shared parenting is too dangerous due to risks of violence, abuse, mental health or conflict. The underlying policy premise is that issues affecting the minority 32 of dissolution situations should apply to the majority as a precautionary measure. Although often exaggerated in nature, these arguments threw down the gauntlet for researchers to differentiate safe from unsafe circumstances and to provide nuanced guidance for policymakers. These answers have been found in the most recent research, specifically:

a. Shared Parenting is generally the best option in most cases without mitigating factors and should not be automatically precluded where those factors exist;

b. Types of violence need to be distinguished in arriving at parenting decisions with recognition given the fact that fully half of first-time violence occurs during dissolution and is transient 33;

31 Warshak RA, supra note 10; McIntosh JE, Smyth BM & Kelaher MA, supra note 13; Warshak RA, supra note 11.

32 For example, Bala, N, supra note 5 ( only 8 % of filings allege domestic violence by either or both spouses); This rises to 75 % in contested custody cases according to Kruk E, supra note 30 at 8; Additionally, only 10-20 % of cases are considered as “hi-conflict” according to Bala, N, supra note 5.

33 Kruk E, supra note 30 at 8.
c. While extreme conflict precludes shared parenting, children in hi-conflict situations fare no worse in shared parenting than in sole custody and often times better. The key factor is the strength of the parent-child relationship\textsuperscript{34};

d. Special interventions like parallel parenting, therapeutic mediation, parenting education programs, and parental coordination should be considered in hi-conflict situations\textsuperscript{35}.

The implication of social science research for policy makers is that legal practitioners and judicial decision-makers need to be supported by appropriate educational programs in their work.

Finally, \textbf{third wave arguments concede that shared parenting is beneficial for most children, but caution against the use of any presumptions}, emphasizing that individualized discretionary “best interests” standard must be maintained. Counter-arguments to a rebuttable presumption of shared parenting generally fall into four categories:

a. \textbf{“One Size Fits All” is too narrow.} This argument suggests that any presumption will over-constrain judicial discretion or individualized decision-making. It overlooks that a presumption is a legal starting point within a generally applicable framework that may be countered by case-specific evidence. Certainly, the presumption of innocence as the basis of law has not interfered with findings of guilt. Rebuttable presumptions are already commonly used in family law in equalization, child support guidelines, and \textit{de facto} in the \textit{Spousal Support Advisory Guidelines}. In child support, for example, more than 40% of awards differ from the presumptive \textit{Federal Child Support Guidelines}\textsuperscript{36}. This oft-invoked and unsubstantiated expression rings hollow.

b. \textbf{“Not in the best interests of the child”}. This common unsubstantiated allegation represents an emotional argument devoid of logical substance. Since BI\textit{OC} is undefined (See Section C below), it is equally valid to posit the opposite making this an empty argument.

\textsuperscript{34} Nielsen L, \textit{supra} note 13 (meta-analysis of conflict in deciding parenting arrangements).

\textsuperscript{35} Kruk E, \textit{supra} note 30 at 8.

c. **Risks increase in litigation.** This old trope, used in attempts to discredit either shared parenting or a rebuttable presumption, has yet to be supported by facts and smacks of scaremongering. In point of fact, available data supports the opposite conclusion.\(^3^7\)

d. **Presumption increases focus on Parental Rights.** No data supports this allegation which invites the false inference that parental and child rights are somehow binary rather than complementary as stated in the UN *Convention on the Rights of the Child*\(^3^8\). Neither does a presumption trump the paramount welfare considerations of a child.

In short:

A legal presumption of shared parenting based on a firm foundation of research evidence defining children’s needs and interests in the divorce transition provides a clear and consistent guideline for judicial decision making. This presumption provides a clear-cut default rule, removes speculation about future conduct as a basis for making custody decisions, limits judicial discretion, enhances determinacy and predictability of outcome, and reduces litigation and ongoing conflict between parents.\(^3^9\)

---


\(^{38}\) For example, article 7 states:"The child shall ... have ... the right to ... be cared for by his or her parents" while article 9 states: "States Parties shall ensure that a child shall not be separated from his or her parents (...), except when ... such separation is necessary (...). Such determination may be necessary in a particular case ... where the parents are living separately (...).

\(^{39}\) Kruk E, *supra* note 30 at 10.
III “BEST INTERESTS OF THE CHILD” DEFINITION

The Divorce Act is predicated on the paramount consideration of the “best interests of the Child” (BIOC). However, prior to Bill C-78 no definition was provided for BIOC leading to charges by many critics over the years that the standard is arbitrary, unfair, and indeterminate among other descriptions. Apologists defend the undefined status of BIOC on the basis saying that each case must be treated on a case-specific basis thereby adding fuel for critics who rightly argue that unfettered discretion not only violates basic principles of law but also usurps the constitutional role of Parliament as the law-making body. Simply stated, open-ended laws are inherently unconstitutional, and Parliament may not abdicate or delegate its authority – directly or indirectly - to other branches of government.

We therefore recommend that the open-ended nature of the BIOC standard (which we maintain is still too open ended as currently drafted) be repaired by defining the standard in terms of two presumptive principles:

1. It is in the best interests of the child to enjoy equal time with each parent; and,
2. It is in the best interests of the child for each parent to assume equal parental responsibility for major decisions that affect the child’s welfare.

We submit that this definition is consistent with social science consensus discussed above and the United Nations Convention on the Rights of the Child (UNCRC), specifically:

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40 Bala N, “Bringing Canada’s Divorce Act into the new millennium: enacting a child-focused parenting law” (2014) 40 Queens LJ 425 at 470 (“The best interests of the child test is a central concept for resolution of post-separation parenting disputes in most countries and is endorsed by the UNCRC. This test appropriately recognizes that decisions must be made based on an assessment of the needs of the individual child and must be focused on the child’s interests rather than parental rights. While the best interests test is central to decision making, its limitations must be recognized: It is vague, and without further articulation of principles or factors that should be taken into account, the decisions of judges applying this test may be unpredictable or reflect their personal biases and experiences, while the negotiations of parents will be less structured and settlements more difficult to achieve due to the lack of legislative guidance.”).

41 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [UNCRC].
• Article 3: 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 (...); Article 7: The child shall (...) have (...) the right to (...) be cared for by his or her parents;

• Article 9: States Parties shall ensure that a child shall not be separated from his or her parents (...), except when (...) such separation is necessary (...). Such determination may be necessary in a particular case (...) where the parents are living separately (...);

• Article 12: States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities (...). 42

IV RELOCATION/MOBILITY

We recognize that Bill C78 drafters have obviously put a great deal of thought into the issue of resolving relocation issues in a fair and expeditious fashion 43. We commend the drafters for their efforts. We note (with some degree of irony) that the drafters had no problem in the relocation portions of C78 to stipulate different presumptions depending upon the scenario. If we are to apply presumptions in relocation, we maintain that these presumptions ought to be uniform throughout. The emphasis must always be upon the best interests of the child. Placing the “onus” upon a parent with minimal residential time to prevent the relocation is potentially cruel to the child who currently enjoys but minimal time with that parent. See section 16.93(2). The burden of proof should always be upon the parent who proposes to move and thus disrupt residential time of the child with Parent “B”, no matter the extent of that residential time.

V SUMMARY

While we commend the government for introducing appropriate changes to align federal with provincial legislation, incorporate inter-jurisdictional processes and to promote alternative dispute resolution, we submit that the proposed Bill is inadequate considering the dramatic social changes and social science research findings since 1985.

42 Widrig M, Rethinking the Child’s Best Interests Standard based on a human rights perspective (Boston -International Conference on Shared Parenting, 2017).

43 See proposed sections 16.9 to 16.95 in Bill C-78.
Our submission – together with suggested legislative wording in Annex A - makes the following recommendations:

1. Adoption of a rebuttable presumption of equal shared parenting consistent with social science research and strong public support;

2. Incorporation of a definition for the heretofore undefined best interests of the child standard as mandating an equal shared parenting presumption while still considering the other factors mentioned in Bill C-78;

3. Reconsider the relocation considerations by always placing the burden of proof on the relocating party.

In addition, academic references in this document are available online\textsuperscript{44} at: https://drive.google.com/drive/folders/1TeZQ9LGzKuZwrSeyhqF9xVNSB77-EAE?usp=sharing

Respectfully submitted on behalf of the following six organizations:

<table>
<thead>
<tr>
<th><strong>ANCQ</strong></th>
<th>Action des nouvelles conjointes et des nouveaux conjoints du Québec</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANCQ is a non-profit Quebec organization dedicated to addressing social and legal discrimination against repartnered families, most notably in family law. Founded in 1999, ANCQ currently has 3,500 members. ANCQ is a strong advocate for the rebuttable presumption of shared parenting.</td>
<td></td>
</tr>
<tr>
<td>Contact: Ms. Lise Bilodeau</td>
<td></td>
</tr>
<tr>
<td><a href="mailto:lise_bilodeau@yahoo.ca">lise_bilodeau@yahoo.ca</a></td>
<td></td>
</tr>
<tr>
<td>418-847-3176</td>
<td></td>
</tr>
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<tr>
<th><strong>CAFE</strong></th>
<th>Canadian Association for Equality</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAFE is an educational charitable organization committed to achieving equality for all Canadians, regardless of sex, sexual orientation, gender identity, gender expression, family status, race, ethnicity, creed, age or disability. Its current focus is on areas of gender equality understudied in contemporary culture such as, for example, the status, health and well-being of boys and men.</td>
<td></td>
</tr>
<tr>
<td>Contact: Mr. Brian Ludmer</td>
<td></td>
</tr>
<tr>
<td><a href="mailto:brian@ludmerlaw.com">brian@ludmerlaw.com</a></td>
<td></td>
</tr>
<tr>
<td>416-781-0334</td>
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\textsuperscript{44} Google Drive does not support all browser types and works best with Internet Explorer or Chrome. Need help: contact gwpiskor@gmail.com.
<table>
<thead>
<tr>
<th><strong>CEPC</strong></th>
<th>Canadian Equal Parenting Council (Conseil Canadien Pour Le Rôle Parental Égal)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CEPC is an advocacy federation of 26 Family Rights organizations representing children, mothers, fathers, grandparents, second spouses with four core goals: equal shared parenting post-dissolution; family law reform based on gender equality; recognition of domestic violence as a genderless social dysfunction; recognition of parental and child rights in accordance with UN declarations.</td>
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</tbody>
</table>
| Contact: Mr. Glenn Cheriton  
  president@canadianepc.com  
  613-523-2444 |

<table>
<thead>
<tr>
<th><strong>L4SP</strong></th>
<th>Lawyers for Shared Parenting</th>
</tr>
</thead>
<tbody>
<tr>
<td>L4SP is an association of lawyers advocating for a Canada-wide legislated rebuttable presumption in favour of equal shared parenting for children of divorce or separation.</td>
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</tbody>
</table>
| Contact: Mr. Gene C. Colman  
  gene@complexfamilylaw.com  
  416-635-9264 |

<table>
<thead>
<tr>
<th><strong>LW4SP</strong></th>
<th>Leading Women For Shared Parenting (Canada)</th>
</tr>
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<tbody>
<tr>
<td>LW4SP is an international organization of 150 influential women in media and politics lending their time and names in support of equal shared parenting as the default model for divorcing or separating parents.</td>
<td></td>
</tr>
</tbody>
</table>
| Contact: Ms. Paulette MacDonald  
  kidsneed2parents@gmail.com  
  289-240-0665 |

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<thead>
<tr>
<th><strong>R.E.A.L.</strong></th>
<th>Real Women of Canada</th>
</tr>
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<tbody>
<tr>
<td>REAL Women of Canada is a national women's organization, incorporated in 1983, whose mission is to promote the equality, advancement and well-being of women, whether in the home, the workplace or the community. It is an NGO in consultative status with the Economic and Social Council of the United Nations, a member of the Family Rights NGO caucus at the UN, and an active partner in the World Congress of Families.</td>
<td></td>
</tr>
</tbody>
</table>
| Contact: Ms. Diane Watts  
  realwcna@rogers.com  
  613- 236-4001 |
Principal Authors:

- Gene C. Colman, B.A., LL.B., Family Law Lawyer, Toronto, called to Bar 1979, Email: gene@complexfamilylaw.com

- George W. Piskor MA.Sc., SM, LL.M., P.Eng, Email: gwpiskor@gmail.com
ANNEX A: PROPOSED AMENDMENTS TO SECTION 16 OF BILL C-78

1 In Clause 12 of the Bill, subsection 16 (2) is extended to now read:

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child’s physical, emotional and psychological safety, security and well-being under two presumptive principles:

    i. It is in the best interests of the child to enjoy equal time with each parent; and,

    ii. It is in the best interests of the child for each parent to assume equal parental responsibility for major decisions that affect the child’s welfare.

2 In Clause 12 of the Bill, renumber proposed subsection 16 (6) entitled ‘Parenting Order and Contact Order’ as subsection 16 (10).

3 In Clause 12 of the Bill, insert the following the new subsections 16 (6) to 16 (9) inclusive:

Rebutting Presumptions

(6) The presumptive principles in subsection 16 (2) may be rebutted on evidence that meeting the needs of the child would be substantially enhanced by a different order.

Rebutting Factors

(7) The factors that can rebut the presumptive principles in subsection 16 (2), where such factors cannot otherwise be addressed or mitigated, are:

    (a) A parent currently lacks basic parenting capacity by reason of substance abuse, mental illness or other material impairment;

    (b) The proposed order would expose a child or parent to a risk of family violence;

    (c) The parents live too far from each other to facilitate an equal time sharing regime.

Adherence to Principles

(8) Where the circumstances under subsection (7) require a departure from the presumptive principles stated in subsection 16 (2), then the court:
(a) shall nonetheless entrust to each spouse the maximum amount of time and parental responsibility as is possible under the circumstances; and,

(b) may designate equal time sharing but not equal parental responsibility for major decisions and vice versa.

Written Reasons

(9) The court shall provide written reasons for an order that deviates from the principles in subsection 16 (2).

4 In Clause 12 of the Bill delete titles and contents of subsections 16.93 (1) through (3) inclusive and replace with Subsection 16.93 as follows:

Burden of Proof - relocation

16.93 If the parties to the proceeding substantially comply with an order, arbitral award, or agreement, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

5 In Clause 12 of the Bill, delete the following text from subsection 16.94:

(1) and (2)
RECOMMENDATIONS

1. **Primary Recommendation**: Rebuttable Presumption - Equal Shared Parenting ("RPESP").

2. **Best Interests of the Child ("BIOC")**: RPESP should anchor BIOC test.

3. **Repair the BIOC Definition**: Open-ended nature of BIOC standard should be repaired by defining the standard in terms of two presumptive principles:

   (1) **BIOC = to enjoy equal time with each parent; and,**

   (2) **BIOC = each parent to assume equal parental responsibility for major decisions that affect child’s welfare.**

4. **2nd Recommendation**: Relocation should have consistent burden of proof – on parent who proposes to move.

SOCIAL SCIENCE RESEARCH ESTABLISHES -

5. **Separation**: Routine separation of a “fit parent” from child should not be deemed BIOC.

6. **Time %**: The closer we get to 50% residential time = better outcomes for children.

7. **Outcomes axes**: ESP = better outcomes on multiple axes: academic, cognitive, depression, anxiety, over satisfaction, self-esteem, peer behaviour, substance abuse, hyperactivity, health and psychosomatic problems, parent-child or family relationships. You name it!

8. **ESP outcomes are better, even independent of other factors**: Joint physical custody (JPC) produces superior outcomes to sole physical custody (SPC) independent of:

   a. Quality of parent-child relationship (i.e. even marginal fit parents are beneficial),

   b. Parental incomes (i.e. JPC benefits not tied to standard of living),

   c. Level of conflict (low to high but not extreme conflict situations warrant JPC).

---

45 Recommended legislative text included in Annex A.
9. **Warshak Consensus Report = Gold standard on ESP:** Widely translated, downloaded many times, and has informed legislation in several countries.

10. **Opposing Arguments:** Have no scientific or logical legs. Arguments change. Social science has discredited them:

   a. Single Attachment Theory—leading proponent of theory himself acknowledged error;

   b. Father’s motivation is to reduce child support – Out of pocket child costs for child support actually higher with ESP;

   c. Yo-yo argument – most adjust easily to two homes;

   d. Not appropriate for young children – ESP is protective factor for infants, toddlers, young children;

   e. ESP too dangerous - risks of violence, abuse, mental health or conflict – Factors that affect minority should not dictate policy for majority;

   f. ESP might be beneficial, but we should not employ presumptions:

      i. One size fits all is too narrow – other legal presumptions do work;

      ii. Not in BIOC – BIOC is undefined;

      iii. Increased litigation risk – no support in facts. ESP reduces litigation;

      iv. ESP focuses on parents’ rights – Parental and child rights are not binary as per U.N. Convention on the Rights of the Child (particularly articles 3, 9 & 12).

11. **ESP advantages:**

    a. clear-cut default rule,

    b. removes speculation about future conduct as basis for decisions,

    c. limits judicial discretion,

    d. enhances determinacy, predictability of outcome,

    e. reduces litigation and conflict between parents.

AND IT’S GOOD POLITICS!

12. **Elsewhere:** Jurisdictions worldwide have adopted forms of ESP or are actively considering legislation. Even in Canada - British Columbia and Quebec are trending more towards ESP.

13. **Canadian Public Support for RPESP:** 70 to 74% of those surveyed; 87% amongst the decided. Support strong regardless of party affiliation, gender, age, location.
MÉMOIRE
AU COMITÉ PERMANENT DE LA JUSTICE ET DES DROITS DE LA PERSONNE
OBJET : PROJET DE LOI C-78 (Loi modifiant la Loi sur le divorce, et d’autres lois)

INTÉRÊT SUPÉRIEUR = PRÉSOMPTION DE PARTAGE ÉGAL DU RÔLE PARENTAL

PRÉSENTÉ CONJOINTEMENT PAR :
ANCQ       Action des nouvelles conjointes et des nouveaux conjoints du Québec
CAFE       Association canadienne pour l’égalité
CEPC       Conseil canadien de l’égalité parentale (CEPC Canadian Equal Parenting Council)
L4SP       Lawyers for Shared Parenting
LW4SP      Leading Women For Shared Parenting (Canada)
R.E.A.L    Real Women of Canada

1-11-2018
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I INTRODUCTION

Nous félicitons le gouvernement de s’être engagé à harmoniser les lois fédérales et provinciales, à intégrer les obligations internationales de La Haye et à améliorer l’efficacité et l’efficience des procédures réciproques nationales.

Même si ces changements sont louables, nous estimons qu’ils constituent une réponse inadéquate à un système de justice familiale désuet et conflictuel que les Canadiens, les juristes, les universitaires et les parlementaires qualifient couramment depuis des années de « brisé » ou de « en crise1 ». Le régime fédéral de divorce, qui a 33 ans, a été rendu désuet à la fois par les résultats de la recherche en sciences sociales concernant l’« intérêt de l’enfant » et par les changements dans les normes et les attitudes de la société, malgré certains changements apportés au fil des ans2. Nous reconnaissions que la collaboration fédérale-provinciale-territoriale est nécessaire pour apporter les changements législatifs, structurels et financiers requis de fond en comble, en ce qui concerne les questions de divorce et de séparation. Nous encourageons le gouvernement à apporter ces changements à plus long terme au-delà du projet de loi C-78, mais nous estimons qu’il peut et devrait profiter de cette occasion générationnelle qu’offre le projet de loi C-78 pour apporter des changements qui se font attendre depuis longtemps à la Loi sur le divorce, notamment en ce qui concerne la définition de « l’intérêt de l’enfant ».

1 Commission du droit de l’Ontario, Voices from a broken family justice system: sharing consultations results – Highlights. September 2010 (2010); selon un rapport, l’accès à la justice au Canada est « catastrophique », ce qui exige des changements d’ici 2030, CTV News.htm (« The civil justice system is too badly broken for a quick fix »; « Access to justice in Canada is being described as « abysmal » in a new report from the Canadian Bar Association, which also calls for much more than « quick fix » solutions. »); Kirk Makin, « A program to fix our ailing family courts », Globe and Mail (11 mars 2011) (ancien juge en chef de l’Ontario Winkler : « Everywhere I go, there is a constant refrain: The family-law system is broken and it’s too expensive. »).

Notre principale recommandation est d'adopter une présomption réfutable de partage égal du rôle parental. Parfois, on parle simplement de « partage parental », le concept est le suivant :

1) entièrement justifié par la recherche en sciences sociales comme étant l’arrangement privilégié pour les enfants après la dissolution, sauf dans les cas d’abus, de négligence ou de violence;

2) les Canadiens, indépendamment de leur sexe, de leur âge, de leur région géographique ou de leur appartenance à un parti, l’appuient en grande majorité et de façon constante;

3) a été recommandé par le Comité mixte spécial sur la garde et le droit de visite des enfants dès 1998 (mais ne constitue pas une présomption réfutable);

4) a été mise en œuvre avec succès dans de nombreux secteurs de compétence;

5) a été déposé dans 20 États américains en 2018.

Les Canadiens ont de plus en plus renoncé au système de justice familiale en tant qu’arbitre indépendant, ayant recours à leurs propres ententes de partage du rôle parental en dehors de « l’ombre de la loi ». Même les associations du barreau, qui sont peut-être les opposants les plus virulents au partage égal du rôle parental, sont confrontées au consensus incontournable des sciences sociales (dont ils ont tendance à faire fi). Ils en sont maintenant réduits en grande partie à argumenter les prétendus démérites d’un mécanisme de « présomption réfutable » – une proposition d’arrière-garde ironique compte tenu de son utilisation régulière dans d’autres domaines du droit de la famille et du droit civil.

Nous avons parlé à de nombreux députés au cours des 10 à 15 dernières années. Nous sommes convaincus qu’en votre for intérieur, vous appuyez le concept de partage égal du rôle parental. Dans un sondage statistique informel que nous avons mené auprès des députés au cours d’une session parlementaire précédente, nous avons déterminé que le partage égal du rôle parental serait adopté par un vote libre et exempt de toute influence politique. Depuis, la question du partage du rôle parental a été incluse dans les plateformes politiques des conservateurs et des
verts. Pour le Parti libéral, l’ancien chef Michael Ignatieff appuie officiellement le partage du rôle parental3, tout comme le premier ministre Justin Trudeau4.

Notre message simple sur le partage égal du rôle parental est le suivant : « Il est temps... en fait, il est plus que temps. »

Nous définissons le partage égal du rôle parental selon les paramètres suivants :

Le partage égal du rôle parental est :

a) la garde légale conjointe (responsabilité parentale);

b) la garde physique conjointe (temps parental);

c) le maximum de temps possible pour l’enfant avec chaque parent (environ 50 %);

d) la manifestation la plus concrète de l’intérêt de l’enfant;

e) assujetti à un examen fondé sur des données probantes de la sécurité de l’enfant.

Le défi consiste à traduire ces principes généraux en lois applicables qui seront facilement compréhensibles pour tous. Nous espérons que les modifications que nous proposons (voir l’annexe A) permettront d’atteindre cet objectif.

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3 M. Ignatieff, The Rights Revolution (House of Anansi Press Toronto, 2000), p. 106 (« Ces groupes ont demandé que le régime de "garde et d’accès" créé par la Loi sur le divorce de 1985 soit remplacé par un régime de “parent partagé” dans lequel les deux parents ont des droits égaux pour élever leurs enfants. Ce sont des suggestions sensées et attendues depuis longtemps, et le fait qu’elles soient formulées montre que les hommes et les femmes luttent pour corriger la révolution des droits, afin que l’égalité fonctionne pour tous [...] Face à ces problèmes, les libéraux doivent aussi assumer leurs responsabilités. Reconnaissions que la révolution des droits doit porter une part du blâme pour l’éclatement de la famille et ses conséquences dans notre société. » [TRADUCTION]).

4 Réponse du premier ministre Trudeau au Parlement, https://youtu.be/zlKhsqJhLL0 à 0:55 (« [...] nous pouvons continuer à [...] jeter des bases solides pour l’avenir de nos enfants en [...] appuyant l’égalité des responsabilités parentales [...] » [TRADUCTION]).
Nous proposons des modifications seulement dans deux domaines :

1. Définition de « l’intérêt supérieur de l’enfant » (ISE). L’ISE a été indéterminée et arbitraire\(^5\), et manque de critères définitifs concrets pour orienter la prise de décisions judiciaires. Conformément aux constatations des sciences sociales et en intégrant les critères de la CNUDE à l’article proposé du projet de loi C-78 qui porte sur les « considérations principales », nous proposons qu’une présomption réfutable pour le partage égal du rôle parental soit ancrée sur le critère de l’ISE. Nous appuyons l’énumération des divers facteurs dans le projet de loi actuel. Le point de départ, cependant, devrait être le partage égal du rôle parental.


Nous approfondissons nos recommandations dans les sections suivantes et incluons le texte législatif proposé à l’annexe « A ».

II PARTAGE DU RÔLE PARENTAL

Il n’est pas controversé d’affirmer qu’un enfant bénéficie de la participation active des deux parents, que ce soit dans une famille intacte, divorcée ou séparée. Le Canada est de plus en plus considéré comme un cas aberrant en raison de l’aptitude des tribunaux, par ailleurs non fondée sur le plan scientifique, pour le régime standard de garde par un seul parent (p. ex., une soirée en semaine et une fin de semaine sur deux) – plus récemment, il a été rebaptisé « garde conjointe

(légale) », mais avec le même effet. En tant que nation, nous déplorons la séparation d’un enfant de son parent migrant de l’autre côté d’une frontière internationale pas si loin de nous, et pourtant, nous séparons régulièrement les enfants d’un parent apte dans les procédures de divorce et jugeons qu’il en va « de l’intérêt supérieur » de l’enfant.

Le partage du rôle parental est défini dans la recherche moderne comme la garde légale conjointe (responsabilité parentale partagée) et la garde physique conjointe (temps parental) où les enfants vivent avec chaque parent au moins 35 % du temps. Cependant, les recherches démontrent clairement que plus les enfants passent près de 50 % du temps avec chaque parent, meilleurs sont les résultats.

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6 Les chercheurs sur le partage du rôle parental ont généralement convenu que 35 % est le seuil « moyen » minimum pour le partage du rôle parental en tant que terme technique aux fins des discussions sur la recherche et les politiques. Il ne s’agit pas d’établir un seuil inférieur en deçà duquel il n’y a plus d’avantage lié au partage du rôle parental puisque les effets d’un temps parental semblable varient selon l’enfant et le contexte.


– à la page 8 du manuscrit :

Les résultats de nombreuses études réalisées dans de nombreux pays occidentaux montrent clairement qu’une augmentation du temps consacré au rôle parental est liée à une plus grande sécurité de la relation père-enfant divorcée (pour les examens de ces études, voir Fabricius et coll., 2010, p. 225-227; Fabricius et coll., 2012, tableau 7.2; et Fabricius et coll., 2016, tableau 4.1).

À la page 11 du manuscrit :

Un seul examen (de 19 études; Baude, Pearson et Drapeau, 2016) a comparé la garde physique exclusive à deux seuils pour la garde physique conjointe; c’est-à-dire de 30 à 35 % de temps passé avec le père, contre 40 à 50 %. Les enfants qui avaient presque autant de temps parental (40 à 50 %) présentaient une meilleure adaptation comportementale (p. ex., agressivité, problèmes de comportement) et sociale (p. ex., aptitudes sociales, acceptation sociale) que les enfants en garde physique exclusive, tandis que ceux dont le temps parental était partagé de 30 à 35 % ne présentaient pas ces caractéristiques.

À la page 15 du manuscrit :

Toutefois, lorsque le temps parental est à peu près le même (45 %), l’insécurité au sujet des conflits entre les parents n’était pas plus grande dans les familles en situation de conflit grave que dans les familles très peu litigieuses.
1. **Données probantes en sciences sociales**

Les données sur le partage du rôle parental ne sont pas nouvelles. Dès le milieu des années 1970, les chercheurs documentaient les avantages de l’augmentation du temps passé auprès du père par rapport au modèle de la garde maternelle qui était alors la norme, ce qui a servi de base à l’enchâssement d’une participation accrue du père dans les lois américaines et européennes sur la garde.

Aux pages 15 et 16 du manuscrit :

En revanche, si le temps parental est égal, même si le changement dans les circonstances est plus important que dans le cas d’un partage à 35 %, il y a moins de place pour l’insécurité quant à l’engagement du père envers une présence continue, car cet engagement se manifeste par la disponibilité d’un foyer équivalent pour l’enfant. Ainsi, **l'égalité du temps parental, en soi, a probablement un sens pour protéger l'enfant contre l'insécurité inhérente au conflit parental.**

À la page 16 du manuscrit :

Plusieurs recherches indiquent que la réduction du temps parental avec le père menace la sécurité émotionnelle en empêchant les enfants d’avoir des interactions quotidiennes suffisantes pour les rassurer qu’ils sont importants pour leur père. Les résultats corrélatifs de nombreuses études montrent qu’une **augmentation du temps parental avec les pères, y compris dans le cadre d’une garde partagée égale, est associée à une amélioration de la sécurité émotionnelle dans la relation père-enfant.** Aucune de ces études n’a révélé que la sécurité de la relation mère-enfant diminuait avec l’augmentation du temps parental avec le père. **Cela signifie que les enfants de parents divorcés qui ont les meilleures relations à long terme avec les deux parents sont ceux qui ont eu le même temps parental avec chacun des parents.**

Aux pages 16 et 17 du manuscrit :

**L'égalité du temps parental semble protéger les enfants contre l'insécurité causée par les conflits entre les parents. Ces données ne sont disponibles que depuis peu parce que nous n'avons été en mesure d'étudier des échantillons plus importants de familles en situation de conflit grave où le rôle parental est partagé également que depuis peu.**
Cependant, d’après une quarantaine d’années de recherche, un consensus scientifique solide s’est dégagé, à savoir que le partage du rôle parental donne de meilleurs résultats pour les enfants que le rôle parental unique sur presque toutes les mesures du bien-être, soit le développement scolaire et cognitif; la dépression, l’anxiété, la satisfaction générale, l’estime de soi; le comportement des pairs, la toxicomanie, l’hyperactivité; les problèmes de santé et psychosomatiques, les relations parents-enfants ou autres relations familiales. De plus – et contrairement aux affirmations faites par les opposants au fil des ans selon lesquelles le partage du rôle parental n’est justifié que dans des conditions limitées, spéciales ou même idéales – la garde physique conjointe (GPC) produit des résultats supérieurs à la garde physique exclusive (GPE) indépendamment de ce qui suit :

- la qualité de la relation parent-enfant (c.-à-d. que même les parents plus ou moins adéquats sont bénéfiques);
- le revenu des parents (c.-à-d. que les pensions alimentaires en GPC ne sont pas liées au niveau de vie);
- le niveau de conflit (sauf dans les situations de conflit extrême, les situations litigieuses d’intensité faible à modérée justifient la GPC).


De même, le partage du rôle parental, y compris les nuits, s’est avéré scientifiquement bénéfique pour les nourrissons et les tout-petits (même moins d’un an), même lorsque les parents ne sont pas d’accord.  

La question du partage du rôle parental a fait l’objet de controverses, de fausses déclarations et de désinformation au fil des ans, mais tout doute raisonnable aurait dû être écarté avec la publication de « Consensus de Warshak » (le Consensus) en 2014 sur le partage du rôle parental et sur le partage des nuits par 110 éminents chercheurs et praticiens. Les sept recommandations du Consensus appuient le partage du rôle parental comme arrangement de choix dans des circonstances normales, même pour les nourrissons et les tout-petits, et même dans des situations de conflit modéré; le partage du rôle parental peut être contre-indiqué dans des situations de conflit prolongé ou extrême, de violence, de négligence ou de grave déficience des compétences parentales, mais même ici où une certaine forme de protection est indiquée, cela « ne devrait pas être utilisé pour priver la majorité des enfants élevés par deux parents aimants de continuer à recevoir ces soins après la séparation de leurs parents ».  

Le « consensus de Warshak » représente la norme d’excellence en recherche sur le partage du rôle parental. Près de quatre ans après sa publication, ce document traduit en 18 langues demeure l’un des articles les plus téléchargés de la revue et a éclairé les délibérations législatives dans plusieurs pays. Plus important encore, « aucun article, y compris la seule critique du Consensus (McIntosh et coll.) », n’a

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12 Ibid., p. 203 [TRADUCTION].


explicitement relevé des erreurs dans le rapport ou contesté l’une ou l’autre de ses conclusions et recommandations14 ».

La communauté des sciences sociales a rapidement changé sa position sur les présomptions en matière de partage du rôle parental. Le partage du rôle parental a été appuyé15 à l’exercice de réflexion de janvier 2013 de l’Association for Family & Conciliation Courts (AFCC), et la majorité des experts convoqués ont appuyé une présomption de rôle codécisionnel, mais pas de temps parental16. La dernière étape vers une présomption de partage du rôle parental, y compris le temps parental, a été franchie trois ans plus tard par un groupe d’experts convoqué à l’International Conference on Shared Parenting (Conférence internationale sur le partage du rôle parental) de 201717 :

Les preuves sont maintenant suffisamment profondes et cohérentes pour permettre aux spécialistes des sciences sociales de recommander provisoirement un plan de GP aux décideurs [...] ces déclarations sont explicitement faites avec prudence [...] [Nous] nous attendons à ce que les chercheurs continuent d’étudier la question [...] les utilisateurs de cette recherche doivent être attentifs aux nouvelles constatations qui continuent de renforcer les conclusions ici – ou peut-être qui s’y opposent. Nous pourrions caractériser à juste titre l’état actuel de la preuve comme étant « la prépondérance de la preuve » (c.–à-d. beaucoup plus de preuves en faveur de la présomption que contre elle). Un grand nombre d’études, de diverses forces présumées, suggèrent que, en moyenne, la GP procurera des avantages aux enfants, et peu d’études, voire aucune, montrent qu’elle leur causera du tort.

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14 R.A. Warshak, précité, note 11, p. 207.
16 MK Pruett et JH Difonzo, précité, note 15. Voir le Consensus, point 11 : « Au lieu d’une présomption de temps parental, une liste détaillée des facteurs doit être prise en considération dans chaque cas. » [TRADUCTION]
Le groupe d’experts a ajouté\textsuperscript{18} :

Tous les panélistes se sont toutefois montrés, à juste titre, prudents à l’égard d’une norme universelle, en mettant en garde contre le fait que les exceptions à une présomption de GP doivent être reconnues comme des bases appropriées de réfutation. Parmi les facteurs qui devraient mener à de telles exceptions, il y a les risques crédibles pour l’enfant de maltraitance ou de négligence, la trop grande distance entre le domicile des parents, la menace d’enlèvement par un parent et une surveillance déraisonnable ou excessive. De plus, certains enfants ayant des besoins spéciaux peuvent avoir besoin des soins d’un parent seul.

Un autre facteur de réfutation possible était le sujet d’une discussion plus approfondie, soit la simple existence de la violence entre partenaires intimes (VPI). On fait remarquer que la compréhension de la VPI est de plus en plus sophistiquée, principalement en raison des travaux de Johnson... Il a fait la distinction entre quatre modèles distincts de VPI, dont un seul, la violence coercitive (le modèle stéréotypé de la violence masculine), devrait empêcher la GP... Les chercheurs, les évaluateurs de la garde et les tribunaux doivent examiner non seulement s’il y a des preuves de la VPI, mais aussi sa nature, lorsqu’ils examinent les répercussions sur les plans de partage du rôle parental.

L’argument en faveur d’une présomption réfutable pour le partage du rôle parental repose sur des recherches approfondies qui dépassent de loin\textsuperscript{19} le fondement utilisé pour justifier l’adoption de la norme de garde parentale exclusive. Nous soutenons que les arguments ont été présentés au moyen de recherches empiriques.

2. Adoption par d’autres administrations

Le partage du rôle parental, où les enfants vivent au moins un tiers du temps avec un parent, est devenu courant en Europe et de plus en plus fréquent aux États-Unis.

En Europe, il a atteint près de 50 % en Suède, 30 % en Norvège et en Hollande, 20 % en Allemagne et au Danemark, 37 % en Belgique, 28 % en Espagne (40 % en Catalogne), 11 % en Slovaquie, 17 % en France. Aux États-Unis, le taux connu

\textsuperscript{18} \textit{Ibid.}, p. 9 [TRADUCTION].

\textsuperscript{19} J. Kelly, « Examining resistance to joint custody » dans \textit{Jt Custody Shar Parent} (Guilford, 1991), p. 55-56 (dès 1991, le chercheur a noté ce qui suit : « Il est ironique et intéressant que nous ayons soumis la garde partagée à un niveau et à une intensité d’examen qui n’ont jamais été orientés vers l’entente traditionnelle post-divorce [la garde légale et physique exclusive de la mère et deux fins de semaine chaque mois de visite du père] [...] malgré les preuves croissantes que les ententes traditionnelles de garde exclusive étaient moins propices à l’éducation et à la stabilité des enfants et des familles. » [TRADUCTION]).
est de 35 % au Wisconsin, 46 % dans l’État de Washington, 30 % en Arizona, 27 % en Californie20.


Les statistiques canadiennes sur le partage du rôle parental sont relativement inégales et difficiles à comparer aux normes internationales en raison du seuil de 40 % du temps parental imposé par l’article 9 des Lignes directrices fédérales sur


Le contact avec les deux parents est le droit des enfants et non le droit des parents. Lorsque, en l’espèce, un parent plaide pour un contact inégal entre les enfants et chacun de leurs parents, il incombe à ce parent de réfuter la présomption [TRADUCTION].


25 http://lw4sp.org/definition-of-equally-shared-parenting/, Resources – 2018 Legislative PDF.
les pensions alimentaires pour enfants (bien que le soutien soit un contexte différent).

Comme environ 95 % des causes sont réglées à l’extérieur des tribunaux, les statistiques indiquent que les Canadiens sont de plus en plus attirés par les ententes de partage du rôle parental, avec un taux national estimé à 22 % et une variation régionale élevée26 : C.-B. : 30 %, Alb. : 9 %, Ont. : 5-14 % et QC27 : 22 à 26 %.

3. Soutien de la population

Les Canadiens, comme les citoyens d’autres pays, sont fortement en faveur du partage égal du rôle parental. Dès 2000, un sondage commandé par le ministère de la Justice a révélé ce qui suit :

Une majorité écrasante d’entre eux sont d’avis que le gouvernement doive encourager les ententes de garde conjointe ou partagée. Dans l’ensemble, 71 % des Canadiens sont d’accord. Il est intéressant de noter qu’il n’y a pas de division entre les sexes sur ce point : les femmes et les hommes sont d’accord en nombre égal28.

En fait, des sondages subséquents indiquent que les Canadiens sont relativement uniformes dans leur appui au partage du rôle parental, quel que soit leur sexe, leur âge, leur région géographique ou leur affiliation politique.

De plus, comme le résume le tableau ci-dessous, les Canadiens ont toujours été d’ardents défenseurs d’une présomption réfutable du partage du rôle parental

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27 Des données anecdotiques provenant de praticiens du Québec indiquent que le partage égal des responsabilités parentales existe déjà pour les enfants de plus de 3 ans, ainsi que pour les enfants plus jeunes si le nourrisson n’est plus allaité et que les parents étaient déjà des fournisseurs de soins égaux.

dans les enquêtes menées au cours de la dernière décennie, 74 % d’entre eux étant d’accord (environ 87 % des répondants) – un ratio de 6,4 pour 1 rarement observé dans des enquêtes sociales.

**CANADA (2007-2017) : SONDAGES SUR LA PRÉSOMPTION DU PARTAGE DU RÔLE PARENTAL**

*QUESTION — Comment qualifiez-vous votre appui ou votre opposition aux lois fédérales et provinciales pour créer une présomption d’égalité parentale dans les affaires de garde d’enfants?*

<table>
<thead>
<tr>
<th>Année</th>
<th>Fortement/quelque peu en faveur</th>
<th>Fortement/quelque peu opposé</th>
<th>Incertain</th>
<th>Appui parmi les personnes décidées</th>
<th>Ratio appui/opposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>79,1 %</td>
<td>14,1 %</td>
<td>6,9 %</td>
<td>85,0 %</td>
<td>5,6</td>
</tr>
<tr>
<td>2009</td>
<td>78,0 %</td>
<td>9,7 %</td>
<td>12,3 %</td>
<td>88,9 %</td>
<td>8,0</td>
</tr>
<tr>
<td>2017</td>
<td>69,5 %</td>
<td>13,2 %</td>
<td>17,3 %</td>
<td>84,0 %</td>
<td>5,3</td>
</tr>
<tr>
<td>TOTAL</td>
<td>73,8 %</td>
<td>11,5 %</td>
<td>14,8 %</td>
<td>86,6 %</td>
<td>6,4</td>
</tr>
</tbody>
</table>

Voici un aperçu plus détaillé utilisant la même question que ci-dessus pour deux sondages canadiens ventilés par région, sexe, âge et, pour 2014, le parti pour lequel le répondant a voté : 

**2017**

(Nanos)

<table>
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<th>PAR RÉGION</th>
<th>PAR SEXE</th>
<th>PAR ÂGE</th>
<th>PAR PARTI VOTÉ</th>
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<tbody>
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<td>Homme 78 %</td>
<td>18-34 68 %</td>
<td>Libéral S.O.</td>
</tr>
<tr>
<td>Québec</td>
<td>Femme 62 %</td>
<td>35-54 72 %</td>
<td>Conservateur S.O.</td>
</tr>
<tr>
<td>Ontario</td>
<td>71 %</td>
<td>55 plus 68 %</td>
<td>NPD S.O.</td>
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<tr>
<td>Ouest</td>
<td>70 %</td>
<td>(indécis) 17 %</td>
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<td>(indécis)</td>
<td>16 %</td>
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<tr>
<td>CANADA</td>
<td>70 %</td>
<td>CANADA 70 %</td>
<td>CANADA</td>
</tr>
</tbody>
</table>

**2014**

(Omnipoll)

<table>
<thead>
<tr>
<th>PAR RÉGION</th>
<th>PAR SEXE</th>
<th>PAR ÂGE</th>
<th>PAR PARTI VOTÉ</th>
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</thead>
<tbody>
<tr>
<td>Atlantique</td>
<td>Homme 75 %</td>
<td>18-34 71 %</td>
<td>Libéral 72 %</td>
</tr>
<tr>
<td>Québec</td>
<td>Femme 69 %</td>
<td>35-54 71 %</td>
<td>Conservateur 76 %</td>
</tr>
<tr>
<td>Ontario</td>
<td>73 %</td>
<td>55 plus 74 %</td>
<td>NPD 72 %</td>
</tr>
<tr>
<td>Ouest</td>
<td>73 %</td>
<td>(indécis) 18 %</td>
<td>Bloc 61 %</td>
</tr>
<tr>
<td>(indécis)</td>
<td>16 %</td>
<td>(indécis) 18 %</td>
<td>Vert 71 %</td>
</tr>
<tr>
<td>CANADA</td>
<td>72 %</td>
<td>CANADA 72 %</td>
<td>CANADA 72 %</td>
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</tbody>
</table>
Voici un extrait d’un sondage effectué dans le monde entier\textsuperscript{29} :

<table>
<thead>
<tr>
<th>Région</th>
<th>Pays</th>
<th>Résultats du sondage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Europe</td>
<td>Belgique 2012</td>
<td>70 % en faveur de la GP</td>
</tr>
<tr>
<td></td>
<td>Hollande 2012</td>
<td>71 % en faveur de la GP</td>
</tr>
<tr>
<td></td>
<td>Royaume-Uni 2013</td>
<td>84 % en faveur de la GP</td>
</tr>
<tr>
<td>États-Unis</td>
<td>Massachusetts 2004</td>
<td>86 % en faveur de la GP</td>
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</tbody>
</table>
|          | Dakota du Nord     | 43 % (2006)  
|          |                    | 66 % (2012)  
|          |                    | 60 % (2014) avec 26 % d’indécis |
|          | Maryland 2016      | 63 % en faveur de la GP |
| CANADA   | Pollara 2000       | 71 % en faveur de la GP |
|          | Omnipoll 2014      | 72 % en faveur de la GP |
|          | Nanos 2017         | 70 % en faveur de la GP |

4. **Arguments opposés**\textsuperscript{30}


\textsuperscript{29} Tous les résultats ont été extraits de Leading Women 4 Shared Parenting, http://lw4sp.org/polling-voting/#USAND2017_V. Aussi, les résultats d’enquêtes commandées – Pollara par le gouvernement fédéral et les autres par des organismes privés.

La première vague d’arguments visait à remettre en question la nécessité ou la validité du partage du rôle parental :

a. La théorie désuète de Bowlby sur les « attaches uniques » a été utilisée comme base pour discréditer la nécessité que les deux parents s’investissent après la séparation. Bowlby lui-même a reconnu que sa théorie était erronée.

b. Les pères désirent le partage du rôle parental seulement pour réduire les obligations alimentaires. Les recherches ont montré que les instincts paternels et maternels réfutent tout autant cette affirmation. De plus, les promoteurs ont affirmé que les économies réalisées au titre des pensions alimentaires pour enfants étaient fondées sur la réduction des transferts de pensions alimentaires pour enfants, mais ils ont omis d’inclure les coûts directs de l’entretien d’une deuxième résidence pour enfants comme facteur de coût compensatoire. L’argument était irrémédiablement erroné dès le départ, car les coûts directs de la pension alimentaire pour enfants (transferts plus coûts directs du ménage) sont plus élevés dans le cas du partage du rôle parental en raison des coûts fixes liés à l’entretien d’une résidence supplémentaire permettant d’accueillir l’enfant.

c. L’argument d’effet de « Yo-Yo » soutenait que les enfants subiraient un préjudice psychologique en « rebondissant » entre deux ménages. Cela a été réfuté par des recherches montrant que la plupart des enfants s’adaptaient facilement et avaient des résultats égaux ou supérieurs dans un environnement de double résidence.

d. Même si la reconnaissance du partage du rôle parental peut être bénéfique dans certaines circonstances, les opposants soutiennent qu’elle n’est pas appropriée pour les jeunes enfants. Comme nous l’avons mentionné plus haut, il y a maintenant un fort consensus sur le fait que le partage du rôle parental est non seulement approprié, mais qu’il offre un facteur de protection aux nourrissons, aux tout-petits et aux jeunes enfants31.

Les arguments de la deuxième vague commencent généralement par une proposition générale selon laquelle le partage du rôle parental est trop dangereux en raison des risques de violence, d’abus, d’incidence sur la santé mentale ou de conflit. La prémisse sous-jacente de la politique est que les questions touchant la

31 RA Warshak, précité, note 10; JE McIntosh, B.M. Smyth & MA Kelaher, précité, note 13; RA Warshak, précité, note 11.
minorité\textsuperscript{32} des situations de dissolution devraient s’appliquer à la majorité comme mesure de précaution. Bien qu’ils soient souvent exagérés, ces arguments ont exigé des chercheurs qu’ils puissent faire la distinction entre des circonstances sûres et dangereuses et fournir des conseils nuancés aux décideurs. Ces réponses ont été trouvées dans les recherches les plus récentes, notamment :

a. Le partage du rôle parental est généralement la meilleure option dans la plupart des cas sans facteurs atténuants et ne devrait pas être automatiquement exclu lorsque ces facteurs existent;

b. Les types de violence doivent être distingués pour en arriver à des décisions parentales, compte tenu du fait que la moitié de la violence pour la première fois se produit pendant la dissolution et est temporaire\textsuperscript{33};

c. Bien que les conflits extrêmes excluent le partage du rôle parental, les enfants en situation hautement conflictuelle ne s’en tirent pas moins bien dans le cadre du partage du rôle parental que dans le cadre de la garde exclusive, et souvent mieux. Le facteur clé est la force de la relation parent-enfant\textsuperscript{34};

d. Des interventions spéciales comme le rôle parental parallèle, la médiation thérapeutique, les programmes d’éducation parentale et la coordination parentale devraient être prises en considération dans les situations de conflit grave\textsuperscript{35}.

La recherche en sciences sociales a pour conséquence que les praticiens du droit et les décideurs judiciaires doivent être appuyés par des programmes de formation appropriés dans leur travail.

Enfin, les arguments de la troisième vague concèdent que le partage du rôle parental est avantageux pour la plupart des enfants, mais il faut faire preuve de prudence contre l’utilisation de toute présomption, en insistant sur le fait que la norme discrétionnaire et individualisée d’« intérêt supérieur » doit être

\textsuperscript{32} Par exemple, N. Bala, précité, note 5 (seulement 8 % des signalements allègent la violence familiale par l’un ou l’autre des conjoints ou les deux); selon E. Kruk, précité, note 30, p. 8, ce pourcentage passe à 75 %. De plus, seulement 10 à 20 % des cas sont considérés comme des cas de « conflit grave » selon N. Bala, précité, note 5.

\textsuperscript{33} E. Kruk, précité, note 30, p. 8.

\textsuperscript{34} L. Nielsen, précité, note 13 (méta-analyse du conflit dans la prise de décisions sur les arrangements parentaux).

\textsuperscript{35} E. Kruk, précité, note 30, p. 8.
maintenue. Les contre-arguments à la présomption réfutable du partage du rôle parental se divisent généralement en quatre catégories :

a. « Une solution polyvalente » est un argument trop étroit. Cet argument laisse entendre que toute présomption limitera exagérément le pouvoir discrétionnaire des juges ou la prise de décisions individualisée. Il ne tient pas compte du fait qu’une présomption est un point de départ juridique dans un cadre généralement applicable qui peut être contredit par des éléments de preuve propres à une affaire. Il est certain que la présomption d’innocence comme fondement du droit n’a pas nui aux conclusions de culpabilité. Les présomptions réfutables sont déjà couramment utilisées en droit de la famille en matière d’égalisation, dans les lignes directrices sur les pensions alimentaires pour enfants et, de fait, dans les lignes directrices sur les pensions alimentaires pour époux. Dans le cas des pensions alimentaires pour enfants, par exemple, plus de 40 % des pensions diffèrent des lignes directrices fédérales sur les pensions alimentaires pour enfants. Cette expression souvent invoquée et non corroborée sonne creux.

b. « Pas dans l’intérêt supérieur de l’enfant ». Cette allégation commune non corroborée représente un argument émotif dénué de substance logique. Étant donné que l’ISE n’est pas défini (voir la section C ci-dessous), il est tout aussi valable de postuler le contraire, ce qui en fait un argument vide de sens.

c. Augmentation des risques de litige. Cet argument éculé, utilisé pour discréditer le partage du rôle parental ou une présomption réfutable, n’a pas encore été étayé par des faits et fait plutôt dans l’alarmisme. En fait, les données disponibles appuient la conclusion contraire.


d. La présomption met davantage l’accent sur les droits des parents. Aucune donnée n’appuie cette allégation, qui laisse entendre à tort que les droits des parents et de l’enfant sont binaires plutôt que complémentaires, comme le stipule la Convention des Nations Unies relative aux droits de l’enfant. La présomption ne l'emporte pas non plus sur les considérations d’aide sociale primordiales d’un enfant.

En somme :

Une présomption juridique de partage du rôle parental fondée sur une base de données de recherche solide définissant les besoins et les intérêts des enfants dans la transition du divorce fournit une ligne directrice claire et cohérente pour la prise de décisions judiciaires. Cette présomption établit clairement la règle du défaut, élimine la spéculation sur la conduite future comme fondement des décisions de garde, limite le pouvoir discrétionnaire des juges, améliore la détermination et la prévisibilité des résultats, et réduit les litiges et les conflits continus entre les parents.

III DÉFINITION DE L’« INTÉRÊT SUPÉRIEUR DE L’ENFANT »

La Loi sur le divorce repose sur le facteur prépondérant de l’« intérêt supérieur de l’enfant » (ISE). Toutefois, avant le projet de loi C-78, il n’y avait pas de définition de l’ISE, ce qui a prêté le flanc à de nombreuses critiques au fil des ans, selon lesquelles la norme est arbitraire, injuste et indéterminée, entre autres. Les

38 Par exemple, l’article 7 stipule que l’enfant [...] a le droit [...] d’être pris en charge par ses parents, tandis que l’article 9 stipule que les États parties veillent à ce qu’aucun enfant ne soit séparé de ses parents [...], sauf lorsque [...] cette séparation est nécessaire [...]. Cette détermination peut être nécessaire dans un cas particulier où les parents vivent séparément [...].

39 E. Kruk, précité note 30, p. 10.

40 N. Bala, « Bringing Canada’s Divorce Act into the new millennium: enacting a child-focused parenting law » (2014) 40 Queens LJ 425, p. 470 (« Dans la plupart des pays, le critère de l’intérêt supérieur de l’enfant est un concept central pour le règlement des différends après la séparation des parents et il est approuvé par la Commission des droits de l’homme des Nations Unies. Ce critère est approprié, car il reconnaît que les décisions doivent être prises en fonction d’une évaluation des besoins de l’enfant et doivent être axées sur l’intérêt de l’enfant plutôt que sur les droits des parents. Bien que le critère de l’intérêt supérieur soit au cœur de la prise de décisions; ses limites doivent être reconnues – il est vague et, en l’absence d’une nouvelle formulation des principes ou des facteurs dont il faut tenir compte, les décisions des juges qui appliquent ce critère peuvent être imprévisibles ou refléter leurs préjugés et expériences personnelles, tandis que les négociations des parents seront moins structurées et les règlements plus difficiles à conclure en raison de l’absence d’orientation législative. » [TRADUCTION]).
apologistes défendent le statut non défini de l’ISE en affirmant que chaque affaire doit être traitée au cas par cas, ce qui alimente les critiques qui soutiennent à juste titre que le pouvoir discrétionnaire absolu non seulement viole les principes fondamentaux du droit, mais usurpe aussi le rôle constitutionnel du Parlement en tant qu’organe législatif. En termes simples, les lois ouvertes sont intrinsèquement inconstitutionnelles, et le Parlement ne peut ni abdiquer ni déléguer son pouvoir – directement ou indirectement – à d’autres organes du gouvernement.

Par conséquent, nous recommandons que la nature ouverte de la norme de l’ISE (qui, selon nous, est encore trop ouverte dans sa forme actuelle) soit corrigée en définissant la norme en fonction de deux principes de présomption :

1. **Il est dans l’intérêt supérieur de l’enfant de jouir d’un temps égal avec chaque parent;**

2. **Il est dans l’intérêt supérieur de l’enfant que chaque parent assume une responsabilité parentale égale pour les décisions importantes qui touchent le bien-être de l’enfant.**

Nous sommes d’avis que cette définition est conforme au consensus des sciences sociales dont il a été question plus haut et à la Convention des Nations Unies relative aux droits de l’enfant (CNUDE)\(^{41}\), plus précisément :

- Article 3 : Les États parties s’engagent à assurer à l’enfant la protection et les soins nécessaires à son bien-être, compte tenu des droits et des devoirs de ses parents [...] ; Article 7 : L’enfant a [...] le droit [...] d’être élevé par eux ;

- Article 9 : Les États parties veillent à ce que l’enfant ne soit pas séparé de ses parents [...], sauf lorsque [...] cette séparation est nécessaire [...]. Une décision en ce sens peut être nécessaire dans certains cas particuliers [...] lorsqu’ils [les parents] vivent séparément [...];

- Article 18 : Les États parties s’emploient de leur mieux à assurer la reconnaissance du principe selon lequel les deux parents ont une responsabilité commune [...]\(^{42}\).

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\(^{41}\) 1577 RTNU 3 (entrée en vigueur le 2 septembre 1990) [CNUDE], 20 novembre 1989.

IV RÉINSTALLATION ET MOBILITÉ

Nous reconnaissons que les rédacteurs du projet de loi C-78 ont manifestement beaucoup réfléchi à la question de la résolution équitable et rapide des problèmes de réinstallation\textsuperscript{43}. Nous félicitons les rédacteurs de leurs efforts. Nous remarquons (avec un certain degré d’ironie) que les rédacteurs n’ont pas eu de problème avec les parties du projet de loi C-78 portant sur la réinstallation pour stipuler différentes présomptions selon le scénario. Si nous devons appliquer des présomptions en matière de réinstallation, nous maintenons que ces présomptions devraient se voir attribuer la même valeur. Il faut toujours mettre l’accent sur l’intérêt supérieur de l’enfant. Imposer le « fardeau » à un parent qui a peu de temps à consacrer au domicile pour empêcher la réinstallation est potentiellement cruel pour l’enfant qui a actuellement peu de temps avec ce parent. Voir le paragraphe 16.93(2). Le fardeau de la preuve devrait toujours incomber au parent qui se propose de déménager et de perturber ainsi le temps de résidence de l’enfant avec le parent « B », peu importe la durée à domicile.

V RÉSUMÉ

Bien que nous félicitions le gouvernement d’avoir apporté des changements appropriés pour harmoniser les lois fédérales avec les lois provinciales, intégrer les processus intergouvernementaux et promouvoir le règlement extrajudiciaire des différends, nous estimons que le projet de loi est inadéquat compte tenu des changements sociaux spectaculaires et des résultats de la recherche en sciences sociales depuis 1985.

Notre mémoire, ainsi que le libellé du texte législatif proposé à l’annexe A, formule les recommandations suivantes :

1. L’adoption d’une présomption réfutable de partage égal du rôle parental, conformément à la recherche en sciences sociales et à l’appui solide de la population;

2. L’intégration d’une définition de la norme de l’intérêt supérieur de l’enfant jusqu’à présent non définie comme exigeant une présomption de partage égal du rôle parental tout en tenant compte des autres facteurs mentionnés dans le projet de loi C-78;

3. Le réexamen des considérations relatives à la réinstallation en imposant toujours le fardeau de la preuve à la partie qui propose la réinstallation.

\textsuperscript{43} Voir les articles 16.9 à 16.95 proposés dans le projet de loi C-78.
En outre, les rapports universitaires auxquels on renvoie dans ce document sont accessibles en ligne à l’adresse suivante⁴⁴ :

https://drive.google.com/drive/folders/1TeZQ9LGzKuKZwrSeyhqF9xVNSB77-EAE?usp=sharing

Le présent document est respectueusement soumis au nom des six organisations suivantes :

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<tr>
<th>Ancq</th>
<th>Action des nouvelles conjointes et des nouveaux conjoints du Québec</th>
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<tr>
<td></td>
<td>L’ANCQ est un organisme québécois sans but lucratif qui se consacre à la lutte contre la discrimination sociale et juridique à l’égard des familles reconstituées, notamment en droit de la famille. Fondée en 1999, l’ANCQ compte actuellement 3 500 membres. L’ANCQ est un ardent défenseur de la présomption réfutable du partage du rôle parental. Personne-ressource : Mme Lise Bilodeau <a href="mailto:lise_bilodeau@yahoo.ca">lise_bilodeau@yahoo.ca</a> 418-847-3176</td>
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<tr>
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<th>Canadian Association for Equality</th>
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<tr>
<td></td>
<td>Le CAFE est un organisme de bienfaisance voué à l’éducation qui s’est engagé à atteindre l’égalité pour tous les Canadiens, indépendamment du sexe, de l’orientation sexuelle, de l’identité de genre, de l’expression de genre, de la situation de famille, de la race, de l’ethnicité, des croyances, de l’âge ou de l’incapacité. Il se concentre actuellement sur les domaines de l’égalité entre les sexes sous-étudiés dans la culture contemporaine, comme, le statut, la santé et le bien-être des garçons et des hommes. Personne-ressource : M. Brian Ludmer <a href="mailto:brian@ludmerlaw.com">brian@ludmerlaw.com</a> 416-781-0334</td>
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<th>CEPC</th>
<th>Conseil canadien de l’égalité parentale</th>
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<td>Le CEPC est une fédération de défense des droits de la famille qui regroupe 26 organismes représentant les enfants, les mères, les pères, les grands-parents et les deuxièmes conjoints et conjointes et qui a quatre objectifs principaux, soit le partage égal du rôle parental après la dissolution; la réforme du droit de la famille fondée sur l’égalité des sexes; la reconnaissance de la violence familiale comme dysfonctionnement social sans genre; la reconnaissance des droits des parents et des enfants conformément aux déclarations de l’ONU. Personne-ressource : M. Glenn Cheriton <a href="mailto:president@canadianepc.com">president@canadianepc.com</a> 613-523-2444</td>
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<th>L4SP</th>
<th>Lawyers for Shared Parenting</th>
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<tr>
<td></td>
<td>L4SP est une association d’avocats qui milite en faveur d’une présomption</td>
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⁴⁴ Google Drive ne prend pas en charge tous les types de navigateurs et fonctionne mieux avec Internet Explorer ou Chrome. Besoin d’aide : contact.gwpiskor@gmail.com.
réfutable pancanadienne prévue dans la loi en faveur d’un partage égal du rôle parental pour les enfants de parents divorcés ou séparés.
Personne-ressource : M. Gene C. Colman
gene@complexfamilylaw.com
416-635-9264

<table>
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<tr>
<th>LW4SP</th>
<th>Leading Women For Shared Parenting (Canada)</th>
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<td>LW4SP est une organisation internationale de 150 femmes influentes dans les médias et la politique qui consacrent leur temps et leur nom pour appuyer le partage égal du rôle parental comme modèle par défaut pour les parents qui divorcent ou se séparent.</td>
<td></td>
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<tr>
<td>Personne-ressource : Mme Paulette MacDonald</td>
<td><a href="mailto:kidsneed2parents@gmail.com">kidsneed2parents@gmail.com</a></td>
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<th>R.E.A.L</th>
<th>Real Women of Canada</th>
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<td>REAL Women of Canada est une organisation nationale de femmes, constituée en société en 1983, dont la mission est de promouvoir l’égalité, l’avancement et le bien-être des femmes, que ce soit à la maison, au travail ou dans la collectivité. REAL Women of Canada est une ONG consultant auprès du Conseil économique et social des Nations Unies, un membre du caucus des ONG en droits de la famille à l’ONU et un partenaire actif au Congrès mondial des familles.</td>
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<tr>
<td>Personne-ressource : Mme Diane Watts</td>
<td><a href="mailto:realwcna@rogers.com">realwcna@rogers.com</a></td>
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**Auteurs principaux :**

- Gene C. Colman, B.A., LL.B., avocat en droit de la famille, Toronto, admis au barreau en 1979, courriel : gene@complexfamilylaw.com

- George W. Piskor MA.Sc., SM, LL.M., P.Eng, courriel : gwpiskor@gmail.com
ANNEXE A : MODIFICATIONS PROPOSÉES À L’ARTICLE 16 DU PROJET DE LOI C-78

1 Le paragraphe 16(2) de l'article 12 du projet de loi est étoffé et se lit maintenant comme suit :

   (2) Lorsqu’il examine les facteurs visés au paragraphe (3), le tribunal accorde la priorité à la sécurité, à la sécurité et au bien-être physique, émotionnel et psychologique de l’enfant en vertu de deux principes de présomption :

   i. il est dans l’intérêt supérieur de l’enfant de jouir d’un temps égal avec chaque parent;

   ii. il est dans l’intérêt supérieur de l’enfant que chaque parent assume une responsabilité parentale égale pour les décisions importantes qui touchent le bien-être de l’enfant.

2 À l'article 12 du projet de loi, renuméroter le paragraphe proposé à 16(6) intitulé « Ordonnance parentale et ordonnance de contact » comme étant le paragraphe 16(10).

3 À l'article 12 du projet de loi, insérer les nouveaux paragraphes 16(6) à 16 (9) suivants :

Réfutation des présomptions

(6) Les principes de présomption énoncés au paragraphe 16(2) peuvent être réfutés sur la base d’une preuve étayant que la réponse aux besoins de l’enfant serait substantiellement améliorée par une ordonnance différente.

Facteurs de réfutation

(7) Les facteurs qui peuvent réfuter les principes de présomption énoncés au paragraphe 16(2), lorsque ces facteurs ne peuvent être autrement pris en compte ou atténués, sont les suivants :

   (a) Un parent n’a pas la capacité parentale de base en raison de problèmes de toxicomanie, de maladie mentale ou d’autres déficiences importantes;
b) l’ordonnance proposée exposerait un enfant ou un parent à un risque de violence familiale;

c) Les parents vivent trop loin l’un de l’autre pour faciliter un régime de partage égal du temps.

Respect des principes

(8) Lorsque les circonstances prévues au paragraphe (7) exigent une dérogation aux principes de présomption énoncés au paragraphe 16(2), le tribunal :

(a) confie néanmoins à chaque conjoint le maximum de temps et de responsabilités parentales possible dans les circonstances;

(b) peut ordonner un partage égal du temps, sans partage égal de la responsabilité parentale, pour les grandes décisions, et inversement.

Motifs écrits

(9) Le tribunal fournit par écrit les motifs de l’ordonnance qui déroge aux principes énoncés au paragraphe 16(2).

4 À l’article 12 du projet de loi, supprimer les titres et le contenu des paragraphes 16.93 (1) à (3) inclusivement et les remplacer par le paragraphe 16.93 comme suit :

Fardeau de la preuve – réinstallation

16.93 Si les parties à l’instance se conforment en grande partie à une ordonnance, à une décision arbitrale ou à une entente, il incombe à la partie qui a l’intention de réinstaller l’enfant de prouver que la réinstallation serait dans l’intérêt supérieur de celui-ci.

5 À l’article 12 du projet de loi, supprimer le texte suivant du paragraphe 16.94 :

(1) et (2)
RÉSUMÉ DU MÉMOIRE (conformément au Guide)

RECOMMANDATIONS

1. Recommandation principale : présomption réfutable – partage égal du rôle parental (« PRPERP »).

2. Intérêt supérieur de l’enfant (« ISE ») : la PRPERP devrait ancrer le test de l’ISE.

3. Réparation de la définition de l’ISE : La nature ouverte de la norme de l’ISE devrait être réparée en définissant la norme en fonction de deux principes de présomption :

   (1) ISE = profiter d’un temps égal avec chaque parent;

   (2) ISE = chaque parent assumera une responsabilité parentale égale pour les décisions importantes qui ont une incidence sur le bien-être de l’enfant.

4. 2e recommandation : Le fardeau de la preuve devrait incomber unilatéralement au parent qui propose de déménager.

LA RECHERCHE EN SCIENCES SOCIALES ÉTABLIT CE QUI SUIT :

5. Séparation : La séparation routinière d’un « parent apte » de l’enfant ne devrait pas être considérée comme un ISE.

6. Pourcentage de temps : Plus nous approchons de 50 % de temps passé à domicile = meilleurs résultats pour les enfants.

7. Axes des résultats : PERP = de meilleurs résultats sur de multiples axes : éducation, cognitif, dépression, anxiété, satisfaction, estime de soi, comportement des pairs, toxicomanie, hyperactivité, problèmes de santé et psychosomatiques, relations parent-enfant ou famille, et ainsi de suite!

8. Les résultats du PERP sont meilleurs, même indépendants des autres facteurs, puisque la garde physique conjointe (GPC) produit des résultats supérieurs à la garde physique exclusive (GPE), indépendamment de ce qui suit :

   a. la qualité de la relation parent-enfant (c.-à-d. que même les parents plus ou moins adéquats sont bénéfiques);

45 Texte législatif recommandé à l’annexe A.
b. le revenu des parents (c.-à-d. que les pensions alimentaires en GPC ne sont pas liées au niveau de vie);

c. le niveau de conflit (sauf dans les situations de conflit extrême, les situations litigieuses d’intensité faible à modérée justifient la GPC).


Les sciences sociales les ont discrédités :

a. Théorie de l’attachement unique – le principal auteur de la théorie a lui-même reconnu l’erreur;

b. La motivation du père est de réduire le montant de la pension alimentaire pour enfants – le coût de la pension alimentaire pour enfants est en fait plus élevé avec un PERP;

c. Effet de Yo-yo – la plupart des enfants s’adaptent à deux domiciles;

d. Ne convient pas aux jeunes enfants – le PERP est un facteur de protection pour les nourrissons, les tout-petits et les jeunes enfants;

e. Le PERP est trop dangereux – risques de violence, d’abus, de problème de santé mentale ou de conflit – les facteurs qui affectent la minorité ne devraient pas dicter la politique de la majorité;

f. Le PERP pourrait être avantageux, mais nous ne devrions pas utiliser ces présomptions :

i. Une solution polyvalente est trop étroite – d’autres présomptions juridiques fonctionnent.
ii. Pas dans l’ISE – L’ISE n’est pas défini;
iii. Risque accru de litige – non appuyé par des faits. Le PERP réduit les litiges;

11. Avantages du PERP
   a. définit clairement la règle de défaut;
   b. élimine les hypothèses sur la conduite future comme fondement des décisions,
   c. limite le pouvoir discrétionnaire des juges,
   d. améliore la détermination et la prévisibilité des résultats,
   e. réduit les litiges et les conflits entre les parents.

ET C’EST DE LA BONNE POLITIQUE!

12. Ailleurs : Les administrations du monde entier ont adopté des formes de PERP ou envisagent activement de légiférer. Même au Canada – la Colombie-Britannique et le Québec ont tendance à privilégier le PERP.

13. Appui de la population canadienne au PRPERP : 70 à 74 % des personnes interrogées; 87 % chez les décidés. Fort appui, peu importe le parti, le sexe, l’âge, l’endroit.
Tab 4
Majority of Canadians strongly support or somewhat support legislation to create a presumption of equal parenting in child custody cases

2017-1061 Equal Parenting Summary

submitted by Nanos to the Canadian Association for Equality, September 2017 (Submission 2017-1061)
There is strong support among Canadians with regards to equal parenting legislation in child custody cases.

- **Over two in three Canadians strongly support or somewhat support legislation to create a presumption of equal parenting in child custody cases** – When asked their support for federal and provincial legislation to create a presumption of equal parenting in child custody cases, a majority of Canadians say they strongly support (35%) or somewhat support (35%) this, while nine per cent somewhat oppose and four per cent strongly oppose it. Seventeen per cent are unsure.

Nanos conducted an RDD dual frame (land- and cell-lines) hybrid telephone and online random survey of 1,000 Canadians, 18 years of age or older, between August 30th and September 1st, 2017 as part of an omnibus survey. Participants were randomly recruited by telephone using live agents and administered a survey online. The margin of error for a random survey of 1,000 Canadians is ±3.1 percentage points, 19 times out of 20.

This study was commissioned by the Canadian Association for Equality.
Support for legislation to create presumption of equal parenting

Source: Nanos Research, RDD dual frame hybrid telephone and online random survey, August 30th to September 1st, 2017, n=1000, accurate 3.1 percentage points plus or minus, 19 times out of 20.

**Net Score**

<table>
<thead>
<tr>
<th>Strongly support</th>
<th>Somewhat support</th>
<th>Somewhat oppose</th>
<th>Strongly oppose</th>
<th>Unsure</th>
</tr>
</thead>
<tbody>
<tr>
<td>+56.3</td>
<td></td>
<td></td>
<td></td>
<td>17%</td>
</tr>
</tbody>
</table>

*Note: Charts may not add up to 100 due to rounding*

**Subgroups**

<table>
<thead>
<tr>
<th>Subgroups</th>
<th>Strongly support/ Somewhat support</th>
</tr>
</thead>
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<tr>
<td>Atlantic (n=100)</td>
<td>74.7%</td>
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<tr>
<td>Quebec (n=250)</td>
<td>66.4%</td>
</tr>
<tr>
<td>Ontario (n=300)</td>
<td>70.9%</td>
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<tr>
<td>Prairies (n=200)</td>
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<tr>
<td>British Columbia (n=150)</td>
<td>68.8%</td>
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<tr>
<td>Male (n=478)</td>
<td>77.7%</td>
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<td>Female (n=522)</td>
<td>61.6%</td>
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<tr>
<td>18 to 34 (n=242)</td>
<td>67.8%</td>
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<tr>
<td>35 to 54 (n=358)</td>
<td>72.2%</td>
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<tr>
<td>55 plus (n=400)</td>
<td>68.4%</td>
</tr>
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</table>

**QUESTION** – Do you strongly support, somewhat support, somewhat oppose or strongly oppose federal and provincial legislation to create a presumption of equal parenting in child custody cases?
Methodology

Path Forward!

Winning Conditions

Validate

Test Ideas

Diagnose ENV

Review Research

Confidential
Methodology

Nanos conducted an RDD dual frame (land- and cell-lines) random telephone survey of 1,000 Canadians, 18 years of age or older, between August 30th and September 1st, 2017 as part of an omnibus survey. Participants were randomly recruited by telephone using live agents and administered a survey. The sample is geographically stratified to be representative of Canada.

Individuals were randomly called using random digit dialling with a maximum of five call backs.

The margin of error for a random survey of 1,000 Canadians is ±3.1 percentage points, 19 times out of 20.

The research was commissioned by the Canadian Association for Equality (CAFE).

Note: Charts may not add up to 100 due to rounding.
About Nanos

Nanos is one of North America’s most trusted research and strategy organizations. Our team of professionals is regularly called upon by senior executives to deliver superior intelligence and market advantage whether it be helping to chart a path forward, managing a reputation or brand risk or understanding the trends that drive success. Services range from traditional telephone surveys, through to elite in-depth interviews, online research and focus groups. Nanos clients range from Fortune 500 companies through to leading advocacy groups interested in understanding and shaping the public landscape. Whether it is understanding your brand or reputation, customer needs and satisfaction, engaging employees or testing new ads or products, Nanos provides insight you can trust.

Nanos Research
North America Toll-free
1.888.737.5505
info@nanosresearch.com

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## Technical Note

<table>
<thead>
<tr>
<th>Element</th>
<th>Description</th>
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</thead>
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<tr>
<td>Organization who commissioned the research</td>
<td>Canadian Association for Equality</td>
</tr>
<tr>
<td>Final Sample Size</td>
<td>1000 Randomly selected individuals.</td>
</tr>
<tr>
<td>Margin of Error</td>
<td>±3.1 percentage points, 19 times out of 20.</td>
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<td>Mode of Survey</td>
<td>RDD dual frame (land- and cell-lines) random telephone omnibus survey</td>
</tr>
<tr>
<td>Sampling Method Base</td>
<td>The sample included both land- and cell-lines RDD (Random Digit Dialed) across Canada.</td>
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<tr>
<td>Demographics (Captured)</td>
<td>Atlantic Canada, Quebec, Ontario, Prairies, British Columbia; Men and Women; 18 years and older. Six digit postal code was used to validate geography.</td>
</tr>
<tr>
<td>Fieldwork/Validation</td>
<td>Live interviews with live supervision to validate work as per the MRIA Code of Conduct</td>
</tr>
<tr>
<td>Number of Calls</td>
<td>Maximum of five call backs.</td>
</tr>
<tr>
<td>Time of Calls</td>
<td>Individuals were called between 12:5:30 pm and 6:30-9:30 pm local time for the respondent.</td>
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<tr>
<td>Field Dates</td>
<td>August 30th to September 1st, 2017.</td>
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<td>Language of Survey</td>
<td>The survey was conducted in both English and French.</td>
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<tr>
<td>Weighting of Data</td>
<td>The results were weighted by age and gender using the latest Census information (2014) and the sample is geographically stratified to ensure a distribution across all regions of Canada. See tables for full weighting disclosure</td>
</tr>
<tr>
<td>Screening</td>
<td>Screening ensured potential respondents did not work in the market research industry, in the advertising industry, in the media or a political party prior to administering the survey to ensure the integrity of the data.</td>
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<tr>
<td>Excluded Demographics</td>
<td>Individuals younger than 18 years old; individuals without land or cell lines could not participate.</td>
</tr>
<tr>
<td>Stratification</td>
<td>By age and gender using the latest Census information (2014) and the sample is geographically stratified to be representative of Canada. Smaller areas such as Atlantic Canada were marginally oversampled to allow for a minimum regional sample.</td>
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<tr>
<td>Estimated Response Rate</td>
<td>13 percent, consistent with industry norms.</td>
</tr>
<tr>
<td>Question Order</td>
<td>Question order in the preceding report reflects the order in which they appeared in the original questionnaire.</td>
</tr>
<tr>
<td>Question Content</td>
<td>This was module six of an omnibus survey. Previous modules related to unprompted national issue of concern, immigration, health, foreign policy, marijuana, and consumer research.</td>
</tr>
<tr>
<td>Question Wording</td>
<td>The questions in the preceding report are written exactly as they were asked to individuals.</td>
</tr>
<tr>
<td>Survey Company</td>
<td>Nanos Research</td>
</tr>
<tr>
<td>Contact</td>
<td>Contact Nanos Research for more information or with any concerns or questions.</td>
</tr>
<tr>
<td></td>
<td><a href="http://www.nanosresearch.com">http://www.nanosresearch.com</a></td>
</tr>
<tr>
<td></td>
<td>Telephone:(613) 234-4666 ext.</td>
</tr>
<tr>
<td></td>
<td>Email: <a href="mailto:info@nanosresearch.com">info@nanosresearch.com</a></td>
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</tbody>
</table>
Tabulations
**2017-1061 – Canadian Association for Equality – Creation of presumption in child custody cases – STAT SHEET**

Nanos conducted an RDD dual frame (land- and cell- lines) hybrid telephone and online random survey of 1,000 Canadians, 18 years of age or older, between August 30th and September 1st, 2017. The margin of error for a random survey of 1,000 Canadians is ±3.1 percentage points, 19 times out of 20.

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Page 1

<table>
<thead>
<tr>
<th>Question - Do you strongly support, somewhat support, somewhat oppose or strongly oppose federal and provincial legislation to create a presumption of equal parenting in child custody cases?</th>
<th>Region</th>
<th>Gender</th>
<th>Age</th>
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<td></td>
<td>Canada 2017-08</td>
<td>Atlantic</td>
<td>Quebec</td>
</tr>
<tr>
<td>Total</td>
<td>Unwgt N</td>
<td>1000</td>
<td>100</td>
</tr>
<tr>
<td>Wgt N</td>
<td>1000</td>
<td>100</td>
<td>250</td>
</tr>
<tr>
<td>Strongly support %</td>
<td>34.7</td>
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<td>35.7</td>
</tr>
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<td>Somewhat support %</td>
<td>34.8</td>
<td>35.6</td>
<td>30.7</td>
</tr>
<tr>
<td>Somewhat oppose %</td>
<td>9.2</td>
<td>7.6</td>
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</tr>
<tr>
<td>Strongly oppose %</td>
<td>4.0</td>
<td>2.2</td>
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</tr>
<tr>
<td>Unsure %</td>
<td>17.3</td>
<td>15.5</td>
<td>20.3</td>
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Tab B
Do you strongly support, somewhat support, somewhat oppose or oppose federal and provincial legislation to create a presumption of equal parenting in child custody cases?

<table>
<thead>
<tr>
<th>Region</th>
<th>Total Responses</th>
<th>Strongly support</th>
<th>Somewhat support</th>
<th>Somewhat oppose</th>
<th>Strongly oppose</th>
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<tr>
<td>Canada 200903</td>
<td>1002</td>
<td>48.0</td>
<td>30.0</td>
<td>4.7</td>
<td>5.0</td>
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<tr>
<td>Atlantic</td>
<td>99</td>
<td>48.3</td>
<td>30.0</td>
<td>8.4</td>
<td>6.6</td>
<td>6.8</td>
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<tr>
<td>Quebec</td>
<td>253</td>
<td>43.1</td>
<td>43.2</td>
<td>2.1</td>
<td>3.0</td>
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<td>Ontario</td>
<td>301</td>
<td>52.5</td>
<td>24.5</td>
<td>4.2</td>
<td>5.0</td>
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<tr>
<td>West</td>
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<td>47.7</td>
<td>25.3</td>
<td>5.9</td>
<td>6.1</td>
<td>15.1</td>
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<table>
<thead>
<tr>
<th>Gender</th>
<th>Total Responses</th>
<th>Strongly support</th>
<th>Somewhat support</th>
<th>Somewhat oppose</th>
<th>Strongly oppose</th>
<th>Unsure</th>
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</thead>
<tbody>
<tr>
<td>Male</td>
<td>506</td>
<td>47.2</td>
<td>30.5</td>
<td>4.1</td>
<td>6.1</td>
<td>12.1</td>
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<tr>
<td>Female</td>
<td>497</td>
<td>48.8</td>
<td>29.5</td>
<td>5.2</td>
<td>3.9</td>
<td>12.5</td>
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<tr>
<td>18 to 29</td>
<td>197</td>
<td>53.4</td>
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<td>9.0</td>
<td>4.5</td>
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<td>30 to 39</td>
<td>192</td>
<td>49.0</td>
<td>30.2</td>
<td>3.4</td>
<td>4.0</td>
<td>13.4</td>
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<tr>
<td>40 to 49</td>
<td>217</td>
<td>45.3</td>
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<td>2.1</td>
<td>7.4</td>
<td>12.6</td>
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<td>50 to 59</td>
<td>172</td>
<td>47.4</td>
<td>33.2</td>
<td>5.2</td>
<td>5.6</td>
<td>8.6</td>
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<tr>
<td>60 plus</td>
<td>225</td>
<td>45.6</td>
<td>29.4</td>
<td>4.1</td>
<td>3.7</td>
<td>17.2</td>
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</table>

<table>
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<th>Vote Profile</th>
<th>Total Responses</th>
<th>Strongly support</th>
<th>Somewhat support</th>
<th>Somewhat oppose</th>
<th>Strongly oppose</th>
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<tr>
<td>Liberal</td>
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<td>49.7</td>
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<td>5.0</td>
<td>2.0</td>
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<td>Conservative</td>
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<td>44.8</td>
<td>33.0</td>
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<td>7.2</td>
<td>4.7</td>
<td>12.3</td>
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<td>Bloc</td>
<td>90</td>
<td>41.2</td>
<td>41.7</td>
<td>3.3</td>
<td>5.8</td>
<td>7.9</td>
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<tr>
<td>Green</td>
<td>73</td>
<td>66.9</td>
<td>19.7</td>
<td>3.0</td>
<td>2.0</td>
<td>8.3</td>
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<tr>
<td>Unsure</td>
<td>110</td>
<td>39.0</td>
<td>24.3</td>
<td>8.5</td>
<td>14.5</td>
<td>13.6</td>
</tr>
</tbody>
</table>
Tab 5
(2) Subsections 16(4) to (10) of the Act are replaced by the following:

(4) Subject to subsection (5), in making a parenting order, the court shall:

(a) apply the presumption that allocating 20 parenting time equally between the spouses is in the best interests of a child of the marriage; and

(b) apply the presumption that equal parental responsibility is in the best interests of a child 25 of the marriage.

(5) The presumptions referred to in subsection (4) are rebutted if it is established that the best interests of the child would be substantially enhanced by allocating parenting time or 30 parental responsibility other than equally.

(6) If the presumptions referred to in subsection (4) are rebutted in accordance with subsection (5), the court shall, in making an order under this section, nevertheless give effect 35 to the principle that a child of the marriage should have the maximum practicable contact with each spouse that is compatible with the best interests of the child.

(2) Les paragraphes 16(4) à (10) de la 15 même loi sont remplacés par ce qui suit :

(4) Sous réserve du paragraphe (5), lorsqu'il rend une ordonnance parentale, le tribunal :

a) applique la présomption selon laquelle le partage égal du temps parental entre les 20 époux est dans l’intérêt de l’enfant à charge;

b) applique la présomption selon laquelle le partage égal de la responsabilité parentale est dans l’intérêt de l’enfant à charge.

(5) Les présomptions prévues au paragraphe 25 Non-application des présomptions

(4) sont réfutées s’il est établi que l’intérêt de l’enfant serait considérablement mieux servi par un partage inégal du temps parental ou de la responsabilité parentale.

(6) Dans les cas où les présomptions prévues au paragraphe (4) sont réfutées par application du paragraphe (5), le tribunal, lorsqu’il rend une ordonnance conformément au présent article, applique néanmoins le principe selon lequel l’enfant à charge devrait avoir avec chaque 35 époux le plus de contact possible compatible avec son propre intérêt.
Tab A
SUBMITTED BRIEF
TO THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS
HOUSE OF COMMONS
CANADA
RE: BILL C-78 (An Act to Amend the Divorce Act, et al)

November 26, 2018

Respectfully submitted by
William V. Fabricius, Ph.D.
Associate Professor of Psychology
Arizona State University
My colleagues and I have studied various aspects of parenting time in 14 original, peer-reviewed empirical studies published since 2000, and have been invited to write four authoritative, comprehensive reviews of the divorce literature (see Bibliography). In this Brief, I summarize my most recent review paper, to be published in 2019 in the *Oxford Handbook of Children and the Law*, entitled, *Equal Parenting Time: The Case for a Legal Presumption.*

Overview. Four sources of evidence now converge to strongly suggest that a legal presumption of equal parenting time with both parents is in the best interests of children of divorce:

(1) The scientific evidence that equal parenting time is *correlated* with benefits to children meets four conditions necessary to further establish that equal parenting time likely *causes* these benefits.

(2) The cultural evidence shows that norms about parenting roles have changed in the last generation, and this is reflected in public endorsement of equal parenting time.

(3) Test-case evidence from the 2013 equal parenting law in Arizona reveals that the state’s family law professionals (judges, attorneys, conciliation court directors and staff, and mental health provider) evaluate the law positively after four years’ of experience with the new law.

(4) Examples from recent Canadian case law under the statutory *maximum contact principle* show courts responding to the new cultural norms by crafting individualized equal parenting time orders over one parent’s objections even in cases of high parent conflict, accompanied by well-reasoned judicial opinions about how that is in children’s best interests.

I expand on these four points below and conclude that this overall pattern of evidence indicates that a legal presumption of equal parenting time would help protect children’s emotional security with each of their divorced parents, and consequently would have a positive effect on public health in the form of reduced long-term stress-related mental and physical health problems among children of divorce.

*(1) The scientific evidence that equal parenting time is correlated with benefits to children meets four conditions necessary to further establish that equal parenting time likely causes these benefits.*

Correlational findings. The effects of divorce on children are largely due to how much the divorce threatens their emotional security. Several lines of research suggest that reduced parenting time with
fathers threatens emotional security by preventing children from having sufficient daily interactions to reassure them that they matter to their fathers. The correlational findings of many studies in Western countries show that more parenting time with fathers up to and including equal parenting time is associated with improved emotional security in the father-child relationship. See Figure 1 below, and note that there is no “plateau” at 35% parenting time; rather, children’s emotional security with their fathers continues to increase from 35% to 50% parenting time. None of these studies found that mother-child relationship security decreased with increasing parenting time with fathers. This means that the children of divorce with the best long-term relationships with both parents are those who had equal parenting time.

Figure 1. Relation between the amounts of parenting time per month (4 weeks) with fathers (horizontal axis) and the emotional security of father-child relationships in young adulthood (vertical axis). The vertical line in the center represents equal parenting time with both parents. Data are from Fabricius et al. (2012).

The same is true in high conflict, post-divorce families. In both high- and low-conflict families, more parenting time with fathers during childhood generally predicts greater emotional security of father-child relationships into young adulthood. Nevertheless, parent conflict does have its own harmful effects on children. The best theory we have in developmental and family psychology to explain how conflict harms children – Emotional Security Theory – holds that children fear that conflict will cause parents to become emotionally and physically unavailable, and unable to cooperate
to meet their needs. Earlier studies were mixed regarding whether more parenting time with fathers in high conflict families is harmful for children. New analyses of ours designed to detect complex relations between parenting time and conflict showed that in high conflict families, emotional insecurity about parent conflict spiked at 35% parenting time with fathers, and then decreased such that at equal parenting time it was not higher than in low conflict families.

Emotional Security Theory provides a ready explanation: When parenting time is at 35%, insecurity about the father’s potential withdrawal in response to parent conflict can be heightened because there are long periods when the child is not at the father’s home (see section below on “Shared Parenting”). In contrast, at equal parenting time, there is less room for insecurity about the father’s continued presence because it is concretized in his provision of an equal home for the child. Thus, equal parenting time likely carries meaning to protect the child against insecurity about parent conflict. This evidence has only recently become available because only recently have we been able to study larger samples of high conflict families with equal parenting.

Evidence for Causality of Parenting Time. The worry for policy makers is that better parents are the ones who have agreed to equal parenting time, so that the benefits that are correlated with equal parenting time might be due to the type of parents rather than the amount of parenting time. However, there are four lines of evidence to suggest that selection plays a minimal role in the observed benefits, and consequently that parenting time likely plays a causal role.

(a) The legal context minimizes the possibility that good parents can simply “self-select” into equal parenting time. The amount of parenting time fathers have under current legal regimes is influenced by many factors, including the mother’s preferences, the parents’ perceptions of general maternal bias in the courts, advice from attorneys about likely outcomes, parents’ financial resources to pursue their cases, differences in effectiveness of attorneys in arguing their clients’ cases under the adversarial system, and individual biases among custody evaluators and judges. This “funneling” process represents a different dynamic than the typical cases in which people choose to engage in a behavior
(e.g., smoking) or not, and could in fact constitute a “natural experiment,” in which equally good fathers are “assigned” considerably different amounts of parenting time.

(b) There is a “dose-response” association between more parenting time with fathers and stronger father-child relationships. We have found that even small increases in parenting time from 0% to 50% are significantly associated with increases in father-child relationship security. It is extremely unlikely that the current system would result in such a precise matching of fathering ability and percentage of parenting time, especially because it is rare for parents to undergo extensive custody evaluations.

(c) Positive outcomes are observed even when parents disagree and courts impose more parenting time with fathers. Going back to the classic Stanford Child Custody Study in the 1980s, it was found that the great majority of parents with shared parenting had to accept it after mediation, custody evaluation, trial, or judicial imposition; nevertheless, those with shared parenting time had the most well-adjusted children years later. We have found the same thing in the case of equal parenting time with very young children. If children had equal overnights with each parent by the time they were 2 years old, it did not matter whether their parents had agreed to it on their own, or the decision came out of mediation, custody evaluation, attorney-led bargaining, or court hearing. The two groups had equally good relationships with their fathers as well as with their mothers, and better relationships than those who had had fewer overnights. These findings could also constitute a different type of “natural experiment,” in which courts imposed equal parenting time over mothers’ objections.

(d) Negative outcomes are observed when parental relocations separate fathers and children. To the extent that relocation results from circumstances such as job opportunities, health, extended family factors, etc. that are not related to parenting ability, it could constitute another type of “natural experiment,” in which parenting time is taken away from some fathers but not others. My colleagues and I have conducted the only original, empirical studies of child outcomes of parental relocation after divorce. These studies found no positive outcomes associated with parental relocation; instead, compared to non-relocating families, relocation of more than an hour’s drive from the original family
home before the child was 12 years old was associated up to 10 years later not only with harm to children’s emotional security with parents and their emotional security about parent conflict, but also with more anxiety, depression, aggression, delinquency, involvement with the juvenile justice system, associations with delinquent peers, and drug use. These associations held after controlling for parent conflict, domestic violence, and mothers’ family income. That is important because it eliminates the alternate explanation that conflict, violence, or financial strain caused both the relocation and the poor child outcomes. In addition, we found similar outcomes regardless of whether the custodial mother relocated with the child away from the father’s home, or the non-custodial father relocated without the child away from the mother’s home. The similar outcomes indicate that they were not due to the child having to adjust to a new home environment, but rather to the separation of the child from the father. These relocation studies differed in methodologies and populations sampled, but nevertheless revealed similar results. Thus, as a set of studies, they provide a strong conceptual replication of the finding that separation of the child from the father by more than an hour’s drive, and the reduced parenting time that necessarily follows, is associated with a wide range of harmful consequences to the child.

(2) The cultural evidence shows that norms about parenting roles have changed in the last generation, and this is reflected in public endorsement of equal parenting time.

Custody policies are value-laden. Their moral legitimacy comes from their connection to the prevailing, underlying cultural norms about gender roles and parenting; thus, they necessarily undergo fundamental historical change more so than other laws. In connection to the long-term historical trend toward gender equality and involvement of fathers in child care, there is now consistent evidence in Canada and the United States of a strong public consensus that equal parenting time is best for children. In our own public opinion research, we have found that respondents continue to endorse equal parenting time even in hypothetical scenarios in which one parent had provided more pre-divorce child care, and in which they remained locked in conflict. In addition, there were no differences by gender, age, education, income, political outlook, whether the respondents themselves were currently married, had ever divorced, had children, or had paid or received child support.
This strong cultural norm that equal parenting time is best for children would by itself provide sufficient justification that a legal presumption for equal parenting time is in children's best interests. The reason is that in this cultural milieu, those children who received the old standard, every-other-weekend visitation would be placed in the position of comparing themselves to their peers who had equal parenting time and searching for an explanation for why they are different. As a result, many children would unnecessarily worry that their own fathers’ limited post-divorce involvement with them was due to their fathers' deficiencies, or their fathers’ lack of caring, or their own unworthiness. A legal presumption for equal parenting time is in children’s best interest because it would protect them from this source of emotional insecurity.

(3) Test-case evidence from the 2013 equal parenting law in Arizona.

Lawmakers are often counseled to reject a presumption of equal parenting time, under the assumption that it would impose a one-size-fits-all rule and prevent judges from using discretion in individual cases to protect children. Fortunately, we have a test case to allow us to examine whether a presumption constrains judicial discretion and puts children at risk. Just such a law has been in operation in Arizona since 2013, and an initial state-wide evaluation of the law has been published.

The evaluation study consisted of a survey sent to all the state conciliation court staff (response rate = 82%), family court judges (40%), private mental health providers (50%), and private attorneys (11%), asking for their perceptions of how the law is working. All four groups agreed that the courts are interpreting and applying the law as a presumption for equal parenting time, and that as a result, fit fathers are highly likely to have their petitions for equal parenting time awarded.

The findings indicate that the Arizona law does not constrain judicial discretion or expose children to harm. Quite the opposite, on average the four groups of family law professionals rated the law positively overall, and positively in terms of children’s best interests. The survey also allowed participants to express their own ideas about what is good and bad about the law. Judges seldom said anything about their discretion to individualize parenting time being constrained by the law. On the
contrary, they often said that they had to correct some parents’ misunderstanding that the law was a one-size-fits-all rule. In addition, there was no reported change after the law in rates of parent conflict or legal conflict leading up to the final decree.

(4) Examples from recent Canadian case law.

The maximum contact principle in section 16(10) of the Divorce Act is universally considered to not be a presumption in favor of equal parenting. Nevertheless, examples of recent case law in Canada illustrate individual trial judges and appellate courts making their own use of the maximum contact principle and responding to the new cultural norms by crafting individualized equal parenting time orders over one parent’s objections even in cases of high parent conflict, accompanied by well-reasoned judicial opinions about how that is in children’s best interests.

For example, the Saskatchewan Court of Appeal in Ackerman v. Ackerman (2014) noted that, although there was no presumption in favor of shared parenting by the maximum contact principle, “maximum contact between a child and each of his or her parents is desirable,” and upheld the trial judge's alternating-week equal parenting time order.

In Fraser v. Fraser (2016), Justice McGee noted, “Ongoing relationships with each of one's parents is a right. When a parent argues for unequal parenting time, the onus is on that parent to demonstrate why the proposed schedule is in the child’s best interests.” She found that, given the complexity of the family members’ lives with three young, active children, an alternating-week schedule would reduce the amount of transitions, maximize contact with both parents, and ensure that each parent took responsibility for homework. Each parent would also take the children to activities while in the other parent's care to remedy the court's concern that seven days would be too long to be away from a parent. This provided the additional benefit of dividing up transportation when the children had conflicting schedules.

In C. (M.) v. C. (T.) (2010), the court applied the maximum contact principle to order equal parenting time on a three-day rotating basis despite a high level of parent conflict. Justice Walsh
eloquently expressed the psychological theories and research findings about emotional security that I have described above:

I do not do this in an attempt to be fair to the parents, but rather because it will allow for more meaningful interaction between the children and both parents, particularly the father. It will, in my opinion, be better for the children's mental, emotional and physical health; reduce the disruption in the children's sense of continuity; foster the love, affection and ties that exist between not only the children and parents, but the children with the paternal grandmother and with the extended families of both parents; and will provide the children with a secure environment.

In *Gibney v. Conahan* (2011), Associate Chief Justice O'Neil of the Nova Scotia Supreme Court noted the influence of parenting research reported in the media and the prevailing cultural norms about gender roles and parenting:

Much is written and appears in popular magazines, on radio and TV about the need for children to have the opportunity to bond with both parents. The litigants herein espouse this view. They do not agree on how much time Mr. Conahan requires to achieve and maintain a loving and deep relationship with the children and they with him. Ms. Gibney proposes that he parent six overnights every four weeks and five hours on four evenings over this period.

In keeping with the changing role of women in the work place and men in the household, as well as an increased acceptance of the parenting ability of men, the law has evolved. Age-old stereotypes about the role of men and women as parents are slowly dissipating.

The court was satisfied that each parent would maximize the parenting opportunity afforded to them, and that equal parenting time would allow continuity with friends and school and
time with extended family members. The court found that a weekly equal parenting time schedule with a mid-week visit for the other parent was in the children's best interests.

“Sheared Parenting” Lastly, it is important to point out that some researchers and advocates for “shared parenting” suggest that 35% parenting time would generally be enough to support strong father-child relationships. However, when we consider what 35% parenting time (128 days) actually looks like in a parenting plan, the view becomes less sanguine. There are 36 weeks of school, and 16 weeks total of school vacations and holidays; thus, if the child spends half of school vacations and holidays with the father (56 days), that leaves 72 days of parenting time during the 36 school weeks, or an average of two days per school week. Half of those will be weekends, leaving an average of one school day and night per week with the father. That makes it difficult for the father to be much of a presence in the child’s school life, and makes it difficult for the child to see the father as a parent who knows about all the different aspects of the child’s life. Two days per school week also means that there will be long periods of time before the child returns to dad’s home, up to seven days if the parenting plan is Wednesday and Thursday with dad one week, and Friday and Saturday the next week. That makes it difficult for the father to establish consistent parenting routines, and difficult for the child to adjust before it is time to leave again.

The alternative presumption is that the child should have as close to equal proportions of parenting time with both parents as is possible for that family, on a schedule that is individualized for each family. This approach is more in line with what we know about the effects associated with different amounts of parenting time.

Bibliography

Original, peer-reviewed empirical research publications:


**Invited, peer-reviewed chapters review of divorce literature**


Tab B
CONTENT OF OPINION
William V. Fabricius, Ph.D.
Associate Professor of Psychology
Arizona State University
Tempe, Arizona, USA
April 19, 2018

Executive Summary

The Basis for Inclusion of Exhibits “1” to “33.” The Exhibits constitute, in my opinion, the best and the most up-to-date original studies and literature reviews of the empirical social science literature bearing directly and indirectly on the issue of equal parenting time for the children of divorced and separated parents. The objective basis for determining the quality of these Exhibits includes publication in peer-reviewed social science journals and books, and/or grounding in established basic principles of child development.

The Content and Consensus of Exhibits “1” to “33.” The Exhibits jointly address the following 10 aspects of the issue of equal parenting time for the children of divorced and separated parents and reveal the following:

A. Beneficial child outcomes are associated with equal parenting time.
B. These beneficial outcomes are grounded in promotion of emotional security with parents, and protection from emotional insecurity about parent conflict.
C. Increased emotional security protects children from serious, stress-related mental and physical health problems in mid-life, and early mortality.
D. Young adult children of divorce endorse equal parenting time as the best arrangement for children.
E. The belief that equal parenting time is best is grounded in the meaning that all children attach to the time that their parents spend with them; i.e., that they matter to their parents.
F. There is strong public consensus that equal parenting time is best for children.
G. Thus, a rebuttable presumption of equal parenting time would best serve children’s best interests.
H. Evidence shows that children benefit from equal parenting time even when it is imposed by courts over one parent’s objections.
I. A recent evaluation of Arizona’s 2013 law establishing a presumption of equal parenting shows that the state’s family law professionals (i.e., judges, attorneys, conciliation court staff, and mental health providers) perceive the law positively overall and positively in terms of serving children’s best interests.
J. Recent evidence shows that equal parenting time for children under 3 years of age is also associated with long-term benefits to their relationships with both parents.

How Does Equal Parenting Time Work to Deliver Benefits to Children? As noted in “B” “C” and “E” above, equal parenting time reassures children of the continued involvement of both of
their parents, especially the parent who would otherwise be the “non-custodial” or “non-residential” parent. Loss of time with a parent, as well as parent conflict, both threaten the child’s emotional security that he or she will continue to be cared for. Parent conflict triggers worry that, in the extreme, one parent will harm the other, or one will leave the family, or at the very least that both parents will be so preoccupied that they will not be available to the child. Similarly, traditional visitation arrangements trigger worry that, in the extreme, the visiting parent may not return, or at least may become too preoccupied with other things or people and not available to the child. The stress hormones released by chronic worry can cause organ damage over the long term and suppress the immune system, while also interfering with emotional regulation and clear thinking. Especially in the face of continuing parent conflict after separation, equal parenting time provides concrete assurance to the child of a home with each parent and thus each parent’s continuing availability. Thus, limiting parenting time in response to parent conflict is misguided, because it exposes the child to two sources of emotional insecurity.

1. I have been asked to review and comment upon the attached social sciences literature as to whether, in my professional opinion, these studies should be taken into account by any Court considering interim or final changes to a child's living arrangements in a contested adjudication.

2. In my professional opinion, the papers and reports listed in Exhibits "1" to “33” in my Affidavit are both relevant and substantively merit-worthy in understanding the issues regarding optimizing children's adjustment to family separation.

3. In my professional opinion, the journals and books in which these papers have been published and the professional background of the authors of these papers, substantiate that these papers are worthy of treatment as expert opinion on the matters spoken to and are relevant to a proper understanding of the issues that must be addressed in assessing the best interests of the children of separated families.

4. I am aware of and remain up-to-date concerning the other divorce research on parenting time and parent conflict that is not discussed below. Many of these other studies are reviewed and analyzed in the publications that are discussed below. One important source of reviews of the divorce literature is the book by L. Drozd, M. Saini & N. Olesen (Eds.), Parenting Plan Evaluations: Applied Research for the Family Court (2nd Ed.). New York, NY: Oxford University Press. This book contains chapters by most of the important researchers in the field, and I am familiar with all these chapters and the arguments the authors make therein.

5. Explanation of the current status of the social science literature.
A. Beneficial Outcomes Associated with Shared Parenting


Dr. Kelly was involved in one of the first modern longitudinal studies of divorce, and she has remained one of the most respected scholars and practitioners in the field. She argues that most of decisions about parenting time are based on cultural traditions and beliefs regarding postseparation parenting plans, visitation guidelines adopted within jurisdictions, unsubstantiated theory, and strongly held personal values and professional opinions, and have resulted since the 1960s in children spending most of their time with one residential parent and limited time with nonresident, or ‘‘visiting,’’ parents. She provides an overview of the large body of social science and child development research generated over the past three decades that shows that traditional visiting patterns and guidelines are, for the majority of children, outdated, unnecessarily rigid, and restrictive, and fail in both the short and long term to address their best interests.


Exhibits 2, 3, and 4 include the first comprehensive review of the empirical research on parenting time, and two updates. The authors explain the shortcomings of much of the early research that was based on poor measures, and that failed to discover that minimal parenting time harms father-child relationships. The authors review the more recent studies, which consistently show that more equal parenting time is related to more secure, long-term father-child relationships. Further, the authors make the connection to the health literature, which
shows that poor parent-child relationships predict serious stress-related health problems in later adulthood; thus, equal parenting time is a public health issue. Finally, the authors review the limited and contradictory evidence on shared parenting time and parent conflict and conclude that the evidence does not support reducing parenting time to protect children from parent conflict; rather, doing so likely exposes children to two sources of harm.


These two reviews, the first of 40 studies of child outcomes associated with shared parenting time and the second updated to 60 studies, are the most comprehensive and up-to-date, and come to the same conclusion that shared parenting time is consistently associated with benefits to children’s behavioral, emotional, physical, and academic well-being and relationships with parents and grandparents, independent of family income and parental conflict.


The authors studied shared physical custody in Sweden, the country in the world where the phenomenon is most prevalent. Using nationally representative survey data and controlling for interparental and parent–child relationship quality and parents’ income, the results showed that children sharing residence equally have lower likelihood of experiencing high levels of stress. The results can be interpreted as evidence for a positive effect of continuing everyday-like parental relationships after a family dissolution.


Using nationally (Sweden) representative survey data, the authors found no significant difference in self-esteem between children who lived equally with both parents, mostly with one parent, and those in nuclear families, whereas children in single care showed lower self-esteem compared with children in the other living arrangements. The difference was not explained by socioeconomic factors.

Using data from the Danish National Birth Cohort, the authors found that 11-year-olds who lived with one primary residential parent reported markedly higher stress levels (higher distress, negative emotional states, more psychosomatic symptoms, difficult school-related experiences, and less social support from peers) than children who reported they had shared parenting time.

B) Findings show that children who have equal parenting time with both parents have the best long-term outcomes in terms of lower distress about parent conflict, and higher emotional security with each of their parents.


Both studies found that children experience the most distress about parent conflict at moderate levels of parenting time with fathers (about 30% parenting time), and that at equal parenting time distress about parent conflict goes down, most likely because equal parenting time assures them of their fathers’ continued commitment to them even in the face of high levels of conflict with the mother.


Findings from over 270 young adults from divorced families and over 370 from intact families showed that those who had equal parenting time after divorce had equally good long-term relationships with their mothers and with their fathers as those from intact families (Figure 1).


Findings from 123 young adults from divorced families showed that those who had less than equal parenting time with mothers had worse long-term relationships with their mothers than those who had equal parenting time with both parents (Figure 1), and those who had equal parenting time had equally good long-term relationships with both parents as those from intact
families (Table 1).

Empirical findings show that equal parenting time benefits children in high parent conflict families.


This study of 266 young adults found that the more time children lived with their fathers after divorce, the better their current relationships were with their fathers, independent of parent conflict. Thus, more parenting time with fathers was beneficial in both high- and low-conflict families.


This is the first statistical meta-analysis of studies comparing joint physical custody with sole-mother custody and sole-father custody. Children in joint physical custody, regardless of the amount of parent conflict, had better general adjustment, family relationships, self-esteem, emotional and behavioral adjustment, and divorce-specific adjustment than children in sole-custody settings, and were not different from those in intact families.


This review of the literature 10 years later found that equal parenting time was associated with better outcomes for children when there is high parent conflict.


This review of studies of parent conflict and shared parenting time is the most comprehensive and up-to-date and finds that in families with high parent conflict, including legal conflict over parenting time, joint physical custody is the arrangement that best serves children’s interests.

C) **Distress about parent conflict, and emotional insecurity with either parent predict children’s serious long-term mental and physical health problems.** Thus, equal parenting time can serve as a buffer against these outcomes, because, as shown in B, equal parenting time is associated with both lower distress about parent conflict and higher emotional security with both parents.

This authoritative review of the extensive mental and physical health literature going back to the 1950s was published in one of the top psychology journals. The authors found that studies consistently showed that poor mother-child relationships and poor father-child relationships, as well as exposure to parent conflict carry long-term risk of stress-related mental health disorders, major chronic diseases, and early mortality.

D) **Children of divorce believe that equal parenting time is best for children.**


The authors assessed the perspectives of 820 college adults from divorced families on the issue of children’s living arrangements after divorce. 70% believed that living equal time with each parent was the best living arrangement for children of divorce, and 93% of those who had lived equal time with both parents believed it was best.


The authors review 10 qualitative studies from six countries reporting children’s self-reported experiences with shared parenting. Children identified the satisfaction that they felt in having a relationship with both parents. Contrary to detractors of shared custody regimes, the studies found that the most common response of children was about having equal parenting time with both parents, as one 12-year-old boy said, “I see both my mom and dad equally which makes them happy as well.”

E) **The belief among adult children of divorce that equal parenting time is best is rooted in the importance that all children attach to the amount of time that their parents spend with them, and to the meaning that spending time together has for children:** It is one of the things that tells them that they matter to their parents. Children who harbor doubts about how much they matter to their parents are at risk for depression, anxiety, aggression, and delinquency in adolescence.

Exhibit 2: Fabricius, Braver, Diaz & Velez (2010).

As part of a 10-year longitudinal study, the authors conducted open-ended interviews of 393
young adolescents about their relationships with each of their parents, including divorced mothers and fathers. One of the three main themes that emerged in nearly all children’s responses was their concern about the amount of Interaction they had with each parent, which refers to the amount of time the parent spends doing things with the child (e.g., "She does a lot with us." "Sometimes he’ll take me out to basketball." "Most of the time we really don’t spend time with each other.").


As part of the same longitudinal study, the authors found that the amount of time mothers and fathers spend with young adolescents predicts how much children feel they matter to their mothers and fathers.


As part of the same longitudinal study, the authors found that young adolescents who harbor doubts about how much they matter to their parents are at risk for depression, anxiety, aggression, and delinquency.

F) Public Consensus about Shared Parenting


Custody policies are value-laden. Their moral legitimacy comes from their connection to the prevailing, underlying cultural norms about gender roles and parenting; thus, they necessarily undergo fundamental historical change more so than many other laws. In line with the historical trend toward gender equality and involvement of fathers in child care, there is now consistent evidence of a strong public consensus that equal parenting time is best for children.

G) Policy Considerations

The author argues that we may not know how to properly individualize, tailor, or custom-fit parenting plans to achieve the best possible outcomes in each case. So, the costs involved in the futile pursuit of case-specific decisions come with few corresponding benefits. Instead, the vagueness and ambivalence lead to greater conflict. It is better to have a starting place that covers the majority of cases and families, with the ability to deviate when the fit is bad. The public strongly believes that shared parenting is that starting place and that any other position is biased. A shared parenting presumption would minimize the incentive for parent conflict most of all.


This review of the literature is organized into 16 arguments in support of an equal parental responsibility presumption in contested child custody cases.

**Exhibit 23:** Kruk, E. (2008). Child custody, access and parental responsibility: The search for a just and equitable standard. Unpublished manuscript commissioned by the Father Involvement Research Alliance (FIRA) based at the University of Guelph.

Unlike previous examinations of child custody and access in Canada, this paper proceeds from the perspective that the “best interests of the child” require supporting parents in the fulfillment of their parental responsibilities. This paper aims to shift the current rights-based discourse of Canadian feminist and fathers’ rights groups to a responsibility-based framework focused on children’s needs.


The author describes how data have been distorted in ways that steer policymakers, family court personnel, and parents off-course in regard to child custody decisions and policies.

**H) Children benefit from equal parenting time even when it is imposed by courts over one parent’s objections.**

**Exhibit 3:** Stanford Child Custody Study, reviewed and newly-analyzed in Fabricius, Sokol, Diaz & Braver (2012).

New analyses of this classic study revealed that very few parents initially agreed on joint residential custody, and the great majority had to accept it over their initial objections. About
half accepted it after using some level of court services (mediation, custody evaluation, trial, or judicial imposition). Nevertheless, those with joint residential custody had the most well-adjusted children years later.


In this study of 116 young adults whose parents divorced before they were 3 years old, when the parents disagreed about equal parenting time and the court nevertheless imposed equal parenting time, the children grew up to have as secure relationships with their mothers and with their fathers as those whose parents had agreed between themselves to equal parenting time.

**I) Evaluation of a Legal Presumption of Equal Parenting Time in Practice**


Lawmakers are often counseled to reject a presumption of equal parenting time, under the assumption that it would impose a one-size-fits-all rule and prevent judges from using discretion in individual cases to protect children. Fortunately, we have a test case to allow us to examine whether a presumption constrains judicial discretion and puts children at risk. Just such a law has been in operation in Arizona since 2013, and an initial state-wide evaluation of the law reveals that the state’s family law professionals evaluate the law positively in terms of children’s best interests and do not report that it constrains judicial discretion.

**J) Application to Infants and Toddlers.**


This study assessed 15-month-olds’ attachment security to mothers and fathers. Results showed that if infants were securely attached to only one parent, it was equally likely to be the mother or their father. Furthermore, secure attachment to either the mother or the father conferred similar benefits and protections against behavior problems at age 8. The authors point out that the
findings are consistent with other research that indicates that infants do not form only one primary attachment.

**Exhibit 28:** Umemura, T., Jocobvitz, D., Messina, S., & Hazen, N. (2013). Do toddlers prefer the primary caregiver or the parent with whom they feel more secure? The role of toddler emotion. *Infant Behavior & Development, 36*, 102–114.

This study assessed 12- to 15-month-olds’ attachment security to mothers and fathers. Results showed that if infants were securely attached to only one parent, it was equally likely to be the mother or their father. Results also showed that when infants were distressed at 24 months of age, they tended to seek out the mother, but only if she was the primary caregiver. If both parents provided substantial amounts of care infants were more likely to seek out either parent when distressed. Most importantly, children recovered from stress more quickly if the parent they chose to seek out was a parent they were securely attached to, regardless of whether it was the mother or father.

**Exhibit 25:** Fabricius & Suh (2017).

This study found long-term benefits to both parent-child relationships associated with overnights up to and including equal numbers of overnights at both parents’ homes when children were 2 years old, as well as when they were under 1 year of age. These benefits held after controlling for subsequent parenting time with fathers in childhood and adolescence, parent education, parent conflict up to 5 years after the separation, and children’s sex and age at separation. These findings stand in contrast to the 4 previous studies that are sometimes cited in opposition to overnight parenting time for infants. Fabricius and Suh explain why the findings of those previous studies are limited and contradictory, and why they do not provide a sound basis for policy about shared parenting for young children. Importantly, Professor Alan Sroufe, one of the leading attachment researchers in the world, had previously counselled against overnight parenting time for infants, but after reading the Fabricius & Suh (2017) paper said, as quoted on p. 82, “Your results would of course lead me to temper my conclusions” (personal communication, September 21, 2016).


This study found that the number of overnight stays in children aged 1 to 5 years was not harmful to mother-child attachment security.

This paper reviews the social science evidence and concludes that overnight parenting time for infants and young children should be encouraged. An international consensus statement signed by 110 developmental and clinical psychologists and family law professionals endorsed the conclusion. The list of endorsers and their professional accomplishments reflect the widespread acceptance among scientists of the consensus report's findings that favor shared parenting and overnighting for young children under normal circumstances.


This paper reviews the impact of the international consensus supporting overnight parenting time for infants and young children reported in Warshak (2014). Nearly four years after its publication, the conclusions and recommendations of the Warshak Consensus Report remain supported by science.


This article summarizes and critiques 11 empirical studies, and concludes that overall, overnighting was not associated with negative outcomes for infants and toddlers and was associated with positive outcomes for preschoolers.


Dr. Lamb is a recognized expert on attachment theory and child development. He examines the five studies of overnight parenting time for infants and toddlers, showing what they do and do not tell us about the ways in which children's adjustment can be promoted when their parents separate. Consistent with attachment theory, the evidence suggests that infants and toddlers benefit when parenting plans allow them to maintain meaningful and positive relationships with both of their parents.
Tab C
Joint Versus Sole Physical Custody: Children’s Outcomes Independent of Parent–Child Relationships, Income, and Conflict in 60 Studies

Linda Nielsen


To link to this article: https://doi.org/10.1080/10502556.2018.1454204

Published online: 11 Apr 2018.
Joint Versus Sole Physical Custody: Children’s Outcomes Independent of Parent–Child Relationships, Income, and Conflict in 60 Studies

Linda Nielsen
Department of Education, Wake Forest University, Winston-Salem, North Carolina, USA

ABSTRACT
Is joint physical custody (JPC) linked to any better or worse outcomes for children than sole physical custody (SPC)? How are these outcomes affected by family income, parental conflict, and the quality of parent–child relationships? Compared to SPC children in 60 studies, JPC children had better outcomes on all measures in 34 studies, equal outcomes on some and better outcomes on other measures in 14 studies, equal outcomes on all measures in 6 studies, and worse outcomes on 1 measure, but equal or better on all other measures in 6 studies. In 25 studies, independent of family income, JPC children had better outcomes on all measures in 18 studies, equal on some and better on other measures in 4 studies, equal outcomes in 1 study, and worse outcomes on 1 but equal or better on other measures in 2 studies. In 19 studies, independent of parental conflict, JPC children had better outcomes on all measures in 9 studies, equal to better in 5 studies, equal in 2 studies, and worse outcomes on 1 but better outcomes on the other measures in 3 studies. In the 9 studies, independent of the quality of parent–child relationships, JPC children had better outcomes on all measures in 5 studies, equal or better outcomes on other measures in 2 studies, and worse outcomes on 1 of the measures in 2 studies. Independent of income, conflict, or the quality of children’s relationships with their parents, JPC generally children had better outcomes on most or on all measures.

KEYWORDS
Joint physical custody; shared parenting; child custody; high-conflict divorce

Do children fare better in joint or in sole physical custody (SPC) families? This question assumes increasing importance as joint physical custody (JPC)—where children live at least one third of the time with each parent—has become more common in the United States and abroad. For example, in Wisconsin JPC increased from 5% in 1986 to more than 35% in 2012 (Meyer, Cancian, & Cook, 2017). As far back as 2008, 46% of the parents in Washington State (George, 2008) and 30% in Arizona (Venohr & Kaunelis, 2008) had JPC arrangements. JPC has risen to nearly 50% in Sweden (Bergstrom et al., 2013), 30% in Norway (Kitterod & Wiik, 2017) and the Netherlands...
(Poortman & Gaalen, 2017), 37% in Belgium (Vanassche, Soderman, DeClerck, & Matthijs, 2017), 26% in Quebec and 40% in British Columbia (Bala et al., 2017), and 40% in the Catalonia region of Spain (Flaguer, 2017). At least 20 states in the United States are considering revising their custody laws to be more supportive of JPC (Chandler, 2017).

Despite its growing popularity, JPC continues to generate controversy in regard to two major issues: Are children’s outcomes better or worse in JPC than SPC families? If JPC children have better outcomes, is this largely because their parents began with more money, more education, less conflict, better parenting skills, or higher quality relationships with their children than SPC parents?

Income, conflict, and parenting factors—specifically the quality of parent–child relationships and quality of the parenting skills—are the three factors that are most frequently proffered as the reasons why JPC children probably have the better outcomes (e.g., Smyth, McIntosh, Emery, & Howarth, 2016). From this perspective, children’s well-being largely rests not on JPC but on parenting, income, and conflict (PIC). In that vein, we might envision this article as a “PIC axe” that will dig up and root out many unfounded assumptions about the roles that parenting, income, and conflict play in explaining the better outcomes for JPC children.

The most comprehensive analyses of the quantitative studies comparing JPC and SPC children’s outcomes summarized all 40 studies that existed at the time the analyses were prepared (Nielsen, 2011, 2014a). This article first updates these previous reviews with 20 additional studies. Then the article addresses the PIC question: Does the parenting quality, income, and conflict between the parents change the outcomes for children in JPC and SPC families? Does PIC trump JPC?

**Previous analyses of JPC and SPC children’s outcomes**

There are 10 qualitative studies that have included 466 children from six different countries who were interviewed about their experiences and feelings about living in JPC or SPC families (Birnbaum & Saini, 2015). The authors concluded that JPC children’s experiences were “mixed and varied” and were related to the quality of their relationships with both parents and the “flexibility/rigidity” of the parenting arrangement. As is always the case with qualitative studies, the weakness of these 10 studies is that there were no objective, quantitative measures, which is why the 60 quantitative studies offer more reliable data.

There are presently only two meta-analyses comparing children’s outcomes in JPC and SPC families (Baude, Pearson, & Drapeau, 2016; Bauserman, 2002). Baude et al. (2016) only assessed 16 of the 55 studies published in English in academic journals that were available at the time of their analysis. In all 16 studies JPC was specifically defined as living at least
30% time with each parent, although in most studies the children were living more equally with both parents. JPC children had better outcomes than SPC children across all measures of well-being. Similarly, in a much older meta-analysis of 21 studies published between 1988 and 1999, JPC children had the better outcomes on all measures, except academic achievement where JPC and SPC children were not significantly different (Bauserman, 2002). The JPC advantage held even after controlling for levels of parental conflict. Because these studies dated back as far as 30 years to a time when JPC was extremely rare, JPC was defined as living at least 25% time with each parent. Not all of the studies were published articles; some were dissertations. Bauserman (2002) addressed this potential weakness by analyzing the data from published articles and dissertations separately. He found no significant difference in effect sizes.

In both meta-analyses the differences between JPC and SPC children’s well-being were statistically significant, but the effect sizes were small. Bauserman (2002) attributed this to the small size of the samples. Baude et al. (2016) attributed small effect sizes to the differences in the samples. For example, effect sizes were much larger for JPC children when the samples came from schools than when samples came from clinical populations of families seeking help. Baude et al. also emphasized that effect sizes were considerably larger for JPC children who lived more than 40% time with each parent than for JPC children who lived 30% to 39% with each parent.

In addition to these two meta-analyses, several articles have summarized a small portion of the studies comparing JPC and SPC children’s outcomes. For example, when Fehlberg, Smyth, Maclean, and Roberts, (2011) and Trinder (2010) wrote their summaries, there were 39 studies comparing JPC and SPC children’s outcomes (Nielsen, 2011). Fehlberg and Trinder included only 5 of the 39 studies. Similarly in “detailing the current body of literature” (p. 156) McIntosh and Smyth (2012) included only 5 of the 40 studies published in peer-reviewed journals (Nielsen, 2013). More recently, Smyth et al. (2016) included only 17 of the 42 studies available at that time in peer-reviewed journals, stating that they had “undertaken a comprehensive integrative review of studies of postseparation shared-time arrangements” (p. 123).

Of further concern, some of these research summaries have misreported the findings from several of the most prominent studies. For example, Smyth and his co-authors (2016) cited Buchanan et al.’s (1996) study as finding that JPC “works badly for children exposed to bitter and chronic tension” (p. 121). This is not correct. Buchanan and her colleagues concluded: “We did not find that dual residence [JPC] adolescents were especially prone to adjustment difficulties under situations of high interparental conflict” (p. 257). Similarly, Smyth et al. (2016) cited Bauserman’s (2002) meta-analysis as finding that JPC “may prolong or intensify children’s exposure to parental
conflict, neglect, violence, abuse or psychopathology” (p. 120). This is not correct. Bauserman (2002) reached exactly the opposite conclusion: “The research reviewed here does not support claims by critics of joint custody that joint custody children are likely to be exposed to more conflict or to be at greater risk of adjustment problems due to having to adjust to two households or feeling torn between parents” (p. 99). Based on their summary of 17 of the 42 available peer-reviewed studies, Smyth et al. (2016) dismissed JPC studies as a “quagmire.” “Put simply, the international literature looks to comprise—at best—a disparate collection of partially overlapping investigations with little convergence among the various lines of inquiry” (p. 135).

One of Smyth’s coauthors, Emery, has gone further in his representations of JPC research to the media and in seminars for family court and mental health professionals. Following the Florida governor’s veto of a shared parenting bill, Emery was quoted in the Florida Sun as saying that JPC studies “are based on small samples” and that “only 10%” of children live in these families.” “The problems with joint custody outweigh the benefits. Children suffer in joint custody arrangements.” Their lives “resemble that of traveling salesmen.” “The classwork, clothing, cleats or clarinet are always at the other house. The children often live under two sets of rules, sometimes with dire consequences” (Presson, 2016). When warning against the risks of JPC in his book, Emery (2016a) reiterated that there is “only a small body of reasonable studies” (p. 72) on how children fare in JPC and that “conflict is more damaging to children than having only a limited relationship with your other parent” (p. 51). In seminars he has announced that there is a recent study showing that “kids in JPC had worse psychosocial outcomes” (Emery & Pruett, 2015), and that in this “nice new study of different custody arrangements predicting 9 years into the future,” having a highly involved father when conflict between the parents was high led to worse outcomes in this 9-year longitudinal study (Emery, 2016b, slide 133). This is incorrect. In the study he was citing (Modecki, Hagan, Sandler, & Wolchik, 2015), there were no JPC children. All children were in SPC families living with their mother and “high involvement” sometimes included letters and phone calls, with no face-to-face contact.

Misreporting, exaggerating, distorting, or omitting data in ways that support only one point of view has been referred to by Emery et al. (2016) as “scholar advocacy” and by Nielsen (2014b) as “woozling.” As Emery et al. (2016) put it, “We must be careful about leaving the door wide open for scholar advocates to promote false or misleading claims” (p. 137). “Making strong claims that go beyond the empirical evidence is a violation of perhaps the most basic rule of science: making consistent efforts to maintain objectivity” (p. 135). Especially when purporting to be presenting summaries of the research, or when making statements to the media or offering advice to practitioners that are supposedly based on summaries of the existing research, responsible scholars report the data as accurately as possible, include the results of all studies, and make clear,
especially to the media, when they are expressing a personal opinion that is not supported by the existing body of research—or is supported by only a limited number of studies.

To address these concerns about “woozling” data and “scholar advocacy,” this article includes all 60 studies that have compared JPC and SPC children’s outcomes and has noted those studies that were commissioned and published by government agencies rather than published in academic journals.

**Selection of the 60 studies**

To identify relevant studies, three data bases were searched—PsycINFO, Social Science Citation Index, and ProQuest Social Science. The key search words were joint physical custody, shared parenting, shared care, custody and income, parenting plans and income, and income and children’s well-being. Eight journals likely to publish articles on these topics were also searched at each journal’s website: *Journal of Family Psychology, Child Development, Journal of Marriage and Family, Child Custody, Family Court Review, Family Relations, Journal of Divorce & Remarriage, and Psychology, Public Policy, and Law*. Articles were selected on the basis of whether they had statistically analyzed quantitative data that addressed the questions presented at the outset of this article. Sixty studies were identified and all were included, thus capturing all data that have been published in English in academic journals or in government-commissioned reports. As noted earlier, excluding any of these studies could potentially bias the analysis.

**Overview of the studies**

As Table 1 indicates, in the 60 studies children ranged in age from infants to young adults, with sample sizes ranging from 21 to 51,802. Data came from eight countries and from different sources: court records, mediation and counseling centers, public schools, convenience samples, and college courses. All studies were published in peer-reviewed academic journals, with the exception of seven studies that were commissioned and published by the Australian government (designated by “gov”). Even though these seven studies did not have the benefit of blind peer review as do articles in academic journals, they are included because they are based on large, nationally representative samples and because they were conducted at research institutes.

Data from the 60 studies are grouped into five broad categories of child well-being similar to the categories used by Bauserman (2002) and Baude et al. (2016) in their meta-analyses: (1) academic or cognitive outcomes, which include grades, attentiveness in class, and tests of cognitive development; (2) emotional or psychological outcomes, which include feeling depressed, anxious, or dissatisfied with their lives or having low self-esteem;
Table 1. Outcomes for Children in Joint Physical Custody (JPC) and Sole Physical Custody (SPC) Families in 60 Studies

<table>
<thead>
<tr>
<th>No. children</th>
<th>Factors included in study</th>
<th>JPC</th>
<th>SPC</th>
<th>Ages</th>
<th>Academic &amp; cognitive development</th>
<th>Depression, anxiety overall satisfaction, self-esteem</th>
<th>Peer behavior, substance use, hyperactivity</th>
<th>Health &amp; psychosomatic problems</th>
<th>Parent–child or other family relationships</th>
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<tr>
<td>JPC better on all measures than SPC: 34 studies</td>
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<tr>
<td>Buchanan</td>
<td>= C = $</td>
<td>51</td>
<td>168</td>
<td>13–16</td>
<td>Better</td>
<td>Better</td>
<td>Better</td>
<td>Better</td>
<td>Better</td>
</tr>
<tr>
<td>Brotsky</td>
<td>C+</td>
<td>45</td>
<td>10</td>
<td>1–10</td>
<td>Better</td>
<td>Better</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Breivik</td>
<td>C $*</td>
<td>41</td>
<td>483</td>
<td>12–16</td>
<td>Better</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Barumazadeh</td>
<td>C * $</td>
<td>91</td>
<td>328</td>
<td>11–12</td>
<td>Better</td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>Bergstrom et al. (2014)</td>
<td>= $*</td>
<td>129</td>
<td>176</td>
<td>4–18</td>
<td>Better</td>
<td>Better</td>
<td></td>
<td></td>
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<tr>
<td>Bergstrom et al. (2018)</td>
<td>$*</td>
<td>136</td>
<td>151</td>
<td>3–5</td>
<td>Better</td>
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<tr>
<td>Bjarnason</td>
<td>$</td>
<td>2,206</td>
<td>25,578</td>
<td>11–15</td>
<td>Better life satisfaction</td>
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<tr>
<td>Bjarnason</td>
<td>$</td>
<td>2,206</td>
<td>25,578</td>
<td>11–15</td>
<td>Better</td>
<td></td>
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<tr>
<td>Carlsund et al. (2012)</td>
<td>$*</td>
<td>270</td>
<td>801</td>
<td>11–15</td>
<td>Better</td>
<td></td>
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<tr>
<td>Cashmore (gov)</td>
<td>= C+ $</td>
<td>84</td>
<td>473</td>
<td>0–17</td>
<td>Better</td>
<td>Better</td>
<td>Better</td>
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<tr>
<td>Cashmore (gov)</td>
<td>= C+ $</td>
<td>90</td>
<td>411</td>
<td>0–17</td>
<td>Better</td>
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<tr>
<td>Campana</td>
<td>$</td>
<td>207</td>
<td>272</td>
<td>10–18</td>
<td>Better</td>
<td>Better</td>
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<tr>
<td>Dissing</td>
<td>$*</td>
<td>3,222</td>
<td>3,032</td>
<td>11–12</td>
<td>Better</td>
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(Continued)
<table>
<thead>
<tr>
<th>Factors included in study</th>
<th>No. children</th>
<th>Academic &amp; cognitive development</th>
<th>Depression, anxiety, overall satisfaction, self-esteem</th>
<th>Peer behavior, substance use, hyperactivity</th>
<th>Health &amp; psychosomatic problems</th>
<th>Parent–child or other family relationships</th>
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<tbody>
<tr>
<td>Fabricius et al. (2012)</td>
<td>C*</td>
<td>152 871 College</td>
<td>Better</td>
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<tr>
<td>Fabricius (2003)</td>
<td>C $</td>
<td>80 739 College</td>
<td>Better</td>
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<tr>
<td>Fabricius &amp; Suh (2012)</td>
<td>C &gt; $*</td>
<td>391 543 mom, 111 dad</td>
<td>Better</td>
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<tr>
<td>Fransson et al. (2016)</td>
<td>C &gt; $*</td>
<td>391 543 mom, 111 dad</td>
<td>Better</td>
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<tr>
<td>Hagquest</td>
<td>$* P</td>
<td>17,754 30,400 College</td>
<td>Better</td>
<td></td>
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<tr>
<td>Irving</td>
<td>= C = $</td>
<td>108 294 College, 1–11</td>
<td>Better</td>
<td></td>
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<tr>
<td>Jablonska</td>
<td>= $</td>
<td>5 17 College</td>
<td>Better</td>
<td>Better behavior, equal drinking</td>
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<tr>
<td>Janning</td>
<td>= $</td>
<td>5 17 College</td>
<td>Better</td>
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<tr>
<td>Jappens</td>
<td>176 707 College</td>
<td>10–25</td>
<td>Better</td>
<td></td>
<td></td>
<td>Better with grandparents</td>
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<tr>
<td>Luftman</td>
<td>$* P</td>
<td>1,573 1,584 15–16</td>
<td>Better</td>
<td></td>
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<tr>
<td>Lee</td>
<td>&gt; C * = $</td>
<td>20 39 6–12</td>
<td>Better</td>
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<tr>
<td>Nilsen</td>
<td>&gt; $*</td>
<td>398 1,223 16–19</td>
<td>Better</td>
<td></td>
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<tr>
<td>Pearson</td>
<td>C &gt; $</td>
<td>62 459 9–12</td>
<td>Better</td>
<td></td>
<td></td>
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<tr>
<td>Shiller</td>
<td>= C</td>
<td>20 20 6–11</td>
<td>Better</td>
<td></td>
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<tr>
<td>Turunen</td>
<td>C $* P</td>
<td>387 758 10–18</td>
<td>Better</td>
<td></td>
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<tr>
<td>Turunen</td>
<td>&lt; C $</td>
<td>240 567 10–18</td>
<td>Better</td>
<td></td>
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<tr>
<td>Wadsby</td>
<td>&gt; $</td>
<td>324 736 17–18</td>
<td>Better</td>
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<tr>
<td>Study</td>
<td>No. children</td>
<td>Factors included in study</td>
<td>Academic &amp; cognitive development</td>
<td>Depression, anxiety</td>
<td>Overall satisfaction, self-esteem</td>
<td>Peer behavior, substance use, hyperactivity</td>
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<tr>
<td>Westphal C</td>
<td>1,076</td>
<td>2,767</td>
<td>10–18</td>
<td>Better</td>
<td>Better</td>
<td>Equal better</td>
</tr>
<tr>
<td>Bergstrom et al. (2013)</td>
<td>17,350</td>
<td>43,452</td>
<td>12–15</td>
<td>Equal</td>
<td>Better</td>
<td>Better</td>
</tr>
<tr>
<td>Drapeau</td>
<td>37</td>
<td>75</td>
<td>8–12</td>
<td>Equal to better</td>
<td>Equal</td>
<td>Equal</td>
</tr>
<tr>
<td>Donnelly = C</td>
<td>12</td>
<td>88</td>
<td>6–18</td>
<td>Equal</td>
<td>Better</td>
<td>Equal</td>
</tr>
<tr>
<td>Fransson ≠</td>
<td>497</td>
<td>854</td>
<td>10–18</td>
<td>$\neq$</td>
<td>497</td>
<td>854</td>
</tr>
<tr>
<td>Havermans (gov) = C</td>
<td>947</td>
<td>3,513</td>
<td>Mums say equal, Dads say better</td>
<td>Mums say equal, Dads say better</td>
<td>Mums say better</td>
<td>Mums say better</td>
</tr>
<tr>
<td>Luepnitz &lt; C =</td>
<td>22</td>
<td>30</td>
<td>8–13</td>
<td>Equal</td>
<td>Better</td>
<td>Better</td>
</tr>
<tr>
<td>Melli &gt; C +</td>
<td>597</td>
<td>595</td>
<td>1–16</td>
<td>Equal</td>
<td>Better</td>
<td>Better</td>
</tr>
<tr>
<td>Neoh</td>
<td>27</td>
<td>40</td>
<td>8–15</td>
<td>Better</td>
<td>Better</td>
<td>Equal</td>
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</table>

**Note:** Continued
<table>
<thead>
<tr>
<th>Factors included in study</th>
<th>No. children</th>
<th>Ages</th>
<th>Academic &amp; cognitive development</th>
<th>Depression, anxiety overall satisfaction, self-esteem</th>
<th>Peer behavior, substance use, hyperactivity</th>
<th>Health &amp; psychosomatic problems</th>
<th>Parent–child or other family relationships</th>
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<tr>
<td>Qu &amp; Weston (2010) (gov)</td>
<td>= C $</td>
<td>1,000 4,320</td>
<td>1–17</td>
<td>Moms say equal, dads say better</td>
<td>Better</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Qu et al. (2014) (gov)</td>
<td>= C $</td>
<td>720 2,354</td>
<td>4–17</td>
<td>Equal</td>
<td>Equal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spruijt</td>
<td>&lt; C = $</td>
<td>135 400</td>
<td>10–16</td>
<td>Equal</td>
<td>Equal</td>
<td>Better dad and stepmom</td>
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<tr>
<td>Bastaits et al. (2014)</td>
<td>&gt; $ P</td>
<td>139 227</td>
<td></td>
<td>Equal</td>
<td></td>
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<tr>
<td>Cashmore</td>
<td></td>
<td>26 110</td>
<td>Teenage</td>
<td>Equal</td>
<td></td>
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<tr>
<td>Faust</td>
<td>C+</td>
<td>34 35</td>
<td>2–19</td>
<td>Equal</td>
<td>Equal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Johnston</td>
<td>= C + = $</td>
<td>28 69</td>
<td>9–15</td>
<td>Equal</td>
<td>Equal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kline</td>
<td>= C+ &gt; $</td>
<td>35 65</td>
<td>4–12</td>
<td>Equal</td>
<td>Equal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pearson</td>
<td>C &gt; $</td>
<td>9 83</td>
<td>9–12</td>
<td>Equal</td>
<td>Equal</td>
<td></td>
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<tr>
<td>JPC worse outcome on 1 measure: 6 studies</td>
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<td>Lodge (gov)</td>
<td>= C &gt; $</td>
<td>105 398 mom, 120 dad</td>
<td>12–18</td>
<td>Equal</td>
<td>Better for girls, worse for boys</td>
<td></td>
<td></td>
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<tr>
<td>Sandler</td>
<td>&lt; C + P</td>
<td>67 74</td>
<td>12–14</td>
<td>Mixed</td>
<td></td>
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Table 1. (Continued).
Table 1. (Continued).

<table>
<thead>
<tr>
<th>Factors included in study</th>
<th>No. children</th>
<th>Ages</th>
<th>Academic &amp; cognitive development</th>
<th>Depression, anxiety overall satisfaction, self-esteem</th>
<th>Peer behavior, substance use, hyperactivity</th>
<th>Health &amp; psychosomatic problems</th>
<th>Parent–child or other family relationships</th>
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<tbody>
<tr>
<td>Sodermans</td>
<td>C $* P</td>
<td>104</td>
<td>14–21</td>
<td>Mixed for depression, equal for life satisfaction</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>330 mom, 70 dad</td>
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<tr>
<td>Vanassche = C + &gt;$ P</td>
<td>395</td>
<td>1,045</td>
<td>12–19</td>
<td>Worse for girls, better for boys</td>
<td></td>
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<tr>
<td>McIntosh (gov) &lt; C* &gt; $ *</td>
<td>Ages2–3: 20</td>
<td>Ages 2–3: 232</td>
<td>2–5</td>
<td>Mixed for toddlers, equal for preschoolers</td>
<td>Equal to better for all ages</td>
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<tr>
<td></td>
<td>Ages 4–5: 60</td>
<td>Ages 4–5: 870</td>
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<tr>
<td>Tomello &gt; C &gt; $</td>
<td>174</td>
<td>1,880</td>
<td>0–5</td>
<td>Equal</td>
<td>Better social development</td>
<td>Equal</td>
<td>Mixed infant attachment</td>
</tr>
</tbody>
</table>

Note: Mixed differences between JPC and SPC outcomes depended on factors like gender, personality, or age. C = conflict links to children’s well-being were included in the study; C * = JPC and SPC parental conflict was statistically factored into analysis; C + = researchers specified that very high-conflict parents in litigation over custody were in this study; + C = no significant differences in JPC and SPC conflict; < C = JPC parents had significantly less conflict than SPC parents; > C = JPC parents had more conflict than SPC conflicts; $ = income links to children’s well-being were included in the study; $ = = no statistically significant income differences in JPC and SPC parents; $ ≠ = incomes not equal, JPC parents had higher incomes than SPC parents; $ * = income differences were factored into statistical analysis before comparing outcomes; P = parent–child relationship quality was factored in before comparing outcomes; gov = government-published study (Australia), not peer-reviewed academic journal.
(3) behavioral problems, which include misbehaving at home or school, hyperactivity, and teenage drug, nicotine, or alcohol use; (4) overall physical health or stress-related physical problems (e.g., sleep or digestive problems, headaches); and (5) the quality of parent–child relationships, which includes how well they communicate with and how close they feel to their parents.

The second column in Table 1 provides much more detailed information about the many different ways that the researchers treated family income, parental conflict, and quality of parent–child relationships in their study. This level of detail had to be provided by using a number of different symbols in the table, as it was not possible to include all of this information in the body of this article.

In 44 of the 60 studies, the researchers considered the quality of parent–child relationships, family income, or parental conflict (the PIC factors) in ways that allowed the impact of the custody arrangement to be assessed separately. This was accomplished in one of two ways. The first was to include the information about JPC and SPC parents’ income, conflict, or the quality of parent–child relationships in the statistical analysis. This resulted in statistical models where the effects of income, conflict, or relationship quality could be assessed separately from the custody arrangement. These studies are designated with an asterisk P* for parent–child relationship quality, $* for income, and C* for conflict between the parents. The studies that included more than one of the three factors in the statistical analysis merit special attention because they are ruling out parenting quality, income, and conflict as probable explanations for children’s outcomes. The second approach was to compare the outcomes in samples where JPC and SPC parents’ incomes or levels of conflict or parent–child relationships were not significantly different from one another. These studies are marked = $ or = C, meaning equal income or equal conflict.

Other information about income and conflict is provided in the second column of Table 1 and designated with various symbols for people who want to know more about each individual study. Studies where JPC parents had significantly higher incomes than SPC parents are marked > $ for greater income, versus = $ for equal incomes between the two groups. In regard to conflict, when the researchers specifically mentioned that there were parents in the study who presently were, or who formerly had been, in litigation over custody, the study is marked C+, meaning high conflict plus litigation. When JPC parents had significantly less conflict than SPC parents, the study is marked < C. A number of studies explored the ways income, conflict, or the quality of parent–child relationships affect children’s well-being in JPC and in SPC families, but without comparing the two custody arrangements to one another. These studies are marked with $ (money), C (conflict), or P (parent–child relationships).
Positive outcomes for JPC children

As Table 1 illustrates, in 34 of the 60 studies JPC children had better outcomes on all measures of well-being than SPC children. In 14 studies JPC children had better outcomes on some measures and equal outcomes on others. In six studies JPC and SPC children were not significantly different on any measure in the study. In six other studies, JPC children had worse outcomes on one of the measures, but equal or better outcomes on all other measures. In none of the 60 studies were the outcomes worse for JPC children on all measures of well-being.

JPC and SPC children were the most alike (had the most “equal” outcomes) in regard to academic achievement or cognitive skills. In seven studies they were equal and in three studies JPC children had the better outcomes. This is consistent with Bauserman’s (2002) meta-analysis, where there were no significant differences in academic achievement between JPC and SPC children. This suggests that the custody arrangement might have the least impact on children’s school performance or on their cognitive development compared to other areas of their lives.

The biggest advantage for JPC children was better family relationships. In 22 of 23 studies that assessed family bonds, JPC children had closer, more communicative relationships with both parents. The one exception is discussed in the section on negative JPC outcomes (Sandler, Wheeler, & Braver, 2013). It is worth noting that the largest of these studies compared 2,206 JPC and 25,578 adolescents who participated in the World Health Organization Health Behavior Survey from 36 different countries (Bjarnason & Arnarrson, 2011). Similarly, in all four of the grandparent studies, JPC children had the closer relationships (Jappens & Bavel, 2016; Kaspiew et al., 2009; Lodge & Alexander, 2010; Westphal, Poortman, & Van Der Lippe, 2015). These findings matter because children who have close relationships with their grandparents after their parents separate are better adjusted emotionally and behaviorally than those who do not (Jappens, 2018).

The next greatest advantage for JPC children was better physical and mental health. In 13 of 15 studies, JPC children were physically healthier and had fewer psychosomatic, stress-related physical problems (insomnia, intestinal problems, headaches, etc.). In 24 of the 40 studies that assessed emotional health (depression, life satisfaction, anxiety, and self-esteem), JPC children had the better outcomes and in 12 studies there were no significant differences between the two groups. In 6 of the 40 studies of emotional well-being, the results were “mixed” depending on the child’s gender and which measure of emotional well-being was being assessed. These six studies are described in the next section.

JPC children were also better adjusted than SPC children during adolescence on a number of measures. Twenty-four studies assessed multiple dimensions of adolescent behavior: drinking, smoking, using drugs, being...
aggressive, bullying, committing delinquent acts, and getting along poorly with peers. In 21 of the 24 studies, JPC teenagers were more well-adjusted than SPC teenagers. In three studies the differences between JPC and SPC teenagers depended on gender or on which one of the several measures was being assessed.

**Representative studies**

Four of the 40 studies that assessed emotional or behavioral well-being are briefly presented here to illustrate the wide range of behaviors that the researchers explored. In a nationally representative sample of Swedish children aged 3 to 5, the 136 JPC children were better adjusted than the 151 SPC children, as assessed by both parents on the Strengths and Difficulties Questionnaire (SDQ) and by the preschool teachers’ answers to a separate questionnaire. The SDQ scale assesses a wide range of behavior including hyperactivity, conduct problems, inattentiveness, symptoms of stress or depression, and problems getting along with peers. The better results for the JPC children held even after controlling for parents’ educational levels and even after separating the children into three age groups: 3-year-olds, 4-year-olds, and 5-year-olds (Bergstrom et al., 2018).

In another Swedish study, the 17,350 JPC adolescents rated themselves higher than the 43,452 SPC adolescents on 7 of the 10 subscales of the 52-item Kidscreen questionnaire developed by researchers from 13 European countries to assess children’s well-being. JPC children rated themselves as better adjusted in regard to physical health, psychological well-being, moods and emotions, satisfaction with material resources, relationships with parents, peer relationships, social acceptance, and bullying. JPC and SPC teenagers were equal on the other three subscales: school satisfaction, self-esteem, and autonomy (Bergstrom et al., 2013).

In regard to school, in Belgium 224 JPC adolescents were more engaged in their academic work and better behaved at school than the 476 SPC adolescents, and parents’ educational levels had no impact on these results (Havermans, Sodermans, & Matthijs, 2017). The most engaged and best behaved children were those who had good relationships with their parents—especially with their fathers. Given the claim that children are stressed by having to move between homes, it is worth noting that JPC children who moved “frequently” during the week between their parents’ homes had outcomes as good as JPC children who spent one whole week with each parent on an alternating week schedule.

We might wonder whether SPC children would have outcomes similar to JPC children if their mother remarried, but this was not the case in a Norwegian study that tested this hypothesis. The 212 SPC children whose mothers had remarried and the 1,011 SPC children whose mothers had not
remarried both had more behavioral and emotional problems than the 398 JPC children (Nilesen, Breivik, Wold, & Boe, 2017).

Overall then, the most prevalent and most consistent benefit for JPC children is having better relationships with their parents. This is also the most important advantage, as it is firmly established in the child development research that close parent–child relationships bestow a wide range of benefits on children—and that the quality of their relationships is as strongly, or even more strongly, linked to children’s well-being than parents’ incomes or educational levels (Lamb, 2010; McLanahan & Sandefur, 1994). Based on the 60 studies, JPC children are not more stressed and distressed than SPC children and are not in dire circumstances when their parents have two different sets of rules.

**Negative outcomes for JPC children**

As previously mentioned, in 6 of the 60 studies JPC children had worse outcomes than SPC children on one of the measures of well-being, but equal or better outcomes on the other measures. The earliest study included 105 JPC and 398 SPC children between ages 12 and 18 living with their mother in Australia (Lodge & Alexander, 2010). The 50 JPC boys were more likely than the SPC boys to report having trouble “getting along well” with their peers. In contrast, the 55 JPC girls reported getting along better with peers than the SPC girls. Specifically 16% of JPC boys versus 8% of SPC boys reported only getting along well with peers “sometimes.” In contrast, only 4% of JPC girls versus 16% of SPC girls reported only getting along well “sometimes.” Other than this one negative finding for JPC boys, JPC teenagers reported having better relationships with both parents, stepparents, and grandparents than SPC teenagers. Interestingly, in JPC families only 2% of children reported not feeling close to their father, whereas almost 9% reported not feeling close to their mother. In stark contrast, in SPC families 35% of children reported not feeling close to their father and 3% reported not feeling close to their mother.

In the second Australian study, 19 to 22 toddlers (the sample size differed on various measures) under the age of 3 had worse outcomes than 191 SPC toddlers on two of the six measures of well-being (McIntosh, Smyth, Kelaher, & Wells, 2010). Compared to SPC toddlers, JPC toddlers scored lower on three questions about “persistence at tasks” and on three questions about how often they “looked at” their mother or tried to “get her attention.” The researchers interpreted the mothers’ answers to these six questions to mean that JPC toddlers were less securely attached to their mother and less persistent at tasks than SPC toddlers. The JPC toddlers also had lower scores on a validated “problem behavior” scale (i.e., sometimes refusing to eat, clinging to mother when she tried to leave). McIntosh et al. (2010) interpreted this as a negative outcome of JPC. In fact, however, JPC toddlers’ scores were well within the
normal range and were not significantly different from the scores of 50% of the toddlers in the general population. On the four validated measures of well-being, JPC and SPC children were not significantly different.

The third study to report some negative outcomes for JPC children compared adolescents from 545 mother custody, 92 father custody, and 385 JPC families in Belgium (Vanassche, Sodermans, Matthijs, & Swicegood, 2013). Overall JPC and SPC teenagers had similar outcomes on all measures—with two exceptions. First, those teenagers who had bad relationships with their fathers were more depressed and more dissatisfied in JPC than in SPC. Second, in those families where conflict remained high 8 years after the divorce, girls were more depressed in JPC than in SPC. In contrast, boys in these high-conflict families were less depressed in JPC than in SPC. Still, the quality of parent–child relationships was more closely linked to the outcomes than was the custody arrangement or the conflict.

In the fourth study, also from Belgium, there were 400 adolescents in SPC (70 were living with their fathers) and 104 in JPC (Sodermans & Matthijs, 2014). No differences between JPC and SPC children were found on the three measures—feelings of mastery (feeling “in control” of their lives), depression, and life satisfaction—until the quality of the parent–child relationship and the child’s personality traits were included in the statistical analysis. Although some might expect that teenagers who were very “neurotic” (anxious, tense, depressed, sad) would not adjust as well living in two homes, this was not the case. Scores on neuroticism, openness (intelligent, curious, and creative), and agreeableness (well-behaved, compliant, and trusting) were not linked to any outcomes. In contrast, teenagers who scored high on conscientiousness (task oriented, planful, rule oriented) felt more depressed and less in control of their lives in JPC than in SPC, although they were no less “satisfied” with their lives in JPC than in SPC. On the other hand, adolescents who scored low on conscientiousness felt more in control and less depressed in JPC than in SPC. As for extraversion (very social, outgoing, active), those who scored very high felt less in control of their lives in JPC than in SPC, but they were no more depressed and no more dissatisfied than the very extraverted children in SPC. Those who scored low on extraversion, however, felt more in control in JPC than in SPC. Again though, personality traits mattered less than the quality of the parent–child relationships and the conflict. “We observe very few changes in the effect sizes of the control variable by entering the personality variables” (Sodermans & Matthijs, 2014, p. 350).

The fifth study was conducted in Arizona with 74 SPC and 67 JPC adolescents in high-conflict families (Sandler et al., 2013). All JPC and SPC parents had been designated as high in conflict by a judge and all were in litigation over custody issues. Those adolescents who gave one of their parents low ratings for “positive” parenting (e.g., making the children feel they “mattered,” setting and enforcing rules) had more behavioral and emotional problems in JPC than in
SPC. When they gave both parents good ratings, however, JPC children had fewer emotional and behavioral problems than SPC children.

The sixth study stands apart from the other 60 studies in several ways that make it difficult to generalize or to interpret the data (Tornello et al., 2013). First, all of these children (ages 0–5) were living in impoverished, inner-city, minority families where only 20% of the parents had been married or cohabited and where mothers’ and fathers’ rates of incarceration, substance abuse, addiction, violence, and mental health problems were extremely high. Second, one third of the children lived primarily with their fathers, yet all of their scores on the measure of secure attachment to the mother were interpreted as if these children were living with the mother and “overnighting” with the father. The 51 1-year-olds who spent more than 50 nights a year with their father or their mother (for the 26 babies who were living with their father) had more insecure attachment scores than the 583 1-year-olds who only saw their father during the day or spent fewer than 50 nights a year with him. The researchers concluded that “frequent” overnighthing—which sometimes reached JPC levels—had a negative impact on babies’ attachments to their mothers. The other five measures of child adjustment were not linked to how much overnight time the babies spent with their nonresidential parent. The one exception was that children who were in JPC as 3-year-olds were better behaved than the SPC children as 5-year-olds.

In these six studies, JPC was less beneficial in some regards than SPC for certain groups of children: adolescents who did not have a good relationships with both parents, teenage girls whose parents had high, ongoing conflict 8 years after separating, adolescents who were highly conscientious or extremely extraverted, and babies under the age of 2 living with impoverished, single parents. With these exceptions, the 60 studies report generally better outcomes for children in JPC versus SPC families. The question then becomes this: What might account for their better outcomes? We thus return to the issue of whether JPC trumps PIC.

The P in PIC: Parent–child relationship quality versus quantity

Do children in JPC families have these better outcomes because they started out with better relationships with their parents and because their parents had better parenting skills than SPC parents? Is it the higher quality of parenting and of their relationship that these children had all along, and not the additional quantity of fathering time in JPC families, that is largely responsible? Quality or quantity: Which matters more? One argument raised against JPC is that these children were doing better before their parents separated due to two parenting advantages: higher quality relationships with their parents and higher quality parenting skills. Supposedly then, it is not the greater quantity of fathering time in JPC that matters, as these children would have done as well in SPC given the advantages they had on the parenting factors.
This argument against JPC is often based on the claim that research shows that the quantity of fathering time has no effect on children and then citing two meta-analyses by Amato and Gilbreth (1999) and Adamsons and Johnson (2013). For example, citing both meta-analyses, Emery (2016b) stated that “father contact made zero difference,” that “Amato found no link between children’s outcomes and father contact” (Emery & Pruett, 2015), and that “Research does not support a focus on time. In fact the amount of time children spend with their divorced dads actually is tied only weakly, or not at all, to measures of children’s psychological well-being” (Emery, 2016a, p. 70). In responding to the issue of states revising custody laws to more equally distribute the parenting time and to be more supportive of JPC, in the Washington Post Emery was quoted as saying, “It’s not the amount of parenting time but the quality of parenting and the quality of co-parenting that matter’ (Chandler, 2017). Similarly, advocating against enacting JPC statutes, Trinder (2010) cited Amato and Gilbreth’s paper: “A meta-analysis of 63 studies found no relationship between the frequency of contact with non-resident parents and child wellbeing” (p. 181).

Reporting these two meta-analyses in this way is misleading and incorrect. More important, applying these meta-analyses to JPC families is inappropriate and illogical. These two meta-analyses address this question: Does the frequency of “contact” with the father by phone, by letter, or in person affect the well-being of SPC children who live with their mother? An entirely separate body of research asks: Is living with the father in JPC more beneficial than living in SPC with the mother?

To not confuse these two issues, we have to understand that studies about “frequency of contact” with the father are not talking about children who live with their father in JPC families. Both meta-analyses reached a number of the same conclusions about fathers’ contacts with their children. The only conclusion reported by those who use these two analyses in arguing against JPC, however, is this: Children who had more “contact” with their father did not have better emotional, behavioral, or academic outcomes than children who had less “contact.” Reporting only this one portion of the findings, however, is misleading and inaccurate for at least six reasons—all of which are explained in both meta-analyses. First, in contrast to the studies that were 20 to 30 years old, in the more recent studies, children with more frequent contact with their fathers did have better outcomes. The researchers believe this is because modern-day fathers play a much larger role in their children’s lives while the parents are together and that the “contact” with their children is much more likely to be personal and to be in person than by phone or letter. Second, White children with more frequent father contact did have more positive outcomes, whereas non-White children had more negative outcomes. This meant when the two were averaged together, it made it appear as if contact had no impact, which was not the case. Third, the
frequency of contact did make a difference for girls, but not for boys, in regard to academics, and for younger children and for children in studies using representative samples. Fourth, contact had a positive impact on academic and internalizing problems, but not on externalizing problems—which, once again, when averaged together made it appear as if contact was not beneficial. Fifth, children with authoritative fathers who were involved in their lives did have better outcomes—which, as the researchers pointed out, could not happen without ample quantities of contact. Sixth—and perhaps most important of all—phone calls and letters (e-mails did not exist decades ago when many of these studies were conducted), with little or no time actually spent with their father, were counted as “contact.”

These two meta-analyses would, in fact, lead us to expect that JPC children would have better outcomes because they are far more likely than SPC children to have the kinds of involvement and interaction with their father that were linked to better adjustment. Amato (personal communication, April 10, 2016) reiterated, “Contact is a necessary condition for a high-quality relationship to develop and be maintained.” In response to people who have misreported or misunderstood her 2013 meta-analysis, Adamsons (2018) explained:

Some have taken the non-significant association between contact and child well-being as an argument against joint physical custody. ...It should not be assumed that fathers do not need time with their children or that the amount of time spent does not matter. ... A father who only sees his children on Wednesday evenings and every other weekend, after which the child returns “home,” has extremely limited opportunities for engaging in children’s activities on a regular basis, being an authoritative parent or engaging in the types of everyday interactions that build relationships. ... How likely are children to view their fathers as “being there” for them, if fathers only can “be there” if the child’s need arises on 1–3 specified evenings or afternoons per week? Fathers should be given equal parenting time and encouraged to spend that time with their children in a variety of positive ways. ... When it is known that father–child contact has positive benefits in some circumstances, but potentially a negative influence in others, to conclude and report that, on average, father contact is not important for children’s well-being is both inaccurate and misleading. (Emphasis added)

In regard to whether children benefit more from JPC than from SPC, the “quantity” issue is specifically asking whether children who live with their father at least a third of the time year round and during the school week have better outcomes than SPC children who spend lesser quantities of time and little or no school week overnight time with their father because they are living with their mother.

The quality–quantity question is this: Do JPC children have better outcomes because they have higher quality relationships to begin with—or is it because they have the additional quantity of time together to build and to maintain high-quality relationships? It is clear from the 60 studies that JPC
children have better relationships with their parents than SPC children. That is not the question. The question is whether these better relationships are largely a result of living in a JPC family. The answer to that question lies in the 60 studies on children’s outcomes. By assessing the quality of the parent–child relationship and then including that assessment in the statistical analysis, we can see whether the custody arrangement itself is having an independent impact.

Unfortunately only 9 of the 60 studies included the quality of the parent–child relationship and parenting skills in the statistical analysis so that the effect of the custody arrangement was assessed separately. In the various questionnaires used in these studies, the children were rating their parents on parenting skills (i.e., setting and enforcing rules, supervising and monitoring, authoritative parenting) as well as on specific aspects of the relationship itself (i.e., feeling loved, being able to communicate comfortably, feeling emotionally supported). Although few in number, the findings from these nine studies are more reliable and more trustworthy than speculations about whether quality matters more than quantity.

What do these nine studies tell us about “quality versus quantity” of parenting in JPC and SPC families? Compared to SPC children, JPC children were better adjusted on all measures in four studies (Carlsund et al., 2013; Hagquist, 2016; Laftman et al., 2014; Turunen et al., 2016), equal on some outcomes and better on others in one study (Bergstrom et al., 2015), equal on all outcomes in one study (Bastaits, & Mortelmans, 2016), and worse outcomes on one measure but better outcomes on the other measures in three studies (Sandler et al., 2013; Sodermans, & Matthijs, 2014; Vanassche, Sodermans, & Matthijs, 2013).

Six of these nine studies went a step further and also included income in the statistical analysis. In four of these six studies, JPC children had better outcomes on all measures than SPC children. They were equal on some and better on other measures in one study, and worse on one of the outcomes in one study. It is worth noting the large number of children in most of these studies: 15,633 JPC and 30,468 SPC (Bergstrom et al., 2015), 17,774 JPC and 30,400 SPC (Hagquist, 2016), 888 JPC and 2,019 SPC (Carlsund, Eriksson, & Sellstrom, 2013), and 1,573 JPC and 1,584 SPC (Laftman et al., 2014).

One additional study should be noted here because it asked parents about father “involvement” with the children before the parents separated. In this large Australian study from a nationally representative sample, both parents were asked how involved the father had been in the children’s lives before their separation (Kaspiew et al., 2009). Fathers and mothers of 1,235 JPC and 6,485 SPC children reported that SPC fathers were just as involved with the children as JPC fathers—with the exception of those SPC fathers who had no contact at all with their children after the parents separated. Over the course of this 5-year study, compared to SPC children, JPC children had better
emotional and behavioral outcomes according to their fathers and equal outcomes according to their mothers (Kaspiew et al., 2009; Qu & Weston, 2010; Qu, Weston, & Dunstan, 2014).

In three of the nine parent–child quality studies, JPC children had worse outcomes than SPC children on one of the measures. In a study with 67 JPC and 74 SPC U.S. teenagers from high-conflict families, those who had good relationships with their fathers had fewer emotional and behavioral problems—but only when they lived in a JPC family (Sandler et al., 2013). Children who had good relationships with their father, but who were not living with him at least a third of the time, reaped no benefits. This finding syncs with a study from Belgium where having a supportive, authoritative (the most beneficial parenting style) father had twice as positive an effect on children’s life satisfaction for the 139 JPC children as it did for the 227 SPC children (Bastaits, Ponnet, & Mortelmans, 2014). On the down side, though, Sandler et al. (2013) found that when the teenagers in these high-conflict families gave either parent a “bad” rating for the quality of their relationship, they fared worse in JPC than in SPC. This was also the case in a study from Belgium where teenagers who had bad relationships with their fathers were more depressed and more dissatisfied in JPC than in SPC (Vanassche et al., 2013).

In two other studies from Belgium, even when the quality of the parent–child relationship was good, some JPC children had worse outcomes than SPC children on one of the measures of well-being. Gender and personality traits played a role. When children were highly conscientious or highly extraverted, they felt more depressed in JPC families. Somewhat perplexingly, though, they reported being just as “satisfied with their lives” in either type of family. Perhaps this was because the quality of their relationships with their parents was more closely linked to their well-being than were their personality traits (Sodermans, & Matthijs, 2014).

In the second study, the quality of relationships with their mother and with their father affected how depressed or how dissatisfied the girls were with their lives. In contrast, for boys, only the quality of their relationship with their father affected depression and life satisfaction. The quality of their relationship with their mother affected boys’ life satisfaction, but not depression. After accounting for the quality of these relationships, if there was high conflict between the parents, girls were more depressed in JPC than in SPC, but boys were more depressed in SPC than in JPC (Vanassche et al., 2013).

A gender difference and weak effect of the parent–child relationship also emerged in a Swedish study. For 1,573 JPC and 1,584 SPC teenagers, being able to turn to their parents for help was more closely linked to girls’ than to boys’ emotional problems and psychosomatic, stress-related health problems (Laftman, Bergstrom, Modin, & Ostberg, 2014). JPC children more often than SPC children sought help and advice from their parents—especially their father. However, the quality of their relationship explained only a small
part of the variation between JPC and SPC children. These two studies suggest that the quality of parent–child relationships might affect boys and girls differently.

Two other studies approached the quantity versus quality question in a different way, both underscoring the importance of quantity of fathering time even in high-conflict families. Seventh graders who spent the most time with their divorced fathers—including living with him up to 50% of the time—had better relationships with him 3 years later than children who spent less time with their father during those 3 years (Fabricius, Sokol, Diaz, & Braver, 2012). Even for those who had the worst father–child relationships in seventh grade, the more time they spent together over the next 3 years, the better their relationship became. This held true even in high-conflict families.

This is consistent with another study with 136 SPC and 75 JPC U.S. college students (Fabricius & Luecken, 2007). The more time they had lived with their father after the divorce, including JPC, the better their current relationship was with him. This held true regardless of the level of conflict between the parents at four separate times: just before separation, during separation, 2 years after, and then 3 years after separation. On a 12-item scale of parental bonding, high-quality relationships were strongly linked to JPC—twice as strongly as the level of parental conflict over 5 years. Children from high-conflict families were not as close to their fathers as those from low-conflict families, but the more time they had spent with their father, the better the relationship was at present. JPC children also had better health and fewer stress-related physical problems than SPC children.

To be clear, the fact that JPC children fare better than SPC children even after factoring in the quality of relationships with their parents does not mean that having a good relationship with parents is not beneficial in SPC families. In a number of studies where JPC children had the better outcomes, good relationships with their parents were more closely linked to their good outcomes than was the custody arrangement (Bastaits & Mortelmans, 2016; Fransson, Turunen, Hjern, Ostberg, & Bergstrom, 2016; Hagquist, 2016201; Sodermans & Matthijs, 2014). For example, JPC children did better at school in terms of behavior, attention, and engagement than SPC children (Havermans et al., 2017). However, this depended more on how close JPC or SPC children were to their father than the custody arrangement. Likewise, teenagers in SPC and in JPC families who could comfortably talk to their parents were the least likely to smoke, drink, or have conduct problems (Carlsund, Eriksson, Lefstedt, & Sellstrom, 2012). In both types of families, children with authoritative parents were less depressed, were less aggressive, and had higher self-esteem than children with permissive or authoritarian parents (Campana, Henderson, & Stolberg, 2008).

In sum, parenting matters in that children are less likely to have problems when they have good relationships with both parents, regardless of the
custody arrangement. JPC children fared better even after the quality of these relationships was included in the statistical analysis. These studies did not conclude, however, that a good parent–child relationship is more beneficial than JPC or that, if the relationships with both parents are good, children will do just as well in SPC as in JPC families. Nor did these studies conclude that JPC children had better relationships with their parents to begin with and that is largely why they fared better than SPC children. Is it quantity or quality? It is not "either–or"; it is "both–and." JPC and good parent–child relationships are each beneficial—especially when combined.

The I in PIC: Income

The second issue is whether JPC children have better outcomes largely because their parents are substantially richer and better educated than SPC parents. Twenty-seven of the 60 studies compared JPC and SPC parents’ incomes or educational levels, which was used as a proxy for income. In these studies there are three ways to explore the effect that parents’ incomes and educational status might have on children over and above the effect of the custody arrangement. We can compare children’s outcomes in the 10 studies where parents’ incomes or educations were equal (= $), in the 16 studies where income or education differences were incorporated into the statistical analysis ($*), and in the 11 studies where JPC parents had higher incomes or educations than SPC parents but income was not factored into the statistical analysis (> $).

In the 10 studies where the parents’ incomes or educations were equal, on all measures JPC children had better outcomes in 7 studies, equal to better outcomes in 2 studies, and equal on all outcomes in one study. In the 16 studies where income or education differences were statistically controlled, JPC children had better outcomes on all measures in 12 studies, equal to better outcomes in 2 studies, and worse outcomes on one measure but better outcomes on the others in 2 studies. In the 11 studies where JPC parents had the higher incomes and income was not statistically controlled, we would expect JPC children to have generally better outcomes than SPC children, if income was an influential factor. In fact, however, compared to SPC children in only 2 of the 11 studies were JPC children better on all outcome measures; in 4 studies they were equal on some and better on others; in 3 studies they were equal on all measures; and in 2 studies the results were mixed depending on the child’s gender.

These “income-outcome” studies suggest that the I in PIC is less likely than the P to explain the JPC advantages. Again though, these studies should not be misconstrued to mean that income has no impact on children’s well-being after their parents separate. For example, adolescents who believed their parents were having serious financial problems were twice as likely to
have difficulty communicating with their parents in JPC and in SPC families and were less satisfied with their lives (Bjarnason & Arnarrson, 2011). In JPC and SPC families, teenage girls who thought their mothers were having financial problems were more depressed than girls who felt their mothers were not struggling financially (Vanassche et al., 2013). Similarly, in both custody arrangements, children whose parents’ incomes were in the bottom 25% had more emotional and behavioral problems than children whose parents were in the top 25% (Bergstrom, Fransson, Hjern, Kohler, & Wallby, 2014).

Still, having wealthier, more educated parents is not always to children’s advantage after their parents separate. In each of the following studies, children with wealthier, more educated parents had worse outcomes than children with less educated, less wealthy parents in both SPC and in JPC families. In a Swedish study with 391 JPC families and 654 SPC families, children with the wealthier, more well-educated parents were more stressed and more anxious (Fransson et al., 2016). Moreover, having a parent with a graduate degree was more closely linked to children’s stress and anxiety than was the physical custody plan. The researchers speculated that highly educated, wealthier parents might put more academic and social demands on their children, which, in turn, increases children’s stress and anxiety.

In a French study with 91 children living in JPC, 34 living with their fathers, and 328 with their mothers and 1,449 living in intact families, in all four family types, wealthier children were just as likely as less wealthy children to report being entangled in their parents’ conflicts and to report high conflict between their parents (Barumandzadah, Martin-Lebrun, Barumandzadeh, & Poussin, 2016). For American adolescents in SPC families, those with higher income mothers had higher levels of deviant behavior and of substance use—which was not the case in the JPC families (Buchanan et al., 1996). Similarly, Flemish adolescents with more well-educated, wealthier fathers were not more satisfied with their lives (Bastaits et al., 2014). Even though JPC parents were richer and more well-educated than SPC parents, JPC children were no more well-behaved and no more engaged in school. The Flemish children who were most engaged and well-behaved were those who had the best relationship with their father—and those were the JPC children (Havermans Sodermans, & Matthijs et al., 2017). Wealthier Dutch children were also no more likely to spend time or to maintain close relationships with their grandparents after their parents separated than less affluent children (Westphal, 2016). One unusual finding is that Canadian children with wealthier parents had fewer internalizing problems in JPC families, but no fewer problems in SPC families (Drapeau, Baude, Quellet, Godbout, & Ivers, 2017).

Metaphorically then, “money does not buy happiness” in that children still generally fare better in JPC than in SPC independent of family income.
The C in PIC: Conflict

If parenting and income do not appear to play a strong role in accounting for the advantages of JPC, what about the C in PIC—conflict? Do JPC parents have significantly less conflict than SPC parents when they separate or in the ensuing years? Do they have a much better coparenting relationship, working together closely in a low-conflict, cooperative, communicative way? Is conflict more closely connected than the custody arrangement to children’s outcomes? If all three of these things are true, then the conflict factor might help to explain why JPC children fare better.

People who warn against the potential risks of JPC often assert that children do not benefit from this arrangement unless their parents have a low-conflict, cooperative relationship—and that being exposed to conflict has a more negative impact than not having an involved relationship with the father (who is almost always the nonresidential parent in SPC families). Some go so far as to claim that the research strongly supports their position. For example, Emery (2014) contends that “the best research supports the conclusion that in high conflict divorces children do worse in joint physical custody than in other arrangements.” “Based on research … living in the middle of a war zone between two parents is more harmful to children than having a really involved relationship with only one of them” (Emery, 2016a, p. 28). “Protection from Conflict is a more basic need than Two Good Parents in my hierarchy of children’s needs in two homes” (Emery et al., 2016a, p. 49, Emphasis added).

In fact this is not what the research shows, according to analyses of the studies that have actually compared JPC and SPC children’s well-being in high-conflict families. Children in high-conflict families generally fare better in JPC than in SPC families. largely it seems because JPC children have closer relationships with their parents to help buffer the impact of high conflict (Bauserman, 2002, 2012; Fabricius et al., 2012; Mahrer, O’Hara, Sandler, & Wolchik, 2018; Nielsen, 2017).

In terms of conflict, in an analysis of 19 studies that compared JPC and SPC parents’ levels of conflict and the quality of their coparenting relationship, JPC couples did not have significantly less conflict or more cooperative, communicative relationships than SPC couples at the time they separated or in the years following their separation (see Nielsen, 2017, for detailed summaries of the 19 studies). Compared to SPC couples, in three studies JPC couples had less conflict, in one study they had more, and in one study the conflict differences depended on the age of the children. Not all of these studies, however, assessed children’s outcomes, so they cannot address the question of whether conflict might have influenced children’s outcomes.

Another aspect of conflict is how much disagreement the parents had over the custody arrangements at the outset. Are JPC parents a unique group who,
unlike SPC parents, agree to the parenting plan voluntarily without being forced or coerced to share? According to the seven studies that have specifically addressed this question, the answer is “no” (see Nielsen, 2017, for a discussion of these studies). The percentage of couples who were initially opposed to JPC at the outset ranged from 30% to 80%. Yet in all seven studies, JPC children had better outcomes than SPC children despite the fact that many of their parents had not agreed to the plan at the time they were separating.

As Table 1 illustrates, 19 of the 60 studies took parental conflict into consideration in one of two ways. In 15 studies there were no significant differences between JPC and SPC parents’ conflicts (=C), which means conflict would be unlikely to explain any differences in outcomes. In the other four studies, the differences between JPC and SPC parents’ levels of conflict were included in the statistical analyses so that conflict would not influence the outcomes (C*). In these 19 studies JPC children had better outcomes on all measures in 9 studies, equal outcomes on some measures and better outcomes on others in 5 studies, equal outcomes on all measures in 2 studies, and worse outcomes on one measure but equal or better outcomes on other measures in 3 studies.

In six other studies there were differences between JPC and SPC parents’ levels of conflict, and this difference was not included in the statistical analysis. This leaves open the possibility that conflict was having an impact separate from the custody arrangement. Compared to SPC parents, in two studies JPC parents had more conflict (> C) and in four studies they had less conflict (< C). If lower conflict bestows benefits on children, then JPC children in these four studies should have generally had better adjustment. This was not the case. Even though their parents had the lower levels of conflict, in only one study did JPC children have better outcomes on all measures. In the other three studies, JPC and SPC children were equal overall. In the two studies where JPC parents had more conflict than SPC parents, JPC children were still better off than SPC children.

As Table 1 indicates, only eight studies controlled for both income ($*) and conflict (C*). These eight studies are especially important because they ruled out both factors as possible causes of children’s adjustment. In five studies, on all measures JPC children fared better than SPC children. In one study JPC children were equal to SPC children on some measures and better on others. In one study they had equal outcomes on all measures; and in one study JPC resulted in worse outcomes on one measure but equal or better results on all other measures. JPC children had the better overall outcomes above and beyond the effects of income and conflict.

As with income and parent–child relationships, however, these conflict studies should not be misinterpreted to mean that high, unrelenting conflict—especially when children are dragged into it—has no effect on children. In
many studies there were links between conflict and various aspects of children’s well-being. Unlike the conflict studies just discussed, these studies did not assess whether the conflict was significantly different in JPC and SPC families, but these studies do shed light on the complicated role that conflict plays separate from the custody arrangement.

Contrary to the assertion that conflict has a very negative impact on children, conflict accounted for only a small portion of the difference between JPC and SPC children in a number of studies where JPC children had the better outcomes (Barumandzadah et al., 2016; Buchanan et al., 1996; Johnston, Kline, & Tschann, 1989; Vanassche et al., 2013). The small impact of conflict decreased even more after children’s personalities were taken into account (Sodermans & Matthijs, 2014). Moreover, even when conflict was high, children had better relationships with their father in JPC than in SPC (Fabricius & Lueken, 2007; Fabricius et al., 2012). In contrast, when conflict was high and children did not have a good relationship with their father, they fared worse in JPC than in SPC (Sandler et al., 2013). Also interesting, even in two studies where JPC parents had more conflict than SPC parents, JPC children still had the better outcomes (Lee, 2002; Melli & Brown, 2008).

As for gender, in JPC or SPC, high conflict had a negative effect on the daughter’s relationship with the father, but not on the son’s—and not on either’s relationship with their mother (Frank, 2007). Similarly, when conflict was high, girls in SPC and SPC families were more stressed than boys (Fransson et al., 2016). In high-conflict families 8 years after the parents’ separation, girls were more depressed in JPC, but boys were more depressed in SPC (Vanassche et al., 2013). Then again, in another study, 4 years after their parents’ divorce, when conflict was high, in JPC and SPC families, boys were more depressed than girls (Buchanan et al., 1996). In regard to school, high conflict before the divorce was linked to less motivation and worse behavior, regardless of the custody arrangement or their parents’ educational levels (Havermans et al., 2017).

Based on these findings, there does not appear to be any clear-cut, consistent, or predictable way that conflict affects children in JPC and in SPC families. It does appear, however that we might be exaggerating the role that conflict plays, especially when children have good relationships with their parents and are living in JPC.

The PIC factors: Understanding the interplay

The 44 studies that considered parent–child relationship quality, income, or conflict also show us that no one factor can account for all the differences. PIC factors work in conjunction with the custody arrangement, interacting in ways that are not consistent or predictable. By looking closely at one study, we can more fully appreciate this interplay.
A California study assessed 51 JPC and 455 SPC teenagers’ social and behavioral problems and their grades 4½ years after their parents’ divorce (Buchanan et al., 1996). Incomes and conflict levels of JPC and SPC parents were not significantly different. In fact, 80% of JPC parents had been in conflict over the custody arrangement at the outset, even though they eventually adopted a JPC plan. Even in the highest conflict families and even when the children were caught in the middle, JPC teenagers fared better. In both types of families, adolescents who did not feel close to either parent had more emotional and behavioral problems than adolescents who were caught up in the high ongoing conflict. “Interparental conflict had much smaller relations to adolescent adjustment than we had expected” (Buchanan et al., 1996, p. 257). Indeed, in high-conflict families, JPC children were more likely than SPC children to get caught in the middle—and yet they still had fewer problems than SPC children. The researchers attributed this to the fact that JPC children had closer relationships with their parents, which offset the impact of high conflict. In short, quality of parent–child relationships trumped conflict and income, but the greatest benefits only accrued when quantity of parenting time through JPC was added to the mix.

**Limitations of the studies**

Several limitations should be kept in mind in regard to the studies discussed in this article. First, the studies report correlations, which means they cannot prove that the quality of the parent–child relationship, family income, parental conflict, or the custody arrangement caused the outcomes. As already explained, however, many of the studies controlled for one or more of these factors, which increases the likelihood that it was the JPC arrangement that accounted for the children’s better outcomes.

Second, the 60 studies are not of equal quality. Some are superior to others in regard to sample size, representativeness of the sample, validity and reliability of the measures, and sophistication of the statistical analyses. The higher quality studies included income, conflict, and the quality of the parent–child relationship quality in the statistical analysis to assess the effect of the custody arrangement itself. Then, too, most of the reports of children’s well-being and about parental conflict came only from mothers, not fathers. Especially because these parents were separated, relying on only one parent’s feedback could yield an inaccurate or skewed view.

Some social scientists have criticized or dismissed JPC studies because the researchers used different measures and different types of samples (e.g., Smyth et al., 2016). This criticism is somewhat unusual because the research on many topics, such as parental conflict or divorce, also use different measures, different research designs, and different samples. More important, when a body of studies has used different measures, different samples, and
different approaches to explore the same basic question, this is considered a strength, not a weakness, in social science research. When studies differ in these respects, but still arrive at the same general conclusion, this is a desirable situation referred to as *convergent validity* (Shadish, Cook, & Campbell, 2001). Convergent validity adds to the confidence and the trustworthiness of the findings. The 60 JPC studies have a high degree of convergent validity in that they consistently find that JPC children are better adjusted than SPC children across a wide range of measures, using different samples, using data from different countries, and collecting data across several decades.

Finally, even though differences between JPC and SPC children’s outcomes are statistically significant, the effect sizes are generally small to moderate. Given this, it has been argued that JPC is not especially beneficial. For example, speaking about these small effect sizes, “Mountains are being made out of molehills” Emery (2015).

Several things must be understood, however, about effect sizes. Small effect sizes are common in studies that assess factors, such as poverty or parental conflict or domestic violence, that affect children. Indeed, fewer than 3% of the studies in social psychology meet the standard for a “strong” effect size (Hemphill, 2003). Nevertheless, small effect sizes in social science and in medical science have important implications for large numbers of people (Ferguson, 2009). In fact, many public health policies and mental health treatment protocols are based on research with weak to moderate effects (Meyer, 2001). Furthermore, “there is no agreement on what magnitude of effect is necessary to establish practical significance” (Ferguson, 2009, p. 532).

Then, too, we need to consider the risks versus the benefits before dismissing small effect sizes as trivial or meaningless “molehills” (Rosenthal, 1990). For example, if there is a statistically significant but weak link (small effect size) between JPC and children’s using drugs, smoking, drinking, and having a weaker or troubled relationship with their father, and if there are no worse outcomes for JPC children, then the benefits outweigh the risks regardless of how small the benefit. Small effect sizes also become increasingly important if the risks are low but the consequences can be enormous; for example, children dying as a result of a drinking accident or drug overdose, or having lifelong health problems as a result of starting to smoke as a teenager, or having little to no relationship with their father for the remainder of their lives.

Underscoring the importance of small effect sizes in regard to children’s well-being, Amato and Gilbreth (1999) offered a hypothetical example of children who have authoritative fathers (the most beneficial parenting style) versus children whose fathers do not have an authoritative parenting style. By changing their wording from “authoritative” fathering to “JPC,” their example would read, “Half of the children live in JPC families and 20% of them
experience a particular behavior problem, compared with 30% of those in SPC families. This outcome would mean that JPC is associated with a one third decline in the probability of experiencing the problem. Most observers would agree that this is a substantively important effect. Yet this example would yield a correlation of only \( -0.115 \) (p. 568). Put differently, in this hypothetical example, even an extremely weak effect size would mean the JPC children were 30% less likely to develop the behavioral problem than SPC children.

In regard to the 60 JPC studies, the issue of effect sizes is further complicated by the fact that most studies did not report effect sizes. Given this, it would be a mistake to jump to the conclusion that the effect sizes are small. Effect sizes can differ dramatically depending on which facet of a child’s well-being is being assessed and what type of sample is used. For example, in Baude et al.’s (2016) meta-analysis, the effect size for the correlation between JPC and behavioral problems was four times as big as the effect size for the correlation between JPC and emotional problems. Effect sizes were also five times stronger for JPC children in studies using school samples than studies using national samples. More noteworthy still, effect sizes in studies where JPC children spent 50% time with each parent were five times stronger than in studies where JPC children lived more than 35% but less than 50% time with each parent. In Bauserman’s (2002) meta-analysis there was also a wide range of effect sizes for the positive impact of JPC, ranging from .005 (very weak) to .97 (extremely strong).

Finally, we should keep in mind that effects of JPC are sometimes as strong or stronger than the effects of parental conflict or family income. For example, in a meta-analysis of 68 studies, the effect size for high parental conflict and children’s adjustment problems was only .19 (Buehler et al., 1997). In another meta-analysis of 50 studies involving 10,364 children, the link between having adjustment problems and blaming themselves for their parents’ conflicts or feeling threatened by the conflict was merely .18. Most of us would be unlikely to criticize people for “making mountains out of molehills” because they considered these findings relevant for children’s well-being.

This is not to say that large effect sizes do not merit more attention or carry more weight than small effect sizes. They do—especially if we are forced to choose only one option. As a hypothetical example, assume we are trying to lower the odds of children becoming clinically depressed after their parents separate. Sixty studies showed that three options all led to statistically significant lower rates of depression for these children. None of the three options was linked to any negative outcomes. If we were free to choose all three, that is what we would do regardless of the effect sizes. If allowed to choose only one, however, we would choose the one with the largest effect size. If there were only one option that had proved to be
statistically significant, no matter how small the effect size, we would choose it. The point is that we should not allow small effect sizes to be the “tail” that wags the “dog” in determining whether JPC is beneficial for most children.

**Conclusion**

As the studies summarized in this article demonstrate, JPC is generally linked to better outcomes than SPC for children, independent of parenting factors, family income, or the level of conflict between parents. It appears that leaving the classwork, clothing, cleats, or clarinet at the other parent’s house and living under two sets of rules has not created dire circumstances for JPC children—perhaps because they are not leaving behind the love, attention, involvement, and commitment of either parent when with their other parent. Those who minimize the contribution of JPC argue that it is factors such as parents’ income, education, parenting skills, and low conflict that better account for the positive outcomes seen in JPC children. This view finds very little support in the data from the 60 studies.

This is not to say that children do not benefit from high-quality relationships with their parents, or living in higher income families, or having parents with low-conflict relationships. As explained in this article, these factors do matter. Nor is this to say that JPC is the most beneficial arrangement for all children. As documented in this article, that is not the case. What these studies do mean is that the vast majority of children benefit more from JPC than from SPC—and that there is no compelling evidence that PIC trumps JPC. Even if the parent–child relationship, income, and conflict were equal, children are still more likely to benefit in JPC families.

**References**

References marked with an asterisk indicate studies included in the research reviews in Table 1.


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Tab D
Shared Physical Custody: What Can We Learn From Australian Law Reform?

Patrick Parkinson

To cite this article: Patrick Parkinson (2018): Shared Physical Custody: What Can We Learn From Australian Law Reform?, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2018.1454197

To link to this article: https://doi.org/10.1080/10502556.2018.1454197

Published online: 10 Apr 2018.
Shared Physical Custody: What Can We Learn From Australian Law Reform?

Patrick Parkinson
Sydney Law School, University of Sydney, Sydney, Australia

ABSTRACT
This article reviews the long battle to reform Australia’s custody and access laws between 1995 and 2011. The result is a law which strongly encourages courts to consider the option of shared physical custody, while also emphasizing the need to protect children from harm, not least from being exposed to family violence. The trench warfare over the text of the legislation between advocacy groups has now largely ceased. Good empirical research on the outcomes of reforms to the family law system assisted in clarifying the issues. However, the role of law in shaping parenting arrangements after separation should not be exaggerated. We can believe too much in law; and therefore, believe too much in law reform.

KEYWORDS
Custody; access; parenting; law reform

The law concerning parenting arrangements after separation, or custody and visitation or access, as is the familiar terminology in North America, is a site of great tension in many jurisdictions. Family law legislation in regard to revising custody laws can be a little bit like the no man’s land on a World War I battlefield. Interest groups and advocates dig deep trenches on either side of an ideological divide. Between them, the land to be won is a section here, a clause there, in regard to legislation on the issue of shared or sole physical custody of children. However, such laws, whatever their terms, ultimately leave a large amount of discretion to trial judges to make whatever decision they consider is in the best interests of the child.

Those engaged in this trench warfare over custody law revisions often claim to represent the interests of one gender, although they also claim to have children’s interests in mind. Consequently, debates about family law are often presented in terms of a gender war (Bala, 1999) in which women’s interests are pitted against those of fathers’ groups (Collier, 2009). To some advocates on either side, the world will end if territory is lost, or a new heaven and a new earth will be ushered in if the desired legislative reforms are achieved.

CONTACT
Patrick Parkinson
patrick.parkinson@sydney.edu.au
Sydney Law School, University of Sydney, Eastern Avenue, Sydney, NSW 2006, Australia.

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The trial judge, of course, occupies an altogether different world—one in which difficult decisions have to be made based on the evidence presented. Not infrequently, the dominant concern is trying to protect a child or one of the parents from harm. Violence, child abuse, drug or alcohol addiction, and mental illness are, for the trial judge, the four horsemen of the Apocalypse in the lives of these children. The busy trial judge might be little concerned in many cases with the detail of what the legislation says, except in terms of the issues to be canvased and the boxes to be ticked in writing the judgment.

This is not to say that the details of family law legislation are irrelevant, but rather that policymakers and family court professionals have different vantage points. Legislation that confers discretion on judges to make decisions about the best interests of children gives them great freedom of decision. However, judges are constrained by the need to rely on the evidence presented. The fierce arguments on the policy battlefield about the factors the court must consider might well only matter at the margins of judicial discretion.

Reflections on the Australian experience

In Australia, over many years, the policy battle has been hard fought, but has now largely ceased. The result is legislation that is far more convoluted and complicated than desirable, but that works tolerably well. The advocates on both sides have left their trenches and returned to civilian life. There are calls to simplify the law, but few argue for major changes to its substance. There are other problems. In particular, the courts hearing custody and access disputes are overloaded, but the legislation itself is not perceived as a cause of significant difficulties.

What can other countries learn from Australia’s battles over revising custody laws in ways that were more favourable toward shared parenting? How much of the legislative terrain was worth fighting over?

Australia’s Family Law Reform Act 1995

The debate about reforming custody laws began in the early 1990s. At that time, Australian law made a distinction between custody and access. Children usually lived in sole physical custody with one parent but the other parent had to be allowed reasonable access, a term that was not clearly defined. In 1995 the law was amended along the lines of the Children Act 1989 in England and Wales (Dewar, 1996). The term custody was replaced with residence and access was replaced with contact.

The reforms were not enacted without debate. Properly, women’s advocates sought much more emphasis in the legislation on domestic violence, which had not previously been given much weight in custody disputes (Parkinson,
For this reason, the 1995 revisions included a history of domestic violence as a relevant factor in making custody decisions. Other than this change, the revisions in the law were unexceptional. Nothing in the 1995 revisions suggested that shared physical custody should be encouraged—or that shared parenting should be considered to be in the children’s “best interests” (Chisholm, 1996). At the most, the law supported the involvement of both parents and gave more guidance to judges in exercising their discretion.

**Opposition to the 1995 custody laws**

The 1995 legislation was fiercely opposed by some women’s groups, who feared that changes to contact laws would adversely affect mothers and exacerbate gender inequalities (Behrens, 1996). Similar concerns have been expressed elsewhere (Mason, 1999). As one Canadian scholar put it, “The responsibility cast upon mothers to ensure contact between children and fathers can be both a burden and a constraint on maternal autonomy” (Boyd, 2010, p. 150).

Those fears were not misplaced; for the reality of modern divorce is, as Melli (2000), once put it, that it involves not “the end of a relationship but a restructuring of a continuing relationship” (p. 638). Marriage is dissoluble, but parenthood is not (Parkinson, 2011). One consequence is that mothers must continue to deal with difficult fathers who they now dislike intensely, and vice versa. Children bond with the most inadequate parents and often miss them when they are gone from the family home (Cashmore, Parkinson, & Taylor, 2008; Gollop, Smith, & Taylor, 2000; Laumann-Billings & Emery, 2000). Children’s interests, in the great majority of cases, in having both parents involved in their lives is necessarily a constraint on parental autonomy.

Modern family law no longer traps people in unhappy marriages, but parenthood traps many in unhappy divorces—ongoing relationships in which their continuing roles as parents require communication and cooperation on many levels. Because it is the common experience of different countries that the great majority of disputes between parents about the postseparation parenting arrangements are resolved without requiring a judicial decision, the reality is that this might well require many women to come to a *modus vivendi* on parenting arrangements with another parent who was violent in the course of the relationship.

One of the main complaints against change to the law was that it would create a pro-contact culture, which would place women and children at greater risk of violence (Behrens, 1996). This concern was expressed in other countries as well (Cohen & Gershbain, 2001; Jaffe & Crooks, 2004).
The parliamentary inquiry of 2003

For the next 8 years after the 1995 reforms, opposition from women’s groups to the changes continued unabated (Armstrong, 2001). Although these views gained traction in the academic literature (Graycar, 2000), it was the concerns of the fathers’ groups that gained more attention within Parliament (Parkinson, 2003). These groups argued that the 1995 laws had changed too little. They pressed for a presumption that parents should share the parenting time with the children equally after separation.

Under mounting pressure for major reform, the Prime Minister, John Howard, established a Parliamentary Inquiry in June 2003 to explore the option of a rebuttable presumption of shared physical custody where children would spend equal time with each parent (Parkinson, 2006b; Rhoades & Boyd, 2004). It might be thought that such an inquiry would be conducted by a committee of lawyers. Instead, the Prime Minister gave the task to the Family and Community Affairs Committee of the House of Representatives, on which there were no lawyers. Chaired by Kay Hull, the Committee conducted one of the largest inquiries ever held in Australia. It issued its report at the end of 2003 (House of Representatives Standing Committee on Family and Community Affairs, 2003).

In the early weeks of the inquiry, Committee members seemed to be inclined toward a presumption of equal parenting time (Parkinson, 2014); but in the end, the Committee unanimously recommended against a presumption of equal time (House of Representatives Standing Committee on Family and Community Affairs, 2003). The Committee considered that a one-size-fits-all approach was inappropriate given the diversity of family situations and the changing needs of children. The Committee recommended that parents should share parental “responsibility” equally. Although not recommending a presumption of shared physical custody, the Committee made it clear that it wanted to see a shift away from any assumption that the normal pattern of contact should be every other weekend and half the school holidays. It considered that “the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time” (House of Representatives Standing Committee on Family and Community Affairs, 2003, p. 30).

The Committee also focused considerable attention on the issue of family violence. It wrote:

The committee agrees that violence and abuse issues are of serious concern and is mindful of the need to ensure that any recommendations for change to family law or the family law process provide adequate protection to children and partners from abuse. (House of Representatives Standing Committee on Family and Community Affairs, 2003, p. 26)
It made specific recommendations to strengthen the emphasis on family violence as a factor that would justify the equivalent of sole physical custody (although in Australia, the language of custody is not used). One such recommendation was a presumption against shared parental responsibility in cases of entrenched conflict, family violence, substance abuse, or child abuse (House of Representatives Standing Committee on Family and Community Affairs, 2003, p. 41).

The eventual outcome of the 2003 report was new legislation, the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Parkinson, 2006a). It provided more guidance for judges than did the 1995 law. Judges were now to consider two primary factors. The first is the “benefit to the child of having a meaningful relationship with both of the child’s parents.” The second is “the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.” There are then a large number of other factors that are described as additional considerations.

The 2006 custody law has sometimes been misunderstood by the public (Family Law Council, 2009; Kaspiew et al., 2009, pp. 304–305). The revised law provides a presumption of equal sharing of parental “responsibility” in cases that do not involve violence or abuse. Although equal shared parental responsibility says nothing, per se, about how time is allocated between parents, courts ordering equal shared parental responsibility are at least required to consider whether shared parenting time would be practicable and in the best interests of the child. This could be either an equal parenting time arrangement, or an arrangement for substantial and significant time. The law defines substantial and significant time as time that is not limited to weekends and holidays and that allows the parent to be involved in the child’s daily routines and participate in occasions and events that are of particular significance to the child or the parent.

**Reactions to the 2006 custody law revisions**

As was the case after the 1995 reforms, the 2006 reforms were met with fierce resistance from women’s groups. Advocacy groups again argued that the reforms would lead to an increased risk of violence and abuse for women and children. Other critics argued that with an emphasis on reaching custody agreements through mediation rather than through litigation, past violence would be minimized (Rathus, 2007). There was also concern about one of the factors that the judge was required to take into account, “the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent.” The fear was that this would deter women from making allegations of family violence (de Simone, 2008).
In the years after the 2006 reforms, those who feared the worst found ample evidence to support those fears, recycling many of the old arguments against the 1995 changes (Graycar, 2012). In response to the concerns about family violence, the government established another inquiry conducted by a former Family Court judge, Richard Chisholm, who sought submissions and consulted various groups. Advocacy groups strongly asserted that the reforms had led to an increased risk of violence against women and children (Chisholm, 2009). This theme was repeated by survey respondents in a major evaluation study by the Australian Institute of Family Studies (AIFS; Kaspiew et al., 2009).

The difficulty with such contentions, to the extent that they were based on anecdotal evidence, is that there were bound to be cases in which the protection of women and children from harm was, or at least appeared to be, grossly inadequate; but the anecdotes tell us little about whether there are systemic problems, and if there are, what aspects of the legislation, if any, might be responsible. Those in the trenches will find plenty of ammunition to support their policy agendas, for in family law, unhappy litigants are not difficult to find. Those who perceive a grave injustice has been done to them are likely to be the most vocal in criticism of the family law system. Individual judges vary in both empathy and expertise. The question remains whether legislation is either the problem or the solution.

Certainly, research found inappropriate shared care arrangements that were not working out well for the children involved (Campo, Fehlberg, Millward, & Carson, 2012; Fehlberg, Millward, & Campo, 2009; Parkinson & Cashmore, 2013), but the great majority of parenting arrangements after separation are negotiated with greater or less difficulty, and those negotiations might or might not be much influenced by what parents think a court would do if they went to trial. Negotiated outcomes could expose women to a risk of violence and involve children in less than optimal parenting arrangements whatever the statutory framework might be in a given jurisdiction.

Fortunately, at the time of enacting the 2006 reforms, the government had commissioned the AIFS, a government research body, to conduct a comprehensive evaluation. It had also commissioned the Chisholm Inquiry on family violence (Chisholm, 2009) discussed earlier, and other legislative reviews (Australian Law Reform Commission, 2010; Family Law Council, 2009). The government also commissioned a major study of shared care (Cashmore et al., 2010).

The report of the AIFS in particular, generated a large amount of data (Kaspiew et al., 2009). The research team found that overall the 2006 reforms to the family law system were working well, although there were some difficulties and challenges. Most parents reported that they were satisfied with the parenting arrangements. Most indicated that they communicated with each other on issues concerning their child once a week or more often. A follow-up study a year later found that most parents considered that their
arrangements were flexible and worked well for each parent and the child (Qu & Weston, 2010). For parents who had separated after 2006, 16% had a shared physical custody arrangement and 7% had an equal time arrangement. The increase in shared physical custody, however, was a trend that had begun before the 2006 reforms (Cashmore et al., 2010).

What about the impact of the legislation in those families where there had been a history of violence? Generalizing is difficult, as within the category of those who report any history of violence or emotional abuse, there is such a broad spectrum of experience (Kelly & Johnson, 2008). The AIFS study reported that a history of family violence did not necessarily impede friendly or cooperative relationships between the parents following separation. In a survey of some 10,000 parents, 16% of mothers who reported being physically hurt by their ex-partner during the course of the relationship reported friendly relationships at the time of the interview, and a further 23.5% reported having a cooperative relationship. Others reported distant or conflictual relationships; 18.5% reported a continuing fearful relationship. Fifty-five percent of mothers and 50% of fathers who reported emotional abuse by their ex-partner in the past reported friendly or cooperative relationships by the time of interview (Kaspiew et al., 2009, pp. 31–32). It follows that a history of violence or emotional abuse does not mean, per se, that parents cannot develop cooperative relationships after separation, although parents who had not experienced family violence were more likely to report friendly and cooperative relationships (Kaspiew et al., 2009, p. 31).

A majority of respondents in all professional categories in the AIFS evaluation thought that “the need to protect children and other family members from harm from family violence and abuse is given adequate priority” in the family law system. However, a substantial minority in each professional category thought otherwise (Kaspiew et al., 2009, pp. 31–32). This is not to say that people thought the system dealt adequately with cases involving family violence and child abuse. Courts must rely on evidence, which, research found, is often lacking even where serious allegations are made (Moloney et al., 2007). However, there was no reliable evidence, beyond some professional opinion, that the 2006 amendments were linked to any increase in violence or abuse. Even one of the fiercest critics of the 2006 legislation, who predicted that it would make it harder to protect children from violence and abuse, conceded that in such cases, “courts appear to be making careful, sensitive, and for the most part, protective and appropriate orders” (Alexander, 2009, p. 12).

One troubling finding was that families in which parents had safety concerns were no less likely than other parents to have shared physical custody arrangements (Kaspiew et al., 2009, p. 233), although there was a slight diminution in these safety concerns over time (Qu & Weston, 2010, p. 101). In the shared physical custody families, 1 in 4 fathers and 1 in 10 mothers indicated that they held “safety concerns” for themselves or the children as a result of ongoing
contact with the other parent (Kaspiew et al., 2009, p. 233). However, these
statistics do not relate to judicial decisions or court orders. They come from a
general population survey of 10,000 people who had separated after 2006. There
was no evidence that courts were making orders for shared time after a full trial
in circumstances where there was a history of significant domestic violence.
Indeed, it would be most unlikely to occur given the legislative provisions on
this issue (Parkinson, 2014). Nonetheless, orders might have been made by
consent in these circumstances.

The 2011 reforms and their impact

Notwithstanding the paucity of evidence that the 2006 reforms were respon-
sible for difficulties that had not been there before, there was a lot of pressure
on the government to amend the law further to respond to the problem of
family violence. Given that it had commissioned various reports (Australian
Law Reform Commission, 2010; Chisholm, 2009; Family Law Council, 2009)
and had various recommendations for amendments to the Act, it would have
been unthinkable to do nothing.

The primary considerations were modified in 2011 so as to provide that
greater weight be given to the protection of the child from harm than to a
meaningful relationship with both parents. It is doubtful that this required
any change in the practices of the courts. Where evidence is presented of risk
to children, the courts have long given this very considerable weight. The
requirement to consider equal time and substantial and significant time
remains. Parliament also enacted a new, and expansive, definition of family
violence (Parkinson, 2012).

Taken as a whole, the empirical evidence does not indicate any substantial
change in outcomes across the population as a result of the 2011 reforms
although small shifts in community perception might be discerned (Kaspiew
et al., 2015).

Lessons from the Australian experience

How much did the law change postseparation parenting arrangements across
the community? The relationship between the law as applied by judges in the
few cases that go to trial, and the decisions parents reach without judicial
determination, is a complex one. Orthodoxy would say that people “bargain
in the shadow of the law” (Mnookin & Kornhauser, 1979). However, in
parenting cases the relevant law in most jurisdictions around the Western
world is some expression of the idea that the judge must try to reach a
decision that is in the best interests of the child. The legislation could give
more or less guidance about how to determine those best interests, but a lot
of discretion remains.
For those who might take some notice of the law in working out a parenting agreement, the law’s influence is necessarily at an abstract and generalized level. Certainly, the 2006 amendments to the Family Law Act in Australia did provide the general public with some high-level messages, as did the 2011 amendments. The idea that normally, parental responsibility should be shared unless there has been a history of family violence or child abuse, was clearly a significant message, even if it was not new. Furthermore, the public were given the message, in statements by ministers, and through media commentary, that an equal time arrangement was one viable option that should be considered by the court. Perhaps for that reason, this became perhaps a more common option than it had been before 2006.

The 2006 reforms were most successful in shifting people away from an assumption that the most a nonresident parent could expect was to have time with the children at the weekends and in school holidays. The evaluation by the AIFS found that lawyers gave advice supporting a shared care set of norms much more frequently after the reforms than they did prior to the reforms (Kaspiew, Gray, Qu, & Weston, 2011, p. 408). The definition of “substantial and significant time,” although convoluted, could be translated into a simple message that the parents should consider how the nonresident parent could be involved in the activities of the children during the school week.

The 2011 reforms reaffirmed that a parent could not expect to have significant time with his or her children if that would expose them to an unacceptable risk of harm. If that is a statement of the obvious, then at least the 2011 amendments made it clear to those who were worried about the courts’ approach that priority would be given to protective responses over ensuring that children spent significant time with each parent.

**Law and social change**

For those who support the normalization of shared care after parental separation, it might be thought for these reasons that the changes to the law had positive and beneficial effects. The Parliamentary Committee that was responsible for the ideas enacted in 2006 certainly thought that changes in the custody laws could have a behavior-shifting role:

> Legislation can have an educative effect on the separating population outside the context of court decisions, if its messages are clear, it is accessible to the general public and well understood by those who offer assistance under it. (House of Representatives Standing Committee on Family and Community Affairs, 2003, at 2.74)

It seems that the Australian legislation was reasonably successful in giving out messages to the general public about the desirability of considering an equal time arrangement or other means of ensuring the substantial
involvement of both parents. It could well be that it was much less successful in educating the public about the circumstances in which shared care would not be in the best interests of children, for example, where there are significant concerns about violence, abuse, drug and alcohol addiction, or mental illness, which make it best for the children to have a sole custody arrangement, perhaps with limited contact with the other parent.

The difficulty is that this message is not of the same kind as the message about shared care. If the public are informed that it is likely to be in the best interests of children to have substantial involvement from both parents, and that subject to the constraints of travel time between the homes, an equal time arrangement or some midweek contact might work well, then they can make that arrangement for themselves. The law, sending this message, can inform the unassisted negotiations between parents, and this message might, in appropriate cases, be given by lawyers and other professionals involved with the family.

However, the message—reinforced by the 2011 reforms—that the courts are instructed to act protectively in cases where there are significant concerns about family violence or child abuse is not one that the parties can act on for themselves. Nor is it likely to form the basis of a compromise in mediation where the protective concerns are denied or minimized. The message is that if the parent resists compromise and litigates, and has evidence that can substantiate the protective concerns, then orders may be made after trial that respond to the protective concerns. That message does not help parents settle. Kaspiew et al. (2011), summarizing the findings of the evaluation by the AIFS, observed:

A clear theme in the qualitative data generated from interviews with legal system professionals (lawyers, registrars, judges and family consultants), was a concern that women, in some cases, were being pressured into agreeing to arrangements that they felt weren’t in their children’s best interests and, in some cases, exposed both the women and their children to increased levels of risk. (p. 409)

That is likely to have been the case before 2006 as well, and indeed was one of the complaints about the very modest reforms to the law made in 1995 (Rhoades, Graycar, & Harrison, 2000). Settlements prior to 2006 might have been more likely to involve every other weekend and half of school holiday arrangements than more substantial shared care, but the protective issues involved in such arrangements are not much less.

How then can the law better address protective concerns? So much of the debate in Australia has been about how the law on the statute book addresses the issue of family violence. Hence the 2011 amendments made changes to the text of the law to satisfy the concerns of advocacy groups. For the most part, this was looking for solutions in the wrong places. The law, as applied by the judges, can only play a protective role if people have sufficient access to justice.

No amount of tinkering with the law, no amount of amendment, can bring about better outcomes for victims of violence and abuse unless the resources
are there to litigate the case. Inevitably, the greater the problems of cost and
delay in gaining access to justice, the less protective the family justice system
will be. Most people, out of necessity or exhaustion, will compromise or
acquiesce in ways that might, in some cases, adversely affect their safety or
what is developmentally best for the children. Litigation is therefore, to this
extent, like the nuclear deterrent. Few sensible people would ever wish to use
litigation to resolve parenting disputes; but to have strength in negotiation,
there needs to be a credible threat of litigation that will lead to outcomes that
restrict or deny contact in cases where protective action is necessary.

**Conclusion**

It is reasonable to suggest, from all the available evidence in Australia, that the
legislation contributed to an increased awareness and acceptance of shared care
arrangements as a viable and “normal” option for parenting after separation. There
is evidence also from the AIFS research that the requirement to consider arrange-
ments for parenting time that is not just at the weekends and on school holidays is
playing a valuable role in shifting community attitudes (Kaspiew et al., 2009,
p. 365). The legislation seems to have encouraged parents who live near one
another to be more equally involved in looking after their children during the
school week.

However, we can believe too much in law; and therefore we can believe too
much in law reform. The law might have a positive effect by offering broad
principles intended to achieve shifts in values and voluntary social behavior, or
by influencing the way in which parents negotiate private arrangements
(Kaspiew et al., 2011). Even still, the law on the books might well be in tension
with the norms and values that social-science trained mediators, custody eva-
uilators, and other nonlawyer professionals bring to the process of dispute
resolution. Here, understanding of the developmental needs of the children
might be a more powerful driver of professional advice and opinion than legal
norms or lawyers’ predictions about “what the court will do” (Rhoades, Dewar,
& Sheehan, 2014). Family law is therefore not hermetically sealed from other
frames of reference or sources of knowledge. The role of law therefore, in norm-
setting and changing behavior might be exaggerated. Nonetheless, Australian
family law does seem to have found a reasonable balance between the different
messages that the law needs to send to a diverse range of audiences.

**References**

Armstrong, S. (2001). “We told you so …”: Women’s legal groups and the Family Law


Tab 7
Tab A
Why Ottawa's changes to the Divorce Act don't go far enough

While it addresses outdated language, it misses out on catching up on provincial changes to legislation (and even just informal ones) that have long been made in courts across Canada.

Last week, Minister of Justice Jody Wilson-Raybould introduced a bill to amend the Divorce Act and other pieces of federal family law legislation in the House of Commons. The Ministry of Justice’s Charter Statement accompanying Bill C-76 announced the changes as ones that will “modernize” federal family law and “promote faster, more cost-effective and lasting solutions to family law disputes.”

While the aim of the bill is a lofty one, the federal government's ability to address family law issues is limited through no fault of its own, making wholesale change to the family law system difficult.

The Divorce Act, for one, deals only with married couples and not those who live common law. In addition, because of the division of powers under the Canadian constitution, provinces have jurisdiction to deal with property...
provinces also occur now parenting, child and spousal support issues for common-law couples will be addressed.

Even with those limitations in mind, however, Bill C-78 could have done much more.

The bill’s amendments to the Divorce Act mainly play “catch up” to what is already happening with most separating couples in Canada.

The most important proposed changes do two things: First, they change much of the antiquated language in the current Act, including replacing the terms “custody” and “access” with “decision-making,” and a “contact order” for “parenting time”; and second, they take legal concepts already in provincial law or decided by judges in the case law, and codify them in the Act itself.

As an example of the latter, while the current Act requires that a court’s decisions about a child must be based on the “best interests of the child,” “best interests” is now defined in the bill. It has already been defined in most of the existing provincial legislation for many years.

“Family violence” is also defined and includes sexual abuse, harassment, financial abuse and psychological abuse, and includes, with respect to a child, “the direct or indirect exposure to such conduct.” The proposed changes direct a court to consider the existence of any family violence as a factor in determining the type of decision-making and contact order to be made. Court decisions have for years been informally taking into account this extended definition of family violence when applying the “best interests” test.

Mobility cases (involving a separated spouse who wants to move with a child) have plagued the courts for many years. C-78 will require a parent who intends to move (whether that parent is the decision maker or if she or he simply has parenting time) to give 60 days’ notice of a relocation. If the parents do not agree on the proposed move, the bill sets out additional considerations when deciding a child’s best interests. Provinces such as Nova Scotia already have such legislation in place for unmarried couples. C-78 largely reflects the case law that has developed around the area.

While various provinces’ laws already do so, Bill C-78 also refers to a “family dispute process” — a “process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law.” Under the bill, the court can direct the parties to attend such a process. It also requires any legal advisor to “encourage the person to attempt to resolve matters through that process unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.”
law, there are a number of continuing problems for separated parents not addressed in C-78. One such issue is the “40 per cent rule.”

The “40 per cent rule” is found in the Child Support Guidelines, and allows a parent who has 40 per cent or more of parenting time, to ask to reduce the amount of child support paid to the primary parent. Many commentators say that the effect of the 40 per cent rule expands the feminization of poverty, because women continue to be primary caregivers and still bear the vast majority of the children’s expenses, but receive significantly less support.

Other easy “fixes” left out of the amendments include initializing the names of divorcing couples and their children, which are otherwise publicly available in most provinces (including to the couples’ tech-savvy children).

Parents in high-conflict separations also remain unable to ask the court under the Divorce Act to appoint a parenting co-ordinator (“PC”). A PC can be tasked with mediating issues regarding children, but most importantly, also have jurisdiction to “break the tie” when the parents cannot agree.

It is unlikely that C-78 will meet its aspirational goal of promoting “faster, more cost-effective and lasting solutions to family law disputes.” The reasons are disparate, and range from the problems created by Canada’s constitutional division of powers, to the difficulty a parent sometimes has in making sound decisions when reeling from a separation.

For these reasons, the changes to terminology and the codification of case law in C-78 will not likely have a significant effect on separating couples.

Laurie H. Pawlizada is a senior partner in the family law group at Torkin Manes LLP in Toronto.

lpawlizada@torkinmanes.com

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Tab B
Family justice in Canada is at a breaking point

Deep structural problems persist in how our justice system handles family disputes. We need to think seriously about a complete overhaul.

BY JOHN-PAUL BOYD 25 FEB 2019

In spite of the reform efforts to date, public confidence is at an all-time low, the number of litigants without counsel continues to rise, and signs point to a worrisome trend of people choosing to opt out of the system altogether, abandoning the relief to which they may be entitled. It’s time for some fresh thinking about what can be done. One solution may be a complete overhaul of the system, including allowing a wider range of professionals to take part. It’s time for a critical examination of all potential alternatives, no matter how improbable they seem, without the assumption that business as usual is best merely because it’s usual.

EDITOR’S PICK

Hot topics
A Jordan rule for minors?

Hot topics
A pressing matter: Fixing national security ahead of the election
In some jurisdictions, up to 80 per cent of litigants are entering the family court system without the benefit of counsel. For most this isn’t a choice, but a matter of necessity. High fees put lawyers out of reach for a growing number of middle-income Canadians, who must then navigate a challenging and complex court system on their own. In some areas of the country, there aren’t enough family law lawyers to meet the needs of those otherwise able to afford legal services.

Making matters worse, our system of justice is adversarial, which makes perfect sense when handling the arm’s-length disputes of shareholders and the parties to a car accident, but is toxic for people with children who must maintain a functioning relationship with each other into the indefinite future. Typically, neither bar nor bench has much training in the sensitive psychosocial implications of family restructuring after separation or the constructive management of family conflict. Nor are we particularly well-equipped to handle delicate issues like addictions, attachment disruption or allegations of abuse with any efficiency.

All this is taking a toll on the efficiency of a court system dealing with a growing backlog of cases. Lack of familiarity with the law, court processes and the rules of evidence increase the number of ill-conceived claims and adjournments and the time it takes to resolve both interim applications and trials. It is taking longer and longer to get to trial; data collected by the federal government shows that more than half of Alberta divorce files were four or more years old in 2015, and many lawyers have had the curious experience of watching their clients’ children grow up before their eyes.

Efforts to remedy these problems have met with modest success.

In 2012 and 2013, questions about access to family justice occupied an unprecedented prominence in the public and professional discourse. This was thanks in part to a trio of reports: Professor Julie Macfarlane’s groundbreaking study of the
experiences of litigants without counsel, the report of the Family Justice Working Group of the National Action Committee on Access to Civil and Family Matters and the report of the Canadian Bar Association's Access to Justice Subcommittee. These reports collectively spurred reform initiatives across Canada, some of which have fizzled and some of which have thrived. Outside of British Columbia, however, it is not at all clear what these initiatives have accomplished.

On the legislative front, Alberta was the first to jettison conflict-laden terms like custody and access in 2005, in favour of presumptions of parental guardianship and child-centred language addressing "parental responsibilities" and "parenting time." British Columbia followed suit in 2013, additionally emphasizing the importance of agreements and out-of-court dispute resolution options, and codifying mobility disputes and the use of parenting coordination. Nova Scotia came close to the mark in 2017, but ultimately opted to retain a scheme including custody. Now, Bill C-78 proposes sweeping amendments to the federal Divorce Act that follow the paths blazed by Alberta and British Columbia. It greatly expands the list of factors to consider in assessing the best interests of children.

Meanwhile, unified family courts, first established in Ontario in 1977, have spread across the land and will enter Alberta later this year. According to research conducted by the Canadian Research Institute for Law and the Family in 2016, most family law lawyers practicing in areas with unified courts say that these courts have simplified court procedures, provide easy access to family justice services and produce outcomes tailored to individual needs. As well, courts across Canada, both unified and generalist, are implementing early intervention programs intended to reduce conflict and canvass opportunities for settlement.

Why, then, do systemic problems persist?

It doesn't necessarily start with lawyers' fees. Yes, lawyers are expensive, but contrary to the too-common view that lawyers foment conflict to line
their own wallets, most family law lawyers would rather seek an informed, rational settlement than pursue litigation, despite its significant remunerative qualities. The cost of counsel largely results from the extraordinary basic cost of practice. Law society fees are compounded by insurance premiums, bar dues and other professional memberships. The cost of commercial office space typically exceeds the cost of housing a family, to which must be added the cost of staffing, bookkeeping, and IT services. The practice of law is expensive, and most family law lawyers earn a fraction of the income of their Big Law counterparts.

If improved funding for legal aid is not on the horizon - bar associations across the country have been chasing that particular squirrel around the tree without luck for decades - and the reduction of lawyers’ fees is unlikely, what else can be done?

First, we should encourage family law lawyers to take on more work on an unbundled basis. Critics will say that unbundling isn’t proper lawyering, pays poorly, and will invite a landslide of complaints before the law society. But the evidence points to high levels of satisfaction among both clients and lawyers. Clients say unbundled services are accessible and more affordable, and help them better understand the law and their options. Lawyers say much the same, and point to improved outcomes for clients.

Second, we should allow people other than lawyers to assist clients with legal problems, both in and out of court. We lucky few are privileged to hold a statutory monopoly on the provision of legal services. But this monopoly is incompatible with the unmet demand for the services only we offer. Somewhere in our entitlement lurks a quid pro quo that we have, at our peril, failed to meet. If we fail to address this, government will do it for us. As McCarthy Tétrault’s Matthew Peters put it at the 2018 BC Legal Innovation Forum: “If we are preventing innovation we are going to lose our social licence.”
I suspect this is the concern motivating a recent softening of positions on the part of the law societies of Ontario and British Columbia when it comes to non-lawyers offering legal services. The title of the recently amended *Legal Professions Act* in British Columbia - note the plural form of the noun - suggests likewise.

This is not to say that more affordable legal professionals should have a scope of practice equal to that of lawyers. They must be properly trained, insured, regulated and governed by a code of ethical conduct. The extent of their services should be developed with care, in consultation with government, the bench and bar, and must be commensurate with the level of training they receive.

What's more, we must vigorously promote the resolution of family law disputes other than by litigation. Family law can no longer be treated as just another species of civil dispute, subject to the same rules and principles despite its special nature and many critical differences. We, as a modern, industrialized society, must put an end to the bizarre situation of spending the vast majority of our family justice dollars supporting the dispute resolution mechanism that is the least efficient, most time-consuming and most destructive to families and children. A miniscule fraction of this funding is devoted to family justice counsellors and mediation services, and, so far as I am aware, none to funding private mediation, collaborative negotiation and arbitration. Surely, the public purse would be better spent supporting processes that are child-centred, holistic, cooperative to the extent possible, and promote the capacity of family members living apart to resolve disagreements on their own.

In fact, we should consider removing family law matters from the courts altogether. These are disputes that could be moved into a specialized administrative system offering both adversarial and non-adversarial dispute resolution alongside: education on parenting after separation, child development and conflict management; social services providing parenting, housing and
employment support; and financial and mental health counselling, parenting assessments and similar services. Such an administrative system should be interdisciplinary and explicitly aimed at promoting the well-being of children, reducing conflict and promoting parents' ability to cooperate with each other. Its rules, policies and forms should be written in plain language and be tailored to the unique needs of families living apart; the rules of evidence and *stare decisis* should be simplified; and the extent of the adversarial and non-adversarial processes provided by the tribunal and the commission should be genuinely proportionate to the circumstances of each family, and the importance, complexity and value of the issues in each dispute.

I am glad to practise at a time when serious change is underway. However, I worry the present efforts, laudable as they are, may not shift the needle on some of the deeper structural problems affecting family justice.

Still, something must be done. The need is urgent and is only growing worse.

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John-Paul E Boyd, AOCA, MA, LLB, is a family law arbitrator, family law mediator and parenting coordinator, and the principal of John-Paul Boyd Arbitration Chambers, providing services throughout Alberta and British Columbia.
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