SHARED PARENTING IN CANADA

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Family law in Canada falls under both federal and provincial jurisdiction. The federal *Divorce Act* applies in divorce proceedings when child custody issues arise in cases where the parents are legally married. Provincial statutes govern cases of parents who are legally not married. Canadian family law in Canada is a complex mixture of statute law, common law, case law, and constitutional law. It is based on the English common law tradition, which derives law from both written statutes and from common law, also known as precedent or judge-made law, as judges make new rules for new situations as they arise.

In Canada as elsewhere, the maternal presumption was replaced in the 1970s by the principle that child custody ought to be decided according to what is in the "best interest of the child," and this new standard was the foundation of Canada's second Divorce Act (1986), whose wording reflects a careful consideration for gender neutrality. Paradoxically, the new act coincided with a proportionally larger share of judicial determinations of sole maternal residence. Since 1986, a major expansion of family law has occurred, with considerable reliance on parental gender as a key factor custody decisions, in the absence of precisely-defined predictors of the "best interests of the child." In recent years there has been some scrutiny and criticism of the gender bias against fathers in cc disputes. The ct has responded with a larger proportion of sole custody/primary residence decisions made in favour of fathers, but not shared parenting. What has changed in recent years are superficial changes to the language of divorce law; for example, "custody" has been replaced by "residence," and "access" with "contact." Other changes include more judges, additional training for judges in family law matters, and the expansion of support services for parents.

Shared parenting, however, has been marginalized as a viable alternative by the Canadian legal establishment as an outlandish proposition, an arrogant presumption and a conspiracy of fathers' rights extremists, that must be strongly resisted. The 37,000 member-strong Canadian Bar Association, in response to a recent federal Conservative private member's bill in favour of amending the Canadian Divorce Act to institutionalize shared parenting as a legal presumption, reacted swiftly in opposition, demanding and receiving a retraction from the Conservative Minister of Justice Robert on the motion. And since 2000, all federal and provincial task force commissions and reports on family law reform avoid ANY mention of equal or shared parenting as a viable option.

The year 1997 marked a turning point in the effort to introduce the notion of shared parenting in Canada, with the publication of a Joint House of Commons/Senate Committee on Child Custody and Access, *For the Sake of the Children*, spearheaded by the Hon. Ann Cools, Senator for Toronto Centre. This report contained two main recommendations: the establishment of a legal presumption of shared parenting, and the promotion of family mediation as the principal method of determining parenting after divorce arrangements. The report was very strong in its recommendations, but even stronger was the backlash to the report, from both legal and feminist groups, and the

Liberal government quickly shelved the report. Since that time, there has been limited movement on both fronts, both federally and provincially, to the point where presently, shared parenting as a legal presumption is rarely or never actually discussed in government reports or recommendations for family law reform. It has become somewhat of a "taboo" subject in official discussions. At the same time, Canadian courts are increasingly making "joint custody" determinations, but with primary residence and contact orders that reflect a sole caregiver presumption. This is "joint custody" in name only.

Currently family mediation is being promoted by provincial governments as an important adjunct to existing family law services. Despite the lip service in favour of mediation, however, there has been limited uptake by parents in dispute over the parenting of their children, as parents who have the upper hand in family court have little incentive to engage in a mediation process.

In opposition to the reluctance of Canadian legislators and the judiciary to promote shared parenting as a legal presumption, there is strong public support for the establishment of shared parenting in law, even in high conflict cases (Canadian polls indicate that 80% of the public supports this reform). The official ruling Conservative Party's position (as well as that of the Canadian Green Party) is the establishment of a rebuttable; shared parenting presumption; the official opposition New Democratic Party as well as the Liberal Party are not in support. Two years ago a Conservative Private member's bill was introduced in the House of Commons; however, this was quickly vetoed by the Conservative Minister of Justice, Robert Nicholson.

Why the lack of political support for shared parenting in the face of strong public support and stated positions in favour of family law reform in the direction of shared parenting? The main reason appears to be vigorous opposition by Canadian Bar Association, as the livelihood of lawyers and allied professionals are at stake. Family mediation is less of a threat to the legal establishment, as even with promotion family mediation is at best an adjunct to legal determination of parenting after divorce in contested cases, and because family mediation in Canada has largely become the domain of lawyers.

A second reason is that unlike Europe, the U.S., and Australia, family law is not a public issue to any degree in Canada; there is limited media attention devoted to child and family policy in general; there is a prevailing public assumption that courts are making shared parenting determinations, yet when people are personally affected, they realize that this is not the case.

Opposition to shared parenting is also evident among women's rights and feminist groups, based on the assumption that mothers are the primary caregivers of children, and fears that shared parenting may be ordered in family violence situations. (The research, however, demonstrates the opposite: Health Canada and Statistics Canada data (such as the National Work-Life Conflict study) have reported an increasing "gender convergence" of child care responsibilities between Canadian mothers and fathers, to the point that shared parenting is now the norm in the majority of two-parent families in Canada. At the same time, studies have determined that the possibility of first-time family violence increases with sole custody (as fully half of first-time family violence occurs after parental separation, in the context of the "winner-take-all" sole custody system; shared parenting, on the other hand, decreases conflict and prevents first-time

family violence.)

For the ruling Conservative government, the issue of establishing a shared parenting presumption is seen as too delicate an issue, and as "opening a can of worms" (as with abortion, same sex marriage, etc.)

Finally, the lack of meaningful reform in the child custody sphere is part of a broader pattern of child and family policy changes in Canada that have undermined rather than supported parents (child protection and child care policies follow a similar pattern). Some years ago, with the advent of same sex marriage in Canada, legislators quietly and without public debate redefined "parent" in all Canadian legal statutes, from "natural parent" to "legal parent."

What are the statistics in regard to the prevalence of shared parenting in Canada? In regard to contested cases and legal determinations, reliable statistics are very difficult to obtain in Canada, access to court files to generate representative samples are difficult if not impossible to obtain. Canadian courts want to appear to support joint custody, but in reality they do not support physical joint custody.

There is, however, a lot of data regarding shared parenting in two-parent families, and in this regard I think Canada is quite advanced: in about 80% of Canadian families with dependent children, both parents are working outside the home, and when both parents work outside the home, shared parenting has emerged as the normal arrangement: according to Health Canada, on average each week mothers devote 11.1 hours to child care; fathers devote 10.5 hours, a 51-49% split (there has been a "precipitous decline" in the amount of time working mothers are able to spend with their children). Statistics Canada reports that in the 2005 General Social Survey, on average, men 25 to 54 spent 1.8 hours a day on direct child care, while women spent 2.5 hours, with a "gender convergence" with respect to child care work in families. In divorce cases with children, when parents agree about parenting arrangements, shared parenting is also the norm, according to Statistics Canada.

In contested divorce cases involving children, however, when parents do not agree about parenting arrangements, sole custody (now called "primary residence") is the norm, both in cases where there is a court hearing and determination on the matter of residence and contact, and also in cases where parents do not agree when one parent gives up the pursuit of shared parenting because he or she cannot afford it, or does not expect to get it in court, or does not want children exposed to an adversarial court battle (these latter cases appear to be "primary residence by consent of the parties," but they are not).

Last available data on outcomes in litigated cases in Canada dates back to 1997, where sole maternal custody was the outcome in 85% of contested cases. There is no recent court file analysis data because courts are reluctant to allow access to court records. Selected cases are published online and these are be used for research, but they do not constitute a representative sample.

Sociologist Paul Millar (2009) analyzed the Statistics Canada Central Divorce Registry (CDR) dataset from the proclamation of the current Divorce Act on June 1, 1986, to September 30, 2002, to isolate the impact of the gender of the parent as a predictor of custody awards, examining de facto living arrangements specified by judges. The CDR dataset yielded over 1.1 million parent-child pairings. He found that the mother obtained either sole custody or joint custody with primary residence in 89% of these pairs. He controlled for the circumstances of the divorce, including which party initiated

the action, the grounds pled, age of each of the parents, the region of the country, the year of the divorce, and duration of the marriage. He found that mothers were more than 27 times as likely as fathers to obtain sole custody.

Also, the National Longitudinal Survey of Children and Youth tracks a large sample of Canadian children as they grow up, children of both married and co-habiting couples (the proportion of children born to co-habiting couples in Canada is now 22%). This data set reveals that by the age of fifteen, 30% of Canadian children experience their parents' divorce. This dataset can be used to identify the variables that correlate with positive and negative outcomes for children of divorce: research indicates that the assignment of sole parenting to mothers is associated with increases in emotional disorders in children, while assignment of sole parenting to fathers is associated with increases in hyperactivity and behavioural problems. Children in shared parenting arrangements clearly do best.

Overall Canadian children are highly at risk compared to other countries; in the UNICEF (2007) study of child wellbeing in economically advanced countries, Canadian children scored very poorly in regard to social and emotional well-being (18^{th} out of 21 countries), especially in regard to childhood depression and suicide, behavioural adjustment, bullying & aggression. Thus despite proclamations of Canada's commitment to its children and families, Canada lags well behind other countries in regard to its child and family policies. This includes the lack of efforts in regard to shared parenting legislation, despite a majority government that claims to support it, but is afraid of incurring the wrath of the feminist and legal lobbies in regard to the issue. (In a recent cabinet shuffle, however, a new Minister of Justice (Peter McKay) was appointed, and there is discussion of a new private member's bill to reform the Divorce Act to institutionalize a presumption of shared parental responsibility. It is likely to be a watered-down version, however, such as in Australia. Privately members of all political parties are in support of shared parenting, but it is considered "political suicide" if the issue is raised—despite the overwhelmingly strong public support for shared parenting.)

Finally , a few words about my own work in the area of shared parenting. I consider my work first and foremost as undertaken from a child-focused perspective. In advancing a presumption of shared parenting in family law, I have placed at the forefront two key interrelated concepts that I believe should be central to family law reform:

1. an evidence-based "best interests of the child from the perspective of the child" legal criterion, to replace the present vague and indeterminate discretionary best interests of the child standard, with decision-making based on research that examines child outcomes in different parenting after divorce arrangements. Further to this I have developed a critique of the discretionary best interests of the child standard, as well as empirically-based arguemtns for the establishment of a rebuttable legal presumption of shared parental responsibility.
2. a responsibility-to-needs orientation, to replace the current dominant "rights-based" approach. More specifically, I refer to the responsibilities of both parents to their children's needs, and the responsibility of social institutions (including legal and judicial, child welfare and educational institutions) to support parents in the fulfillment of their parental responsibilities to their children's needs. From this I have developed a 4-pillar approach to the legal determination of parenting after divorce, which is the subject of my forthcoming book.

The book, "The Equal Parent Presumption: Social Justice in the Legal Determination After Divorce" (McGill-Queen's University Press), is an elaboration of an earlier policy paper, "Child Custody, Access and Parental Responsibility," and focuses on the latest research on child and parental outcomes in sole custody versus shared parenting arrangements after separation and divorce. In addition, the book outlines a 4-pillar approach to the legal determination of parenting after divorce:

(1) A rebuttable legal presumption of equal parental responsibility
(2) Treatment: the establishment of mediation and therapeutic services to this population
(3) Prevention
(4) Enforcement

I would like to elaborate on the first pillar, which itself has 4 elements:

(1) A Parenting Plan Requirement (applied to all parents in dispute): a legal requirement that parents develop a parenting plan before any hearing is held on the matter of parenting after divorce;

-Parents would have a choice of developing the plan jointly though direct negotiation, legal negotiation, or family mediation; a comprehensive network of accessible family mediation and family support services focused on assisting parents in the development of the plan would have to be established

> -This parenting plan would be tailored to children's ages and stages of development, parents' schedules and preferences, and children's unique needs. (Parental self-determination would thus be the cornerstone of family law.)

(2) Application of the Approximation Rule in the First Instance (applied to parents who cannot agree on a parenting plan): when parents cannot agree on a parenting plan, in the interests of stability and continuity, children would spend time with each parent in equal proportion to the relative amount of time each parent devoted to child care before divorce;

> -As a form of equal parenting, the "approximation rule" is individualized, child-focused, and gender neutral. It also provides judges with a clear guideline and avoids the dilemma of judges adjudicating children's best interests in the absence of expertise in this arena.
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> -Given the gender convergence and the emerging norm of SP in two-parent families (Atwood 2007; Marshall 2006), in Canada the approximation rule would translate to roughly equal time apportionment in most disputed cases of parenting after divorce.

(3) An Order for Equal Parenting Time (applied to parents who cannot agree on a parenting plan and each claim to have been primary caregivers before divorce);

> -Again, in addition to being child-focused and gender neutral, this presumption will provide judges with a clear guideline and will avoid the dilemma of judges adjudicating the relative amount of time each parent spent in caregiving tasks before divorce.
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> -This is intended to maximize the involvement of both parents in their children's lives after divorce. Equal time division allows each parent a meaningful level of involvement and responsibility for children, while at the same time providing each a respite from full-time child rearing, which is particularly important when, as is the case in most Canadian families,

both parents work full-time. It is also intended to maximize parental co-operation and reduce conflict after parental divorce.

-It establishes an expectation that the former partners are of equal status before the law in regard to their parental rights and responsibilities, and conveys to children the message that their parents are of equal value as parents. (At the same time, in the interests of stability and continuity in children's relationships with their parents, pre-existing parent-child relationships would continue after divorce.)

-In cases in which parents dispute the relative amount of time each spent in child caregiving before divorce, the court would apply an equal-time presumption and not get drawn into investigations regarding the proportionate amount of time each parent spent with the children prior to divorce.

-A presumption of equal parental responsibility is thus a much more individualized approach than the one-size-fits-all formula of sole custody (a blunt instrument which forcefully removes a parent from the life of a child in contested cases). First, parents are free to make whatever arrangements they wish on their own and, second, if they cannot decide, a presumption in which post-divorce parenting arrangements approximate as closely as possible the existing arrangements in the two-parent family would be applied, in the interest of stability for children. Third, in cases in which both parents present as primary caregivers and cannot agree on a parenting plan, a presumption of equal time parenting would apply, in the interests of decreasing conflict and ensuring that each parent remains meaningfully involved in children's lives.

(4) A Rebuttable Legal Presumption Against Equal Parenting Responsibility (applied when it is established that a child is in need of protection, with the court making a custody determination);

-This provision is essentially the same as that for children in two-parent families in regard to the legal determination of parenting after divorce in family violence and child abuse cases, with the safety of children as the paramount consideration. As in current practice, courts would make protective orders only when allegations are upheld, after thorough child welfare investigation, and sole custody or primary residence would be ordered only with an investigated finding that a child is in need of protection from a parent.

-Detection of abuse is a difficult matter: at one extreme, a significant proportion of family violence situations are hidden to state authorities, and at the other extreme, false allegations are made. Where violence and abuse are alleged, criminal court proceedings as well as a comprehensive child welfare assessment must precede any family court judgment on matters related to parenting after divorce.

The 4-pillar framework is unique in several ways. First, it is a child-focused approach that takes on board not only empirical research findings on the needs and best interests of children of divorce, but also the primary concerns of both feminist and father advocacy groups. Second, the framework merges a rebuttable legal presumption of equal

parenting responsibility with a rebuttable presumption against equal parental responsibility in cases of established family violence and child abuse. Third, it confronts the problem of discrimination against children of divorce on the basis of parental status, as it adopts a child-in-need-of-protection criterion rather than the discretionary best-interests-of-the-child standard to determine the need for the removal of a parental from children's lives. Fourth, it is a hybrid of the "approximation standard" and an equal 50–50 parenting time arrangement, but also incorporates elements of a "parenting plan" approach. In this way it transcends a "one-size-fits-all" approach and is highly individualized, while at the same time providing clarity and predictability of outcome.

My hope is that family law reform in Canada and elsewhere will be based on these four pillars. Most important to family law reform, I believe, is that we operationalize both a best-interests-of-the-child-from-the-perspective-of-the-child legal criterion, and a responsibility-to-needs approach to parenting after divorce.

8 Arguments Against the Discretionary Best-Interests Standard:
(1) The best-interests-of-the-child standard is vague and indeterminate.
(2) The best-interests-of-the-child standard is subject to judicial error.
(3)Best-interests-of-the-child-based decisions reflect a sole custody presumption and judicial bias.
(4)The best-interests-of-the-child standard sustains, intensifies, and creates conflict, and fuels litigation.
(5)The best-interests-of-the-child standard makes the court dependent on custody evaluations lacking an empirical foundation.
(6)The views of children and parents regarding the best interests of the child are radically different to those of the judiciary.
(7)The best-interests-of-the-child standard is a smokescreen for the underlying issue of the judiciary and the legal system retaining their decision-making power in the child custody realm.
(8)Contrary to the UN Convention on the Rights of the Child, Canadian children of divorce are discriminated against on the basis of parental status in regard to the removal of their parents from their lives.

16 arguments in support of equal parenting:
1. Shared parenting preserves children's relationships with both parents.
2. Shared parenting preserves parents' relationships with their children.
3. Shared parenting decreases parental conflict and prevents family violence.
4. Shared parenting reflects children's preferences and views about their needs and best interests.
5. Shared parenting reflects parents' preferences and views about their children's needs and best interests.
6. Shared parenting reflects child caregiving arrangements before divorce.
7. Shared parenting enhances the quality of parent-child relationships.
8. Shared parenting decreases parental focus on "mathematizing time" and reduces litigation.
9. Shared parenting provides an incentive for inter-parental negotiation, mediation and the development of cooperative parenting plans.
10. Shared parenting provides a clear and consistent guideline for judicial decision-making.
11. Shared parenting reduces the risk and incidence of parental alienation.
12. Shared parenting enables enforcement of parenting orders, as parents are more likely to abide by a shared parenting order.
13. Shared parenting addresses social justice imperatives regarding the protection of children's rights.
14. Shared parenting addresses social justice imperatives regarding parental authority, autonomy, equality, rights and responsibilities.
15. The discretionary best interests of the child / sole custody model is not empirically supported.
16. A rebuttable legal presumption of shared parenting responsibility is empirically supported.