

Bringing Canada's *Divorce Act* into the New Millennium: Enacting a Child-Focused Parenting Law

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Canada's Divorce Act relies heavily on the concepts of custody and access to govern post-separation parenting, concepts that have proprietary connotations with parental winners and losers. The 1985 Act fails to adequately reflect current social values, family arrangements or social science research, and it does not mention either the views of the child or domestic violence. The author responds to the Act's shortcomings by proposing comprehensive reform to its post-separation parenting provisions. Building on provincial and international reforms, the author recommends a principled articulation of the best interests of the child that would provide judges, family lawyers, mediators and parents with the guidance needed to develop appropriate parenting plans. This principled articulation would support co-parenting, without establishing a presumption of equal parenting time. The author's approach goes beyond prior parliamentary attempts to enact appropriate legislation by balancing the importance of maintaining parent-child relationships with domestic violence concerns. Further, the author advocates for the inclusion of relocation provisions, which require notice of planned relocation and structured decision making about whether relocation is in the best interests of the child.

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Introduction

The concepts of “custody” and “access”, which are foundational to the law governing post-separation parenting in Canada’s *Divorce Act*,¹ are unhelpful relics of the last century, focusing as they do on the protection of the rights of parents rather than the promotion of the “best interests” of children. The provisions of the *Divorce Act* dealing with post-separation parenting are inconsistent with contemporary values and parenting practices. They do not reflect current social science research—especially in regards to the effects that separation and domestic violence have on children—and are contrary to the requirements of the United Nations *Convention on the Rights of the Child (UNCRC)*² on the importance of considering the views of children. In the three decades since the

1. RSC 1985, c 3 (2nd Supp).

2. 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [UNCRC].

enactment of the *Divorce Act*'s parenting provisions, parenting behaviour within both intact and separated families has changed dramatically. The inadequacy of the Act's parenting provisions has led Canadian judges, family lawyers and mediators to create "best practices" that ignore the provisions. "Unwritten amendments" to the statute, however, have had serious consequences. Some professionals, and many of the large number of divorcing parents who are unrepresented, are, at best, left without appropriate guidance and, at worst, misguided by the present statute.

Clearly, the interests of children, parents and the justice system require the reform of the parenting provisions of the Act.³ The reforms need to focus on parental responsibilities and children's relationships, rather than on parental rights. Divorce means the end of the spousal relationship, but it does not mean the end of the parent-child relationship, and there needs to be supports in place to allow for effective "co-parenting" relationships to develop. In some cases, it may be necessary for a judge to impose a plan on parents, or even stop the involvement of a violent or abusive parent in a child's life. However, in most cases, the law and family dispute resolution professionals should be assisting separated parents in the development of their own parenting plan. These plans should normally allow for significant involvement of both parents in the lives of their children that will evolve as children mature and circumstances change. The law must recognize that, in most cases, children benefit from a significant ongoing relationship with both parents, yet, at the same time, offer a way to adequately deal with issues of domestic violence and the protection of children. Finally, legislators intent on reform must recognize the importance of "hearing the voices of children", not only to protect their rights but also to improve their outcomes.

3. As discussed in this article, there has been similar controversy over provincial statutes that govern parenting disputes between separated parents who are not getting a divorce, generally those parents who are not married to each other. Some provinces, notably Alberta and British Columbia, have reformed their laws and can serve as models for federal reforms. For Alberta, see *Family Law Act*, SA 2003, c F-4.5 [Alta FLA]. For British Columbia, see *Family Law Act*, SBC 2011, c 25 [BC FLA]. Most provinces and territories, however, still have statutes patterned on the federal *Divorce Act* and also need to reform their laws.

Part I of this article begins with a discussion of patterns of parenting in intact and separated families in Canada. Simply put, fathers⁴ are doing more child care in intact families today than when the present *Divorce Act* came into force in 1986.⁵ Accordingly, most separated parents now have an arrangement that involves some form of joint or shared parental responsibility.

Part II reviews trends in Canadian jurisprudence and legislation related to parenting concepts and concludes that judges are abandoning their formerly cautious approach in favour of a willingness—in appropriate cases—to impose various forms of shared custody or co-parenting.

Part III summarizes the growing body of research by social scientists and mental health professionals related to post-separation parenting. This research has value but is also limited and indeterminate.

Part IV discusses the confusion and conflict over terminology such as “shared parenting”, “shared custody”, “equal parenting” and “joint custody”. Given the controversy surrounding terminology in Canada, and the Act’s lack of precision, it may be most useful for law reform purposes to employ the term “co-parenting” to describe relationships where both parents have significant involvement in child care and decision making on behalf of the child. Co-parenting should be used in most—but not all—cases of parental separation.

Part V discusses reforms in other countries, with a particular focus on Australia, a country that has undertaken significant reform of its laws and family justice system, and has seen substantial research conducted on the effects of family justice reform on children.

Part VI discusses past efforts to reform the parenting provisions of the *Divorce Act: Bill C-22*,⁶ proposed by the Liberal government, which died

4. The discussion in this article focuses on cases where a child has only two opposite-sex parents with an interest in parenting the child, reflecting the vast majority of divorcing parents in Canada. Comparable issues arise with same-sex parents, but there is very little empirical research on issues related to same-sex parents and post-separation parenting. Similar approaches are also appropriate where there are more than two parents or guardians, although there may be challenges in identifying “parents” and making appropriate arrangements.

5. The present *Divorce Act* was enacted in 1985 and came into force in 1986. *Supra* note 1.

6. *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to amend other Acts in consequence*, 2nd Sess, 37th Parl, 2002 (second reading 25 February 2003, not active) [Bill C-22].

on the order paper in 2003, and Bill C-560, a private member's bill that was defeated at second reading in May 2014, which would have created a presumption of "equal parenting time".⁷ Debates about these proposals resulted in polemical rhetoric. Fathers' groups argued that the present law "disenfranchises fathers",⁸ while feminists castigated proponents of reform for "demonizing mothers".⁹

Part VII sets out proposals for reform. Parenting arrangements that deal with decision making and children's care, whether reflected in "parenting orders" or "parenting plans", should be based on individualized assessments of a child's best interests that take into account such factors as the child's age and stage of development. Further, as the active nature of the terms "shared parenting" and "co-parenting" imply, parenting plans are not intended to be static "once and for all" resolutions, but should evolve over time as the circumstances of the parents and children change. A child-focused approach also recognizes that there are cases where the continued involvement of both parents is not appropriate, especially where there are concerns about domestic violence, parental mental health or substance abuse. Additionally, the law must recognize the value of taking into account the views and perspectives of children when parenting plans are being made.

While legislative reform is needed, the proposals made here are in some measure a codification of present best practices and case law, with

7. *An Act to amend the Divorce Act (equal parenting) and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2013 (first reading 16 December 2013, defeated 27 May 2014) [Bill C-560].

8. For the views of a prominent female supporter of equal parenting and Bill C-560, see Barbara Kay, "After a Divorce, Equal Parenting Rights Should be the Norm", *National Post* (19 March 2014), online: <www.nationalpost.com> (while many refer to the supporters of Bill C-560 as "fathers' rights advocates"—terminology which is used here—there are also women who support the "equal parenting movement", just as there are many men who support feminist opposition to a presumption of equal parenting). See also Edward Kruk, *The Equal Parenting Presumption* (Montreal: McGill-Queen's Press, 2013) [Kruk, *Equal Parenting*]; Grant A Brown, *Ideology and Dysfunction in Family Law: How Courts Disenfranchise Fathers* (Calgary & Winnipeg: Canadian Constitutional Foundation & Frontier Centre for Public Policy, 2013) (for recent polemics supporting a presumption of equal parenting and respect for fathers' rights).

9. See e.g. Susan B Boyd, "Demonizing Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes" (2004) 6:1 *J Assoc Research on Mothering* 52 [Boyd, "Demonizing Mothers"].

the recognition that there are clearly limits on the impact of this type of statutory reform. A better articulation of child-focused concepts and principles will offer more guidance to judges, who decide a small fraction of all Canadian parenting disputes, and to parents who make their own plans, often with the assistance of mediators, lawyers or other professionals. The appropriate concepts and principles, once codified in legislation, should facilitate the making of child-focused parenting arrangements, especially for those without access to adequate professional assistance. Changing legislation alone, though, cannot address the challenges posed by the highest conflict cases, nor ensure protection from domestic abuse.

Many other jurisdictions have undertaken statutory reforms of parenting law similar to those proposed here. While empirical research on positive developments in these jurisdictions inevitably confounds the effects of legislative reform with other social and systemic changes, it is apparent that adopting legal reforms—which better reflect contemporary values and knowledge—is integral to a process of change. Reforming legislation should help stimulate a process of professional and public education, and the development of services that can change family dispute resolution culture and outcomes for children. In particular, the types of substantive legal reforms advocated are related to the increased use of consensual methods of dispute resolution.¹⁰

Parts I to VII of the article focus on reform of the *Divorce Act*. Part VIII, in conclusion, goes beyond these reforms to address the need for changes in professional culture, social attitudes, practices and in services provided to parents.

I. Parenting in Canada: Intact and Separated Families

Only limited Canadian research exists on parenting in either intact families or by separated parents. Further, the available data has its limitations, as much of it reports on family arrangements at a specific point

10. See e.g. Jana Singer, “Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes” (2014) 77:1 Law & Contemp Probs 177.

in time, which cannot accurately reflect complex and evolving social and familial realities. Despite these limitations, it is clear that fathers are doing more child care in both intact and separated families than was the case in previous generations, and some form of joint legal custody or shared decision making is now used for a majority of post-separation parenting arrangements. These developments reflect both the changing expectations of fathers about their parenting roles and the increased participation of mothers in the labour force, creating the need for fathers to “pull their weight” and participate in more child care.

A. Married and Cohabiting Parents

Statistics Canada undertakes a time use study of the Canadian adult population every five years. These studies report a trend of “converging gender roles”, with women doing more work in the paid labour force and men doing more child care and housework.¹¹ For married and cohabiting couples, mothers and fathers are increasingly involved as both parents and earners. Gender roles have been converging, yet there is still a notable gap, with men on average doing more paid work (and enjoying more leisure time), and women undertaking more of the domestic responsibilities.¹² Nonetheless, in a growing number of families, parents either share child care equally and are equally involved in the labour force, or the father

11. Statistics Canada, “Converging Gender Roles”, by Katherine Marshall, in *Perspectives on Labour and Income*, Catalogue No 75-001-XIE (Ottawa: Statistics Canada, 2006) 5. In 1976, 36% of couples with dependent children at home were dual-earner families. By 2005, that proportion had increased to 69%. While just over 90% of women with preschool children reported doing significant daily child care in both 1986 and 2005, the portion of male parents with daily involvement with these children increased from 57% to 73%. However, unlike housework, where the average time spent has increased for men but dropped for women, time spent on child care increased for both sexes. Overall, in 2005, fathers with children under nineteen years of age living in their homes spent about one hour per day on child care (up from 0.6 in 1986) and mothers spent two hours per day on child care (up from 1.4 hours in 1986). *Ibid* at 11.

12. See Statistics Canada, “General Social Survey: 2010 Overview of Time Use of Canadians”, Catalogue No 89-647-X (Ottawa: Statistics Canada, 2011) at 8.

[In this study of time use,] women spent more than twice as much time on [child care] as did men. For example, the total time women spent on children aged 0 to 4 was 6 hours 33 minutes per day. For men [with children this age], the corresponding duration was 3 hours 7 minutes. These differences between

assumes the role of the primary caregiver while the mother is the primary earner.

Another indication of social change is the number of families with a stay-at-home father. Although families with a stay-at-home parent have declined substantially since 1986, the proportion with a father in this role has increased from 4% in 1986 to 11% in 2005. Further, by 2006, 11% of fathers of newborn infants participated in the paid parental leave program under the *Employment Insurance Act*.¹³

B. Separated, Divorced and Never-Cohabited Parents

Very substantial behavioural changes among parents who are separated, divorced or never cohabited are apparent, with father involvement increasing markedly over time. Although broad trends are clear, the exact details of the change remain uncertain because different types of studies disclose different magnitudes of change. Specifically, studies of court orders reveal different patterns of parenting from studies of wider populations of separated parents.

men and women were only partly attributable to more men working full time. Women with young children who worked full time (30 or more hours a week) spent a total of 5 hours 13 minutes a day on childcare. In comparison, men in the same situation spent 2 hours 59 minutes taking care of their children.

Ibid. This study, however, is skewed as it includes both intact and separated couples, and men in situations of separation have less opportunity to care for their children. See Linda Duxbury & Christopher Higgins, *Revisiting Work-Life Issues in Canada: The 2012 National Study on Balancing Work and Caregiving in Canada* (Ottawa: Sprott School of Business, 2013) at 121. These researchers undertook a study of 25,000 people in the Canadian labour force and found that:

Women are the primary earner or equal partners in the breadwinning equation in just over half the families in our study Almost one in three of the women said that their partner had primary responsibility for childcare in their families. These data suggest that men are assuming primary responsibility for childcare in families where the woman is the primary breadwinner Gender is not associated with any of the forms of work-life conflict considered in this study. This suggests that as men do more at home and breadwinning is shared, work-life becomes more of an issue for men who now have to balance competing career demands with their partner and assume more responsibility at home.

Ibid.

13. SC 1996, c 23.

Statistics Canada collected data and reported on court orders made at the time of divorce until 2002.¹⁴ According to this data, the proportion of children in the sole custody of the mother at the time of divorce has declined steadily since 1988, when mothers had sole custody of 76% of children. By 2002, mothers had sole legal custody of 45% of children, and joint legal custody was ordered for 47% of children of divorce. While the time-share for each parent was not reported, it is clear that most of the joint custody cases did not involve equal time-sharing. Legal custody was awarded to the father for 8% of children in court orders in 2002, down from a high of 15% in 1986. Thus, many cases where previously sole legal custody would have been given to the father or mother in the 1980s were by 2002 joint legal custody arrangements.

A Department of Justice study of court files for divorcing parents during the 2010 to 2012 period found that in approximately six out of every ten cases, children resided primarily with their mothers. In one tenth of cases, children lived primarily with fathers; in two out of ten cases, there was a shared custody arrangement (the child lived with each parent at least 40% of the time—the cut-off for taking account of shared care for child support purposes); and one in ten had other arrangements, including split custody of children.¹⁵ This study also found that in three quarters of the cases, there was an order for joint legal custody (i.e., shared legal responsibility for decision making). Documents filed by parents indicated that family violence was mentioned in 8% of divorce files as a concern of either or both spouses.

14. Statistics Canada, *Divorces, 2001 and 2002* (Ottawa: Statistics Canada, 4 May 2004) (Statistics Canada collected data on this issue until 2008).

15. Canada, Department of Justice, "Survey of Family Courts and Court File Review, Internal Analysis" (Ottawa: Department of Justice, April 2013), cited in Canada, Department of Justice, *Making the Links in Family Violence Cases: Collaboration Among the Family, Child Protection and Criminal Justice Systems*, vol 7 (Ottawa: Department of Justice, November 2013) at 25, n 49. The survey stated that "[t]hese figures are based on limited data, and as a result may not be representative of the entire population of divorced parents. Totals may not add up to 100% due to the exclusion of the 'other' category: 2.2% for physical custody and 2.8% for legal custody." *Ibid* at 25.

Statistics Canada also undertook a court-based study of divorce files from 2010 to 2011.¹⁶ The substantial majority of cases (80%) were uncontested, with no documents filed to contest the relief sought. Among the 20% of contested cases, a pretrial conference hearing was held 55% of the time.

Clearly, the vast majority of divorce cases are resolved before reaching the trial stage. Many of the cases that are uncontested are settled by negotiation or mediation, before filing of court documents. Further, most of the cases that are initially contested are usually also settled whether after mediation, a judicially led conference or interim order from a judge. In the Statistics Canada study, only 2% of divorce files reached a trial, usually commencing more than twelve months after the initiation of proceedings.¹⁷

C. Separated Families and Parenting

The 2011 Census reported that 21% of lone-parent families were headed by a male, the highest rate in Canadian history. However, 79% of lone-parent families continued to be headed by a female.¹⁸

In 2011, Statistics Canada undertook a study of 1,055 separated or divorced parents.¹⁹ Though the results may not be representative of

16. Statistics Canada, "Divorce Cases in Civil Court, 2010/2011", by Mary Bess Kelly, Catalogue No 85-002-X (Ottawa: Statistics Canada, 28 March 2012) at 12–13 (the study reported on cases in Nova Scotia, Ontario, Alberta, British Columbia, Yukon, Northwest Territories and Nunavut).

17. *Ibid* at 13. Approximately one third of cases (34%) had a trial within one year of filing. The remaining 66% were held during the second year (42%) or after two years (24%). *Ibid* at 14.

18. Statistics Canada, "Portrait of Families and Living Arrangements in Canada: Families, Households and Marital Status, 2011 Census of Population", Catalogue No 98-312-X2011001 (Ottawa: Statistics Canada, September 2012) at 3 (between 2006 and 2011 the number of male lone-parent families (+16.2%) increased much faster than the number of female lone-parent families (+6.0%)). See also Statistics Canada, "Fifty Years of Families in Canada: 1961 to 2011", Catalogue No 98-312-X2011003 (Ottawa: Statistics Canada, September 2012) at 4 (these lone-parent families included those that resulted from divorce, separation, widowhood, adoption and other care arrangements).

19. Statistics Canada, *Spotlight on Canadians: Results from the General Social Survey—Parenting and Child Support After Separation or Divorce*, by Marie Sinha, vol 1, Catalogue No 89-652-X (Ottawa: Statistics Canada, February 2014).

the entire population due to its sample size, the study provides a useful picture of post-separation parenting. Parents in this study reported that after a separation or divorce, the mother's home was most often the child's primary residence (70%); 15% of parents reported that the child lived mainly with the father; and 12% of parents reported that the child had equal living time between the two parents' homes. The remaining 3% indicated other living arrangements, such as living with grandparents. Approximately 18% reported that there was no contact between the non-residential parent and the child in the previous year.

This 2011 study offers additional information on how separated parents report making their parenting arrangements. Just over one third of parents (35%) responded that major decisions were made jointly with their ex-partner. 59% of primary care parents reported having a written agreement or court order; 32% said that parenting arrangements were solely orally made and agreed to; and 9% indicated that there was no agreement in place.

Since this study represents arrangements at a point in time, some of the parents without formal arrangements may have later-made oral or written agreements. However, the results indicate that a significant portion of the population never formalizes parenting or child support arrangements.²⁰

A 2014 survey completed by 174 Canadian family lawyers and judges reported that almost half their cases involved some form of "joint physical custody", "shared custody" or "shared residence" (where the children spend at least forty percent of their time with each parent).²¹ More than two thirds were involved in some form of joint legal custody or "joint

20. *Ibid.* In this study, of those with written agreements or court orders, over a third of primary care parents (35%) reported that they resolved their cases by consulting lawyers but without going to court; a slightly greater portion (40%) used the court process, with or without lawyers; about one in ten used mediation (13%); and another one in ten made agreements on their own (10%). There did not seem to be an appreciable difference in terms of the arrangements made (i.e., equal time-sharing vs. a primary residence) whether parents used the court process, mediation, or negotiation on their own or with lawyers. *Ibid.* at 14–15.

21. See Nicholas Bala et al (survey undertaken at the National Family Law Program in Whistler, British Columbia, 13–17 July 2014) [unpublished][Bala et al, National Family Law Survey] (the results here are based on five questions from this survey). The attendees were from across Canada; approximately one third responded. An average of 46% of respondents' cases involve some form of "joint physical custody", "shared custody" or "shared residence"

guardianship”. The participants also reported a substantial increase in the use of shared custody or joint legal custody over the past five years.

D. Summary of Parenting Patterns

While different studies vary somewhat in the details that they provide on family life and post-separation parenting arrangements, the broad picture is clearly one of increasing father involvement, both in intact families and post-separation. In about one in ten cases of separated parents, the father has primary care, and in six out of ten cases the mother has primary residence. In at least one fifth of cases, each parent has the child at least forty percent of the time; though less than one in ten cases involves equal residential care.

The proportion of cases in which there is shared decision making or joint legal custody has increased sharply over the past three decades. At least two thirds of cases in the court system now involve some form of joint legal custody or shared parental responsibility for decision making. In at least one tenth of cases, however, there is little or no contact with the non-residential parent. It is likely that the cases of no contact are disproportionately cases where: fathers have never lived with their children; there has been high conflict or alienation; there are serious concerns about domestic violence that have resulted in a suspension of contact; or the parents live far apart.

Relatively few parenting disputes are resolved by a judge after a court hearing. Most cases result in a parenting arrangement based on negotiation, judicially led case conferencing or mediation. Some cases are resolved informally without a written agreement or court order, and one might speculate that many of these are cases where the parties did not cohabit and the non-residential father has little or no contact with the children. Many of these no contact cases appear to have been resolved

(where the children spend at least 40% of their time with each parent—the cutoff for “shared custody” for child support purposes). An average of 68% of their cases involved some form of “joint legal custody” or “joint guardianship”. They also reported a substantial increase in the use of shared custody or joint legal custody over the past five years (31% increased substantially, 53% increased somewhat, 16% stayed about the same and only 1% decreased). In only 13% of their cases was there a provision for limited or no contact with the non-residential parent. There were no significant variations to these questions by region.

without a court order; that is, the father has “dropped out” of the process or has been excluded from the children’s lives by the mother, rather than being excluded by a court order.

II. The Evolution of Parenting Law in Canada

Prior to the twentieth century, divorce was very rare, but when it did occur, the common law viewed the father as the “natural” guardian of the children. In practice, however, fathers often delegated actual care to female relatives. During the first half of the twentieth century, divorce and separation were still relatively uncommon, but when they occurred, the courts applied the “tender years doctrine”. Reflecting the parenting arrangements within marriage during that period, mothers almost always had custody of the children, unless they committed adultery, thereby demonstrating a lack of “moral fitness”.²²

In the latter part of the twentieth century, the divorce rate rose, and the law evolved from a presumption of maternal care to an assessment of the “best interests” of the child, which in theory required an individualized assessment of each case. However, even after Canada adopted the “best interests of the child test”, most mothers were still awarded custody of their children, while fathers received access—typically limited to two weekends a month and some vacation time. As recently as the 1970s, the Supreme Court of Canada considered it a matter of *common sense* that children should normally be in the custody of their mothers in the event of separation.²³

Under the Act and other similar provincial legislation, the parent with custody had “full parental control” and was “exclusively” responsible for the “care, upbringing and education of the child”.²⁴ The access parent,

22. For an in-depth discussion of the history and development of child custody law in Canada, see Susan B Boyd, *Child Custody, Law, and Women’s Work* (Don Mills, Ont: Oxford University Press, 2003) [Boyd, *Child Custody*].

23. See *Talsky v Talsky* (1975), [1976] 2 SCR 292, 62 DLR (3d) 267.

24. *Kruger v Kruger* (1979), 25 OR (2d) 673 at 677, 104 DLR (3d) 481 (CA).

almost always the father, clearly had a limited role, characterized as a “passive bystander” or “visitor” in the child’s life.²⁵

By the late 1970s, however, the concept of joint legal custody was starting to be used, in recognition that it might be in the best interests of many children for parents to share legal responsibility for decision making after separation.²⁶ Initially, the courts were very reluctant to make joint custody orders in the absence of the agreement of both parties. Judicial caution was reflected in the 1979 Ontario Court of Appeal decision *Baker v Baker* where Lacourcière JA stated “joint custody [is] an exceptional disposition, reserved for a limited category of separated parents”.²⁷

Gradually though, courts have recognized that in many cases it is valuable for children to have a strong relationship with both parents after they separate. While still using the concepts of *custody* and *access*, since 1986 the *Divorce Act* has explicitly allowed for joint custody. Subsection 16(10) specifies that in making orders for the care of a child:

[T]he court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.²⁸

The statutory title for this provision is “Maximum Contact”.²⁹ The second part is often called “the friendly parent” provision, because it encourages

25. See *Young v Young*, [1993] 4 SCR 3 at 47, 108 DLR (4th) 193, L’Heureux-Dubé J, dissenting; *Gordon v Goertz*, [1996] 2 SCR 27 at para 78, [1996] 5 WWR 457, L’Heureux-Dubé J, dissenting. Although L’Heureux-Dubé J was dissenting in both cases, her approach reflects the views dominant in the 1960s and 1970s about the limited role of “access parents”—almost invariably fathers at that time—after separation.

26. See e.g. *Baker v Baker* (1978), 3 RFL (2d) 193, 2 ACWS 55 (H Ct J), rev’d (1979), 23 OR (2d) 391, 95 DLR (3d) 529 (CA); Jay Folberg, “Joint Custody” in Rosalie S Abella & Claire L’Heureux-Dubé, eds, *Family Law: Dimensions of Justice* (Toronto: Butterworths, 1983) 185; Edward J Rosen, “Joint Custody: In the Best Interests of the Child and Parents” (1978) 1 RFL (2d) 116.

27. (1979), 23 OR (2d) 391 at 533, 95 DLR (3d) 529 (CA).

28. *Divorce Act*, *supra* note 1, s 16(10).

29. *Ibid.*

awarding custody or primary care to a parent who will support the child's relationship with the other parent.³⁰

In the 1993 Supreme Court of Canada decision *Young v Young*, McLachlin J, as she then was, commented on this provision:

Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent. *Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature.*³¹

Despite the Court's endorsement of subsection 16(10), there have been concerns that this provision may increase the risk of harm in situations of domestic violence by promoting contact between children and abusive parents, and by exposing primary care parents to continued risk.³² There are also related concerns that this provision may be used against mothers who are taking legitimate steps to protect children from abusive former partners. The silence of the *Divorce Act* on domestic violence heightens these concerns.

As discussed above, over the past two decades there has been a significant increase in the proportion of cases where each parent has the child at least forty percent of the time. Further, while there is no definitive data on the amount of access or parenting time for a parent without primary care, it is clear that a *typical* access order now provides for significantly more involvement with a non-primary residential parent (usually the father) than was the case thirty years ago. Today, parenting arrangements often involve more than two weekends a month, with some mid-week overnight access being common, and time during the school vacation periods becoming more extended. It is widely accepted by family justice professionals and parents in Canada that non-primary residential

30. See Department of Justice, "An Analysis of Options for Changes in the Legal Regulation of Child Custody and Access", Catalogue No 2001-FCY-2E, online: <www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2001_2b/option1b.html>.

31. *Supra* note 25 at 117 [emphasis added].

32. See e.g. Jonathan Cohen & Nikki Gershbain, "For the Sake of the Fathers?: Child Custody Reform and the Perils of Maximum Contact" (2001-02) 19 Can Fam LQ 121.

parents should be more than just visitors; they should be involved in the education and extracurricular activities of their children on a regular basis.

While most joint custody arrangements are the product of an agreement or mediation, since 1979, courts have been more willing to order joint custody, even when one or both parents object. Even in cases where there is conflict between the parents, courts may order joint legal custody through a process referred to as “parallel parenting”, provided that decision making on different issues can be delineated.³³ These arrangements expect only limited parental co-operation, with each parent having responsibility for the child for certain periods of time and in regard to certain types of decisions. While parallel parenting can be a useful way to resolve some cases, there are legitimate concerns that this arrangement may leave children spending years in a stressful situation, shuttling between parents who have high antipathy and an inability to effectively communicate let alone co-operate.³⁴

33. See e.g. *Ursic v Ursic* (2006), 32 RFL (6th) 23, 149 ACWS (3d) 103 (Ont CA).

34. See e.g. Philip Epstein & Lene Madsen, “Joint Custody with a Vengeance: The Emergence of Parallel Parenting Orders” (2004) 22 Can Fam LQ 1. See also *Baker-Warren v Denault*, 2009 NSSC 59, 277 NSR (2d) 271. Justice Forgeron made an order for parallel parenting and wrote:

Where parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that such a situation will change, joint custody is ordinarily not appropriate. This lack of effective communication, however, must be balanced against the realistic expectation, based upon the evidence, that communication between the parties will improve once the litigation has concluded. If there is a reasonable expectation that communication will improve despite the differences, then joint custody may be ordered.

...

Courts have increasingly embraced the concept of parallel parenting in circumstances similar to the case at bar. A parallel parenting regime is a mechanism which can be employed where there is high parental conflict, and where a sole custody order is not in the child’s best interests. A parallel parenting regime permits each parent to be primarily responsible for the care of the child and routine decision-making during the period of time when the child is with him/her. Significant decision-making can either be allocated

In 2005, the Ontario Court of Appeal heard and decided two cases involving joint legal custody. In *Kaplanis v Kaplanis*,³⁵ the Court of Appeal overturned an order for joint custody imposed by the lower court, but in *Ladisa v Ladisa*,³⁶ the Court upheld the decision of the trial judge to impose joint legal custody. In both cases, the mother opposed joint legal custody and sought sole custody. The distinguishing feature of the cases was that the Court of Appeal in *Ladisa* was satisfied that the parents were able to put aside their differences, and communicate and co-operate effectively in the interests of the child.³⁷ In *Kaplanis*, Weiler JA declined to order joint custody, recognizing:

The fact that one parent professes an inability to communicate with the other parent does not, in and of itself, mean that a joint custody order cannot be considered. On the other hand, hoping that communication between the parties will improve once the litigation is over does not provide a sufficient basis for the making of an order of joint custody. There must be some evidence before the court that, despite their differences, the parties are able to communicate effectively with one another.³⁸

These appellate decisions establish that a court, when deciding whether to grant joint custody, should focus on the actual history of the parenting and relationships, not just on statements of parents about their feelings toward each other, which may be very negative, especially during litigation.

between parents, or entrusted to one parent. Parallel parenting ensures that both parents play an active and fruitful role in the life of their child while removing sources of conflict through a structured and comprehensive parenting plan.

...

The adoption of a parallel parenting regime is not a solution for the vast majority of the cases before the courts. It is reserved for those few cases where neither sole custody, nor cooperative parenting meets the best interests of the child.

Ibid at paras 24, 26, 32 [emphasis added, citations omitted].

35. (2005), 249 DLR (4th) 620, 10 RFL (6th) 373 (Ont CA) [cited to DLR].

36. (2005), 11 RFL (6th) 50, 193 OAC 336 (CA).

37. For a discussion and commentary, see Martha Shaffer, "Joint Custody Since *Kaplanis* and *Ladisa*: A Review of Recent Ontario Case Law" (2007) 26:3 Can Fam LQ 315.

38. *Kaplanis v Kaplanis*, *supra* note 35 at para 11.

An illustration of how far courts are willing to go to encourage shared parenting is the 2009 Ontario case of *Warcop v Warcop*.³⁹ The parents separated when their son was six-months old, and the mother left the home with the child. After the separation, the mother did not facilitate contact between the father and son, and she refused to allow overnight visits. A temporary order was made that granted the father overnight access. At trial, the child was two-and-a-half years of age, and each party acknowledged that the other was a “good parent”. The mother wanted to raise the child with “assistance from” and “in consultation with” the father. The father wanted both parties to raise the child “jointly . . . in consultation with each other”.⁴⁰ Justice Gray ordered joint legal custody and a residential schedule of alternating and equal care, commenting:

The issue is whether a reasonable measure of communication and cooperation is in place, and is achievable in the future, so that the best interests of the child can be ensured on an ongoing basis. In making this assessment, the Court must be governed by the evidence that has been presented as to the communication and cooperation between the parties to date; the mechanisms that are in place to ensure that it will continue; and the assessment of the judge as to the capabilities of the parties to do so in the future.

...

There is simply no reason why the relationship with both parents, and their respective extended families, should not be encouraged to develop to the full extent. . . . [T]hese parties have already demonstrated a degree of cooperation and joint decision-making that is commendable.⁴¹

Although it is understandable that judges want to encourage, and indeed often require, each parent to support a child’s relationship with the other parent, commentators have questioned whether the Court in *Warcop* failed to give adequate attention to the child’s young age and the mother’s history of primary care.⁴² Overnight visits with a parent are

39. (2009), 66 RFL (6th) 438, 178 ACWS (3d) 617 (Ont Sup Ct J) [cited to RFL]. See also *Morano v Coletta*, 2008 ONCJ 228, 52 RFL (6th) 200, Dunn J (alternating week interim schedule for ten-month-old child); *Adams v Nobili*, 2011 ONSC 6614, 211 ACWS (3d) 136, Herman J (father to have overnights three nights a week for eighteen-month-old child); *Peters v Tetley*, 2007 ONCJ 594, 174 ACWS (3d) 184, Bishop J (alternating weeks of access for three children, ages twelve, five and two years).

40. *Warcop v Warcop*, *supra* note 39 at para 95.

41. *Ibid* at paras 94–98.

42. See Philip Epstein & Lene Madsen, “Epstein and Madsen’s This Week in Family Law” *Family Law Newsletter* (31 March 2009) (WL Can).

very often appropriate, even for infants, but the type of alternating and equal care arrangement for a young child with high conflict parents may not be in the child's long-term best interests.

High conflict parenting cases present a profound tension. On the one hand, judges do not want to give an effective veto over joint custody to the primary care parent who makes unsubstantiated claims that parental co-operation is not possible or in the child's best interests. Conversely, the courts do not want to place children in a situation where both parents are expected to co-operate but display hostility toward each other and an inability to communicate effectively. As a result, judges involved at the pretrial judicial resolution stage often encourage parents to try co-operating and consider joint custody. At contested hearings, judges are willing to impose a regime of joint legal or physical custody even without parental consent, but generally are reluctant to do so if the parties get as far into the process as a trial over parenting issues.⁴³ Nonetheless, judicial receptivity to some form of joint custody, even for a relatively small portion of litigated parenting cases, has had a major influence on the much larger number of cases that are settled.

Shared parenting principles have also been adopted in some provincial statutes to replace traditional custody and access. In most provinces, the "default" position is that parents share custody, guardianship or "autorité parentale" upon separation, which is only to be modified by court order or agreement of the parties.⁴⁴ This provincial legislation, however, generally applies only if the parents were not married.

Alberta's legislation provides an example of such a regime. Since 2005, the Alberta *Family Law Act* has specified that both parents presumptively have guardianship rights and "shall use their best efforts to co-operate with one another in exercising their powers, responsibilities and entitlements of guardianship".⁴⁵ In the absence of a court order or agreement, both

43. See Martha Shaffer, "Contested Joint Custody in the Ontario Courts: A Case Law Review" (Paper delivered at the Association of Family and Conciliation Courts, Toronto, 29 May 2014) [unpublished]. Shaffer discusses a study of reported contested Ontario cases from 2012 to 2013 in which joint custody was sought in the face of a primary caregiver's (usually the mother) request for sole custody. She reports that almost 80% of the decisions resulted in a sole custody order and about 20% resulted in a parallel parenting or joint custody arrangement. *Ibid.*

44. See e.g. art 600 CCQ; *Children's Law Reform Act*, RSO 1990, c C.12, s 20(2).

45. *Supra* note 3, s 21(2)(c).

parents are joint guardians of a child. Courts in Alberta are authorized to make parenting orders that include provisions relating to parenting time, as well as termination of some or all guardianship rights if required to promote “the best interests of the child”.⁴⁶ The Alberta statute also specifies that in making best interests decisions, family violence and its effect on the *appropriateness* of expecting parents to co-operate on issues affecting the children is a factor to consider, and a child’s “views and preference” are to be taken into account “to the extent that it is appropriate”.⁴⁷

In British Columbia, a new *Family Law Act* came into force in 2013, also adopting the concepts of guardianship, parental responsibility, “parenting arrangements” and parenting time.⁴⁸ The Act creates an expectation that each parent will exercise “parental responsibilities with respect to the child in consultation with the child’s other [parent], unless consultation would be unreasonable or inappropriate in the circumstances”.⁴⁹ Notably, the Act provides that “in the making of parenting arrangements . . . [it] must not be presumed that the parenting time should be equal among the guardians”.⁵⁰ Further, as in most other provinces, the Act specifies that in determining the child’s best interests, the court shall consider the “impact of any family violence on the child’s safety, security or well-being, and whether the family violence is directed toward the child or another family member”.⁵¹ The child’s views are also to be considered, “unless it would be inappropriate to consider them”.⁵²

Thus, both provincial legislative reforms and the evolution of judicial approaches to joint custody reveal strong legal support for various forms of co-parenting, though not of presumptive equal parenting time.

46. *Ibid*, s 18.

47. *Ibid*, s 18(2)(iv).

48. *Supra* note 3. For an analysis of case law under the new Act, see Susan B Boyd & Matt Ledger, “British Columbia’s New Family Law on Guardianship, Relocation, and Family Violence: The First Year of Judicial Interpretation” (2014) 33:3 Can Fam LQ 317.

49. BC *FLA*, *supra* note 3, s 40(2).

50. *Ibid*, s 40(4)(b).

51. *Ibid*, s 37(2)(g).

52. *Ibid*, s 37(2)(b).

III. Social Science Research on Post-separation Parenting

A significant and growing body of social science research exists on the effects of separation, divorce and single parenting on children, including issues related to joint custody and shared parenting. This literature is available to help those involved in professional practice or family justice reform to understand issues and even resolve some matters. In particular, family dispute resolution professionals, including parenting educators, divorce coaches and mediators—but also lawyers who are negotiating for their clients or practicing collaborative law, and judges who are involved in conferences or deciding cases—have an important educational role for parenting and need to be aware of the literature on the effects of separation on children.⁵³ Equally important, however, is an awareness of the inherent limitations of research in this area and the specific limitations of individual studies before using it to formulate policy or decide specific cases.⁵⁴

One of the inherent limitations of research in this field is that it is impossible to do randomized or control group studies. For example, an important body of research reports that various forms of shared parenting—as opposed to sole custody—are often *associated with* better outcomes for children. However, most of those children in shared parenting arrangements have parents who chose this arrangement, are relatively co-operative, have higher incomes and likely have other positive attributes compared to the populations studied that have sole custody. Even if a researcher studies only court-imposed joint custody (rather than voluntary arrangements), the joint custody orders in question are imposed because the judge felt that the family situation was suitable for this type of arrangement. Thus, there will always be an inherent bias in the research studies. Some of the positive factors associated with shared

53. For a discussion of the skills, understanding and knowledge that family dispute resolution professionals require, see e.g. Robert E Emery, *Renegotiating Family Relationships: Divorce, Child Custody and Mediation*, 2nd ed (New York: Guildford Press, 2012).

54. For a helpful discussion of the value and limitations of social science research for family proceedings, see Judith Cashmore & Patrick Parkinson, “The Use and Abuse of Social Science Research Evidence in Children’s Cases” (2014) 20:3 Psychol Pub Pol’y & L 239.

parenting or joint custody can be controlled for in a research study, but it is not possible to control for all of them in a meaningful fashion.

Beyond the inherent limitations of research in this area, many studies have methodological limitations, such as selective study populations, small sample sizes and an absence of longitudinal follow-up. This is not a criticism of the researchers who undertake this work, as there are huge challenges and a lack of funding for this type of research; however, some advocates for reform “cherry pick” specific results from selective studies that may not be representative of broader populations or trends.

Despite these limitations, there are some general conclusions that can be drawn from the social science research on post-separation parenting, as reflected in the Association of Family and Conciliation Courts’ (AFCC) 2014 *Think Tank Report on Shared Parenting*.⁵⁵ The *Think Tank Report* discusses both areas of consensus and disagreement of a group of leading members of the AFCC, concluding:

- Social science research strongly supports shared parenting (i.e., frequent, continuing, and meaningful contact) *when both parents agree to it*. There is also empirical support for shared parenting under broader conditions (e.g., some forms of parental conflict or disagreement) for children of school age or older.

 - There is no “one-size-fits-all” shared parenting time even for the most vulnerable of families.
- ...
- ♦ Shared parenting in the midst of high conflict is generally not in children’s best interests. However, some families are able to manage the conflict on their own or with third-party assistance, such that shared parenting can be implemented without harm to the children, thus bolstering the case for individualized parenting time determinations.
 - ♦ While family violence usually precludes shared parenting, there are some cases in which the violence is tied to the separation or the dynamics of the adults’ relationship while living together and may end when the parents live apart. In such cases, shared parenting may be feasible. The context and meaning of the intimate partner violence (IPV) and the implications for parenting must be carefully determined for each family.⁵⁶

55. *Special Issue: AFCC Think Tank Final Report—Closing the Gap, Research, Policy, Practice, and Shared Parenting* (2014) 52:2 Fam Ct Rev [*Think Tank Report*].

56. Marsha Kline Pruett & J Herbie DiFonzo, “Closing the Gap: Research, Policy, Practice, and Shared Parenting” (2014) 52:2 Fam Ct Rev 152 at 154 [emphasis added]. The *Think Tank Report* has a number of articles on shared parenting and law reform. DiFonzo

The *Think Tank Report* recognized that there is a need for more, as well as better, social science research on many issues. One contentious issue that was clearly identified in the report as requiring further study is the effect of shared parenting and other parenting arrangements on early childhood development and long-term parent-child relationships. In particular, controversy continues over the issues of whether children under four years should have frequent overnights, some overnights, or no overnights, and what the effects of these different arrangements in early life on long-term parent-child relationships and child well-being will be. It is clear that the first four years of life are a developmentally critical period for children and that children are likely to suffer lifelong negative effects from neglect, abuse, or exposure to family violence or high levels of parental conflict during this period. However, young children can become attached to multiple quality caregivers and can thrive even if they have some type of shared care arrangement in this period. Similarly, the promotion of consistent, quality care and the minimization of parental conflict are especially important as children go through this vulnerable, critical stage of development,⁵⁷ but there are also concerns that a failure to establish a strong relationship with each parent during this period may hinder the development of such relationships later in life.

An issue about which there is a significant degree of consensus among researchers and mental health professionals is that children are likely to suffer if their parents engage in “alienating behaviours”. Alienating behaviour is defined as conduct by one parent that undermines the child’s perceptions and relationship with the other parent. It is emotionally

was one of two Canadian members of the Association of Family and Conciliation Courts Think Tank, held in Chicago in January 2013. He did not, however, directly contribute to the special issue. For other reviews of empirical literature, see Belinda Fehlberg et al, “Legislating for Shared Time Parenting After Separation: A Research Review” (2011) 25:3 Intl JL Pol’y & Fam 318; Martha Shaffer, “Joint Custody, Parental Conflict and Children’s Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us” (2007) 26:3 Can Fam LQ 285.

57. See Marsha Kline Pruett, Jennifer E McIntosh & Joan B Kelly, “Parental Separation and Overnight Care of Young Children, Part I: Consensus Through Theoretical and Empirical Integration” (2014) 52:2 Fam Ct Rev 240 at 240, 250–51.

Cautions against overnight care during the first three years are not supported. The limited available research substantiates *some caution about higher frequency overnight schedules with young children, particularly when the child’s relationship*

harmful to children.⁵⁸ However, there are significant challenges in applying research about the harmful effects of alienating parental conduct to specific cases. One such challenge is determining whether a child's resistance to contact with one parent is reflective of alienating conduct by the other parent, or rather reflective of the child's own negative experiences with the rejected parent, perhaps due to violence, abuse or poor parenting by that parent (often referred to as "justified estrangement"). In individual cases, there are also challenges in weighing the effects of alienation against the risks of intrusive legal responses to promote contact with a rejected parent. Despite the challenges of applying alienation research to specific cases, concerns about alienation justify having some type of friendly parent

with a second parent has not been established and/or parents are in frequent conflict to which the child is exposed The field is practically devoid of longitudinal datasets or studies that follow children's adjustment through preschool and into school. The roles of other family members (siblings, grandparents, etc.) and the potential influences of child care as additional forces that influence children's responses to separation and overnights remain unexplored terrain.

Ibid [emphasis added]. See also Marsha Kline Pruett, Jennifer E McIntosh & Joan B Kelly, "Parental Separation and Overnight Care of Young Children, Part II: Putting Theory into Practice" (2014) 52:2 Fam Ct Rev 256. For a more supportive approach to overnight visits for young children, see e.g. Richard A Warshak, "Social Science and Parenting Plans for Young Children: A Consensus Report" (2014) 20:1 Psychol Pub Pol'y & L 46. Warshak concludes the following:

Because of the well-documented vulnerability of father-child relationships among never-married and divorced parents, the studies that identify overnights as a protective factor associated with increased father commitment to child rearing and reduced incidence of father drop-out, and the absence of studies that demonstrate any net risk of overnights, policymakers and decision makers should recognize that depriving young children of overnights with their fathers could compromise the quality of developing father-child relationships. Sufficient evidence does not exist to support postponing the introduction of regular and frequent involvement, including overnights, of both parents with their babies and toddlers. The theoretical and practical considerations favoring overnights for most young children are more compelling than concerns that overnights might jeopardize children's development.

Ibid at 46.

58. See *Special Issue: Alienated Children in Divorce and Separation* (2010) 48:1 Fam Ct Rev. See also Barbara Jo Fidler, Nicholas Bala & Michael A Saini, *Children Who Resist Post-separation Parental Contact: A Differential Approach for Legal and Mental Health Professionals* (New York: Oxford University Press, 2012).

provision in law, encouraging parents to generally support relationships with the other parent, while recognizing the need to balance a supportive attitude against concerns about safety and risk.

Reflecting the limitations of present knowledge, the *Think Tank Report* concluded that parenting time after separation is inescapably case specific. Thus, statutory presumptions prescribing specific allocations of shared parenting time are unsupportable because no prescription will fit all or even a large portion of all families' particular circumstances.⁵⁹

However, the majority of the *Think Tank Report* participants did recognize the value of shared parenting and favoured "a presumption of joint decision making".⁶⁰ There was also a strong consensus about the principle of parental autonomy: Whenever possible, parents should be supported in the negotiation of their own individualized parenting plan.

As reflected in social science research, a conundrum faces those who are making laws or even case-specific decisions. When parents can co-operate and have some form of shared parenting plan in place, outcomes for children are generally better than if children are in the sole custody of one parent. However, if there is high conflict between parents, the collaborative nature of joint decision making and the frequency of parental interactions in a shared parenting plan may place the children in the middle of the conflict, and may result in a worse outcome for the child. The challenge, therefore, is how to encourage co-operation and reduce conflict.

A. Domestic Violence and Children's Best Interests

Social science research has clearly established that intimate partner violence poses significant risks to children, whether or not it occurs in their presence. Those who are victims of IPV may be less effective as parents as a result of the abuse, while those who are perpetrators of violence are not good role models for their children, and are more likely to have poor parenting practices and be physically or emotionally abusive toward their children. Further, children who are exposed to violence between their parents find the experience traumatic. In this regard, the

59. See Pruett & DiFonzo, *supra* note 56 at 153–54.

60. *Ibid* at 167.

safety of children and their caregivers must always be a priority; however, it is also clear that IPV is a complex issue. In considering the effects of violence on children and plans for post-separation parenting, account must be taken of factors such as the nature and frequency of the violence, the extent to which there is a clear perpetrator and victim as opposed to mutual violence, any patterns of coercive controlling violence or violence that is situational and non-recurrent, the effects of the violence on the children, and the extent to which one parent is intimidated by the other.⁶¹

Most jurisdictions, including several Canadian provinces, have specific legislative provisions that recognize IPV as a factor to be taken into account when making best interests decisions, with some having a presumption against joint custody or shared parenting if there has been domestic violence.⁶² The *Think Tank Report* also recognized that a history of IPV is an important factor in determining whether shared parenting may be appropriate.⁶³ The *Divorce Act*, however, makes no mention of domestic violence.

Edward Kruk, a leading Canadian proponent of a presumption of equal parenting time, argues that false or exaggerated allegations of abuse and violence are *equally* as problematic as false denials by perpetrators, and that family violence claims should be considered in family proceedings *only* if the violence is established in child protection or criminal proceedings.⁶⁴ This is a highly problematic position. While the research literature on false allegations of domestic violence is not large and it is a conceptually challenging subject to research, studies that have been undertaken clearly indicate that there are substantially more false denials and minimizations of spousal abuse by genuine abusers (generally men) than exaggerations or false allegations by victims (generally women).⁶⁵

61. See e.g. Margaret F Brinig, Loretta M Frederick & Leslie M Drozd, "Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases" (2014) 52:2 Fam Ct Rev 271; Peter G Jaffe et al, "Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans" (2008) 46:3 Fam Ct Rev 500; Peter G Jaffe, Claire V Crooks & Nicholas Bala, "A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes" (2009) 6:3&4 J Child Custody 169.

62. See e.g. Alta *FLA*, *supra* note 3; BC *FLA*, *supra* note 3.

63. *Think Tank Report*, *supra* note 55.

64. Kruk, *Equal Parenting*, *supra* note 8 at 164.

65. See e.g. Janet R Johnston & Linda EG Campbell, "Parent-Child Relationships in Domestic Violence Families Disputing Custody" (1993) 31:3 Family Conciliation Courts Rev 282; Martha Shaffer & Nicholas Bala, "Wife Abuse, Child Custody and Access in

Of course, potential concerns about exaggerations, distortion, selective recall and outright fabrication in family cases do exist, and each case must be individually assessed. However, the fact that domestic violence concerns are not reported to the police or child protection authorities and have not resulted in a prior finding by the criminal or child welfare courts is not a reason to preclude consideration of evidence of such conduct in family proceedings. During cohabitation, victims of IPV often do not report the abuse to police or child welfare authorities due to feelings of guilt or fear that such a report will exacerbate their situation or result in the removal of children from their care by a child protection agency. Victims may leave the relationship as a result of partner abuse but only disclose it after separation during family proceedings, when they feel safe enough to do so. Indeed, if there has been a report and a finding in child welfare or criminal proceedings, there is unlikely to be a contest about custody in family proceedings, as the perpetrator is likely to already have limited or no contact with the child as a result of a previous judicial finding.

One recent *Divorce Act* reform proposal, Bill C-560 (discussed more fully below), addressed family violence but minimized the issue by characterizing it as an “additional consideration” rather than a “primary consideration”, and indicating that partner violence is only to be taken into account if “committed in the presence of the child”.⁶⁶ This approach is inconsistent with both social science research and public policy. While a history that may include acts of IPV should not always be determinative of a child’s best interests, there is no justification for treating it as a secondary consideration; IPV may be highly relevant to the child’s best interests. Family courts dealing with parenting cases where there are IPV issues must take into account the effects of the violence on the child and the parenting capacity of the victim parent. It is also wrong to limit consideration to cases where violence has occurred “in the presence of a child”. As discussed above, children often suffer from

Canada” (2003) 3:3&4 J Emotional Abuse 253 at 253–75. See also Patrick Parkinson, Judy Cashmore & Judi Single, “Post-separation Conflict and the Use of Family Violence Orders” (2011) 33:1 Sydney L Rev 1. Issues of IPV are often nuanced and complex. In some cases it is not possible or useful to establish a true or false dichotomy about the allegations, as there may be some validity and some distortion in the account of each parent. *Ibid.*

66. Bill C-560, *supra* note 7, cl 7(2).

residing in a home where there is spousal violence, even if they do not see the physical assaults. Further, an ongoing threat to the safety of a child's primary caregiver is highly significant to a child's welfare.

Most Canadian judges and many lawyers and mediators already take into account partner violence when making arguments, settlements and decisions, but the failure of the *Divorce Act* to even mention this factor clearly gives IPV less salience than it merits. Inclusion of domestic violence as a statutory best interests factor will help ensure professionals properly identify and respond to it, and may be especially important for alerting its significance to those parents who lack proper legal advice. An assessment of the effect of family violence requires taking account of factors such as: the nature, extent and frequency of the violence; the willingness of an abusive partner to accept and address concerns about violence; and the effect of the violence on parenting capacity and the concerns that it raises for the future safety of the victim and the child.⁶⁷

B. Role of Children's Perspectives

The *Divorce Act*, notably, makes no mention of the views and preferences of children in making child-related decisions.⁶⁸ It is, however, now widely recognized in provincial and territorial family statutes that the court has a responsibility to take into account the *views and wishes* of the child.

Article 12 of the *UNCRC* establishes that children have the *right* to have their views considered when decisions are made about them.⁶⁹ While children in litigated cases are often very wary of *taking sides* and rarely want to be asked to *decide* about their living arrangements, they usually want to be consulted in some way.⁷⁰ Further, a child-focused decision should take account of *information from the child* about the child's

67. See e.g. Brinig, Frederick & Drozd, *supra* note 61; Patrick Parkinson, "Violence, Abuse and the Limits of Shared Parental Responsibility" (2013) 92 Family Matters 7; Jaffe et al, *supra* note 61; Jaffe, Crooks & Bala, *supra* note 61.

68. *Supra* note 1.

69. *UNCRC*, *supra* note 2, art 12.

70. See Rachel Birnbaum & Michael Saini, "A Qualitative Synthesis of Children's Participation in Custody Disputes" (2012) 22:4 Research on Social Work Practice 400; Rachel Birnbaum & Michael Saini, "A Scoping Review of Qualitative Studies About Children Experiencing Parental Separation" (2012) 20:2 Childhood 260;

perceptions of his interests, needs, experiences, and relationships with his parents and other relatives.⁷¹

Of course, the views and perspectives of the child are only one factor and not determinative on their own. For instance, there are cases involving alienation or manipulation by one parent where it is necessary to discount the wishes and perspectives of the child. However, too often the views and perspectives of the child are not even solicited. Most often, the child whose parents are involved in litigation or a high conflict separation want a reduction in hostility above all, and parents can benefit from hearing this.⁷² Children generally want a harmonious plan that will have both parents significantly involved in their lives and that will be flexible enough to evolve to take account of their views on, for example, schooling, visiting friends and extracurricular activities.⁷³

There are a number of ways to introduce a child's views into parental negotiations and disputes. In litigated cases, a mental health professional might interview children, perhaps as part of a wider assessment, or a lawyer might present the child's views in court. Judges and mediators can also meet with the child in some cases. While the manner in which the child's perspectives are ascertained will vary with the nature of the case and the resources available, it is important for parenting legislation like the *Divorce Act* to specifically acknowledge the importance of the views and perspectives of children in making best interests decisions and parenting plans.⁷⁴

Canada, Department of Justice, "The Voice of the Child in Divorce, Custody and Access Proceedings: Background Paper", by Ronda Bessner, Catalogue No 2002-FCY-1E (Ottawa: Family, Children and Youth Section, Department of Justice, 2002).

71. For commentary expressing concern about the lack of consideration of the views and perspectives of children by Canadian courts, see e.g. Noel Semple, "The Silent Child: A Quantitative Analysis of Children's Evidence in Canadian Custody and Access Cases" (2010) 29:1 Can Fam LQ 1; Maria Coley, "Children's Voices in Access and Custody Decisions: The Need to Reconceptualize Rights and Effect Transformative Change" (2007) 12:1 Appeal 48.

72. See e.g. Carol Smart, "From Children's Shoes to Children's Voices" (2002) 40:3 Fam Ct Rev 307; Carol Smart, "Children's Narratives of Post-divorce Family Life: From Individual Experience to an Ethical Disposition" (2006) 54:1 Sociological Rev 155.

73. See Denise Whitehead, "Is Shared Custody the 'Alchemy of Family Law'" (Paper delivered at Ontario Court of Justice Education Program, Toronto, 15 January 2015).

74. See e.g. Bala et al, "Children's Voices in Family Court: Guidelines for Judges Meeting Children" (2013) 47:3 Fam LQ 379 at 381-410.

As with the omission of domestic violence, the absence of mention of the views of children from the *Divorce Act* has not prevented courts from taking a child's views into account in proceedings under the Act. However, its omission clearly illustrates that the parenting provisions of the Act are outdated and need reform. Further, the omission may result in some judges, lawyers, mediators and parents themselves failing to take appropriate account of the views and perspectives of children. In particular, when parents are making their own plans without court involvement, the views of their children are often ignored. Lawyers, mediators, judges and other professionals working with parents following a separation (including those parents who are not litigating about parenting issues) need to be able to give parents advice about how to talk to their children about their separation and on how to engage their children in making plans in a way that is meaningful but not too intrusive.⁷⁵

IV. Concern, Confusion and Conflict over Terminology

The concepts of custody and access are central to the *Divorce Act*'s parenting regime, and, as a result, they are widely used in Canada. However, the words themselves have unfortunate connotations. The word *custody* has clear proprietary and penal undertones that might suggest that the child is confined to the care and control of one parent. *Access* suggests that a parent has a limited role and relationship with his or her child, again with proprietary implications. For separating parents and their children who are unfamiliar with the terms, the words do not relate to the types of issues that commonly need to be addressed. For parents and children familiar with the terms, the words connote *winners* and *losers*, with the winner being awarded custody and the loser being awarded access. Many Canadian lawyers, judges, mediators and parents are starting to use different terminology in orders and agreements, and this would be encouraged by reform of the *Divorce Act* and provincial legislation.

75. See John B Kelly & Mary Kay Kisthardt, "Helping Parents Tell Their Children About Separation and Divorce: Social Science Frameworks and the Lawyer's Counseling Responsibility" (2009) 22:2 J American Academy Matrimonial Lawyers 315.

Provinces such as British Columbia, Alberta and Quebec have already abandoned the concepts of custody and access. They now promote the use of concepts that more accurately reflect the actual issues and relationships that parents need to address along with various forms of co-parenting. However, one of the complications in discussing issues related to post-separation parenting is that various commentators, researchers, advocates and legislative drafters use the terminology differently.

Terms like *joint custody*, *shared care*, *shared parenting*, *joint guardianship* and *co-parenting* are used synonymously by some, while others use one term, like *joint custody*, for a very wide variety of arrangements. The lack of specificity and variation in the use of terminology is especially important to keep in mind when considering literature from different jurisdictions along with research on rates of use of different arrangements or outcomes for children with different parenting arrangements.

In some academic and professional literature, a minimum amount of residential care is specified for “shared care” or “shared parenting”. In some jurisdictions, including Canada, legislation establishes a minimum parenting time threshold for shared care arrangements that affect child support, with 25%, 30% or 35% of nights per year being common thresholds for the purposes of child support.⁷⁶ In Canada’s *Federal Child Support Guidelines*, the term *shared custody* is legally defined as an arrangement where the child spends at least 40% of her time with each parent, this being a threshold for a possible reduction in child support.⁷⁷ There has been a considerable amount of litigation in Canada about exactly how to calculate a child’s time in the care of each parent for child support purposes, and in some cases, arguments about whether parenting time has reached the 40% threshold have more to do with child support than having a greater opportunity to spend time with a child.⁷⁸

In many jurisdictions, governments and commentators encourage shared parenting, using the term in a broad way and without specific time thresholds. In England, their government also uses the term shared

76. See *Utah Code*, Utah C § 30-3-10.1, s 2(a) (sets a 30% threshold); *Child Support (Assessment) Act 1989* (Cth), s 5(3) (sets a 35% threshold in Australia).

77. SOR/97-175, s 9.

78. See e.g. Nicholas Bala & Marie Gordon, “Kids and Cash: Interconnections of Child-Related and Economic Issues in Family Proceedings” (2012) 31:3 *Can Fam LQ* 309 at 328.

parenting in this general way in its educational material and promotes its use.⁷⁹ Although the new legislation that came into force in England in March 2014 does not use the term shared parenting, the statute requires courts to “presume, unless the contrary is shown, that involvement of [both] parent[s] in the life of the child concerned will further the child’s welfare”.⁸⁰ The statute, however, makes it clear that there is no presumption of “any particular division of a child’s time”.⁸¹

While there is much to commend in promoting this use of the concept of shared parenting, at present in Canada there is considerable confusion between usage of the terms shared parenting and shared custody. Further, for some, use of the term shared parenting may imply that any share other than equal is “unfair”. Accordingly, it may be most useful in Canada to promote the broad notion of co-parenting after separation as the basis for recognizing that it will usually be in the best interests of children for both parents to have significant and ongoing involvement in their children’s lives.

In crafting agreements, many parents avoid labels like *custody*, *access* or even “primary residence”,⁸² preferring to develop detailed parenting plans that address specific issues about time spent with the child and decision making for certain issues—plans that are flexible enough to allow for future variation as circumstances and their children’s needs evolve. In many jurisdictions, the legislation uses the concept of “parental responsibility”, which typically includes decision-making authority and is usually intended to involve significant parenting time between both

79. See UK, Department for Education & Ministry of Justice, *Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child’s Life* (Consultation Paper) (Department for Education, 2012).

80. *Children and Families Act 2014* (UK), c 6, s 11(2)(2A).

81. *Ibid*, s 11(2)(2B).

82. For some purposes, including the determination of child support, it may be important to operationalize parenting concepts with fairly precise definitions in terms of parental rights and time of care. See e.g. *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, art 13 (entered into force 1 December 1983), online: < www.hcch.net > [*Hague Child Abduction Convention*]. See also *Family Law Reform Act 1995* (Cth), s 42 (Austl) (in certain situations, parents and others will be deemed to have “custody” rights for the purposes of the *Hague Child Abduction Convention*, even if that term is not used in orders and agreements under the law in that jurisdiction; parents are given such rights unless a court order to the contrary is made). A similar provision should be enacted in Canada as part of law reform in this area.

parents. This same legislation uses the concept of “parenting time” to describe the time that the child spends in the care of each parent.

The term co-parenting (or shared parenting) has a more active connotation than the words custody and access, indicating that it is something that the parents will *do* rather than *have*. Co-parenting is thus related to the concepts of being involved in a child’s life, providing care and exercising parental responsibilities. Further, co-parenting is related to the promotion of parents developing their own “co-parenting plans”. While guides and precedents can help separated parents develop their own individualized parenting plans,⁸³ the expectation is clearly that these will be “living documents” to be reviewed and to evolve as children’s needs and parental circumstances change.

Co-parenting will usually involve consultation and collaborative decision making. Higher conflict cases with disagreements may need to be solved by resorting to a third-party mediator or decision maker—such as a parenting coordinator—or by having a formal division of decision-making authority, sometimes called “parallel parenting”.⁸⁴ In other cases it may be appropriate for the court to provide that one parent will have final decision-making authority but also be

83. See e.g. Canada, Department of Justice, *What Happens Next?: Information for Kids About Separation and Divorce*, Catalogue No J2-215/2007E-PDF (Ottawa: Department of Justice, 2007) [Department of Justice, *What Happens Next?*]; Canada, Department of Justice, *Making Plans: A Guide to Parenting Arrangements After Separation or Divorce—How to Put Your Children First*, Catalogue No J2-374/2013E-PDF (Ottawa: Department of Justice, 2013) [Department of Justice, *Making Plans*].

84. See *VK v TS*, 2011 ONSC 4305, 206 ACWS (3d) 534. Justice Deborah Chappel observed that parallel parenting orders in high conflict cases may allow each party “the benefit of maintaining each parent as a meaningful player in the child’s life” while allowing them to “reduce parental conflict”. *Ibid* at para 79. She also observed several factors from the case law as being particularly relevant in making such decisions, including whether both parents had strong ties to the child, and whether each had “consistently played a significant role in the child’s life on all levels” prior to separation. *Ibid* at para 96. In situations of extensive conflict, she also considered whether the parents were able “at times to focus jointly on the best interests of the child”, and whether a parallel parenting order could encourage further cooperation. *Ibid* at para 96.

required to consult with the other parent before major decisions are made.⁸⁵

Some commentators suggest that there is a minimum threshold *amount of time* that a parent needs to spend to have a co-parenting relationship (e.g., 25%, 30%, 33% or 35% of nights).⁸⁶ While the amount of time that a parent spends with a child is important, more important is the regularity of the involvement and its significance for the child. In particular, for school-aged children, co-parenting means that both parents should be involved in the child's schooling and extracurricular activities, and, generally, that the child spends some weeknights and weekends with each parent. However, in most cases, co-parenting will not involve equal time with each parent due to the relative location of the parents' residences, logistics, costs, parenting work schedules and the child's need for stability.

While legislation should be enacted that better reflects current values, research and parenting behaviours, and provides more meaningful direction to professionals and parents, from the perspective of Canadian lawyers and judges, the concept of co-parenting proposed here

85. See e.g. *Sader v Kekki*, 2013 ONCJ 605 at para 139, 235 ACWS (3d) 142. In this case, a consultation order was made by EB Murray J:

Natalie's authority to make decisions about Annalie will be exercised within the ambit of certain restrictions I will impose on that authority. . . . [M]ajor points [are] summarized below.

1. Natalie shall have custody of Annalie.
2. *Natalie shall consult with Andrew* in writing at least 60 days in advance with respect to any nonemergency major decision about Annalie's upbringing.

. . .
Andrew should not see this order as one which limits his opportunity to be "*a meaningful player*" in Annalie's life. *He can be involved in Annalie's life if he wishes, and does not need the label of custodial parent to achieve this goal. He is free to participate in her life—by, for example, becoming involved in her daycare centre. When Annalie attends school, he can participate in school activities. When he decides to enrol Annalie in activities (he has not chosen to, to date), he can participate in those activities.*

Ibid at para 139 [emphasis added].

86. See e.g. Patrick Parkinson, "The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience" (2014) 37:1 Dal LJ 301 at 303–04 [Parkinson, "Laws that Encourage Shared Parenting"].

encompasses the more traditional legal arrangements of “joint legal custody with significant access” and “joint physical custody”

V. Reforming Parenting Laws in Other Countries

While issues related to post-separation parenting have been contentious in many jurisdictions, most developed countries have undertaken significant reforms over the past two decades. Canada can learn about improving its laws and practices related to post-separation parenting and family dispute resolution by considering the experiences of these other jurisdictions. Indeed, much of the legislative reform during the past half century in the Canadian family justice field, such as liberalizing grounds for divorce, changing matrimonial property laws and introducing child support guidelines, has been patterned on developments already undertaken elsewhere. Canada could again use other jurisdictions' examples in reforming its laws governing post-divorce parenting.

Many jurisdictions have enacted laws that no longer rely on the concepts of custody and access, but instead use such concepts as parental responsibilities and parenting time. These statutes have provisions encouraging the consideration of some form of shared decision making and significant involvement of both parents in the care of children. However, none go as far as the strong presumption for equal parenting time found in Bill C-560.

Legislation in a number of jurisdictions now encourages judges, lawyers and parents to give serious consideration to various forms of co-parenting, though these jurisdictions invariably recognize that this may not be appropriate if there are concerns about domestic violence, child abuse or parental incapacity due to mental health or substance abuse issues. In most jurisdictions, legislation encourages involvement of both parents in the lives of their children, but avoids detailed prescriptions of division of parental responsibilities or parenting time. Rather, parents are encouraged to make their own individualized arrangements and failing that, judges retain the flexibility to determine the best interests of the child in each case. As Belinda Fehlberg notes: “Overall, the legislative trend has been more clearly and consistently towards encouraging both parents to be actively involved in their children’s lives post-separation, including maximising contact, rather than specifically towards legislating for shared

time.”⁸⁷ Illinois provides an example of a jurisdiction that makes a clear statement promoting shared parenting or co-parenting:

Unless the court finds the occurrence of ongoing abuse . . . the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child.⁸⁸

Similar legislative reforms in Europe promote shared parenting. For example, in France, the old concept of “la garde” (custody) is now replaced by a law based on the principle of “co-parentalité” (co-parenting).⁸⁹ The French legislation provides that parental authority is to be exercised in common when parents cohabit,⁹⁰ and that in the absence of a court order or agreement, parental separation does not change this co-parenting arrangement.⁹¹ As noted above, Quebec has similar provisions in its *Civil Code*.⁹²

Arizona has gone farther than other American states toward encouraging shared parenting, even though it does not go as far as Bill C-560.⁹³ Since January 2013, the law in Arizona provides that “the Court shall adopt a parenting plan that provides for both parents to share legal decision making regarding their child and that *maximizes their respective parenting time*”.⁹⁴ The Arizona presumptions of shared parenting and maximizing parenting time apply regardless of the age of the children

87. Fehlberg et al, *supra* note 56 at 319–20.

88. *Illinois Marriage and Dissolution of Marriage Act*, 750 Ill Comp Stat § 5/602(c) (1977).

89. See *Loi n° 93–22 du 8 janvier 1993 modifiant le code civil, relative à l'état civil à la famille et aux droits de l'enfant et instituant le juge aux affaires familiales*, JO, 9 January 1993, 495, online: <www.legifrance.gouv.fr>. For a discussion of the principle of “coparentalité”, see Frédéric Vauvillé, “Du principe de coparentalité” (2002) 209 *Les Petites Affiches* 4. For another examination of the “coparentalité” principle, see e.g. Hugues Fulchiron, “L'autorité parentale renouée” [2002] *Répertoire du Notariat* Defrénois 959.

90. art 372 C civ.

91. art 373-2 C civ.

92. art 1260 CCQ.

93. *Marriage and Domestic Relations*, Ariz Rev State, tit 25 (2011). See also La Civ Code, art 132 (2014) (Louisiana also has a regime that encourages “equal parenting”, requiring a parent to adduce “clear and convincing evidence” to obtain sole custody rather than joint custody); La Rev Stat, tit 9 § 335 A(2)(b) (courts are also instructed that “to the extent that it is feasible and in the best interest of the child, physical custody of the children should be shared equally”).

94. *Marriage and Domestic Relations*, *supra* note 93, § 403.02(B) (2011) [emphasis added].

in question, though in making orders for parenting plans, courts are to consider such factors as parental alcohol or drug abuse and domestic violence, and shall take into account whether the parents live a large distance apart, making equal time impractical.

A. Australia

Australia has probably garnered more attention for its recent family law reforms than any other country, at least among English-speaking jurisdictions. The Australian reforms—undertaken over the past decade—were enacted after intense debate. They were, at least in part, a response to fathers’ advocacy groups for more involvement in the lives of their children. A very strong movement in Australia for increased use of consensual dispute resolution and the development of a less adversarial family court process has emerged and is supported by various advocates and professional groups. The reforms attempt to balance competing concerns for increased involvement of fathers in the care of children after separation and for the encouragement of non-adversarial dispute resolution with increased emphasis on the protection of women and children subjected to domestic violence.

The international attention reflects both the nature of the reforms and the fact that the Australian government funded relatively extensive research on the effect of the reforms to help address concerns raised in the debates at the time of their introduction.⁹⁵ Given the contentious debates over these reforms, it is not surprising that there is also controversy over their effects, with different commentators drawing varying conclusions about the Australian experience. Some controversy arose from the fact that a number of different reforms were undertaken during the same period, so it is difficult to disentangle the effects of legislative reforms from increased access to alternative dispute resolution services. Perhaps more challenging in terms of drawing overall conclusions is the recognition that while the changes decreased costs for some parents and improved prospects for some children, they may have imposed costs and created risks for others, and left a significant number of children largely unaffected.⁹⁶ Further,

95. See Australian Government, “Australian Institute of Family Studies”, online: < www.aifs.gov.au > .

96. See Parkinson, “Laws that Encourage Shared Parenting”, *supra* note 86 at 330–31.

even in Australia, with its comparatively well-funded research on family justice, there have been great challenges in trying to determine the effects of government actions.⁹⁷

The Australian *Family Law Amendment (Shared Parental Responsibility) Act 2006*⁹⁸ was intended to address the “twin pillars” of post-separation parenting: involvement of both parents in the lives of their children and protection of children from harm and the effects of family violence.⁹⁹ While these two objectives are sometimes in opposition, they can be reconciled.

The actual provisions of the Australian statute are wordy and complex. There is a presumption that it is in the best interests of a child for the parents to have “equal shared parental responsibility for the child”, but this presumption does not apply if there are concerns about abuse or family violence.¹⁰⁰ Notably, it is not necessary to prove family violence or abuse to rebut the presumption, but only to establish “reasonable grounds” for such concerns.

The Australian statute is complex, too, at least in part, because it specifies that the court should *consider* whether it is in the best interests of children to spend “substantial and significant time” with each parent, without indicating what weight is to be given to this consideration. The legislation also requires courts to *consider* an order for *equal time* if this is in the best interests of the child and is reasonably practicable.¹⁰¹ Notably, the legislation does *not* create an explicit presumption that children are to spend “substantial and significant” time with each parent, let alone equal time. However, at least initially, some parents and practitioners in Australia misunderstood the reforms as creating a presumption of equal time (and some Canadian commentators have shared this misunderstanding).¹⁰² This confusion may, in part, have been due to the complexity of the statute, as well as some mixed messages from the

97. See Bruce Smyth et al, “Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?” (2014) 77:1 Law & Contemp Probs 109.

98. (Cth), ss 61DA(1), 65DAA(1) [*FLAA*].

99. See *Mazorski v Albright*, [2007] FamCA 520 at para 3.

100. *FLAA*, *supra* note 98, s 61DA(2).

101. *Ibid*, s 65DAA.

102. See e.g. Kruk, *Equal Parenting*, *supra* note 8 (Kruk frequently cites the Australian legislation and research to support his argument for “the equal parent presumption”).

government when the reforms were introduced.¹⁰³ Now, however, at the very least, justice system professionals understand that there is not a presumption of equal parenting time in Australia.

Under the new statute, courts making parenting arrangements are to consider whether “substantial and significant” time with each parent is in a child’s best interests. The statute specifies that this requires consideration of whether a child should spend time other than weekends and school holidays with a non-resident parent. Quite likely, this provision has resulted in expanded thinking about typical parenting arrangements, and over the past decade, there has been a significant increase in the involvement of fathers in post-separation care, though equal parenting time is not the norm.

Although the statute did not create a presumption of equal parenting time,¹⁰⁴ since the law came into force, fathers have been more likely to seek equal time in negotiations and litigation. There has also been an increase in cases where judges ordered “shared care” (at least thirty-five percent of nights).¹⁰⁵

The encouragement of and support for mediation in Australia is related to the legislative reforms governing parenting. Subject to certain exceptions, including cases where domestic violence or child abuse is alleged or one party refuses to attend, litigants in the family courts of Australia must provide a certificate of attempted mediation before litigation can be pursued. Further, the national government provided significant funding for the establishment of a network of Family Relationships Centres (FRCs)—independent agencies outside the court system that offer a range of services for families, with a major focus on post-separation education and mediation. The FRCs originally provided three hours of free mediation per separated couple and income-based subsidies for mediation thereafter. However, due to recent government funding cuts, this has been reduced to one hour of free mediation, with other mediation

103. See Parkinson, “Laws that Encourage Shared Parenting”, *supra* note 86 at 321–22.

104. See *Goode v Goode*, [2006] FamCA 1346 at para 72.

105. See Commonwealth, Australian Government Attorney General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs, *Evaluation of the 2006 Family Law Reforms*, by Rae Kaspiew et al (Melbourne: Australian Institute of Family Studies, 2009) at 118.

services still provided on a subsidized basis for lower income parents.¹⁰⁶ The number of family cases filed in the Australian courts has fallen by roughly one third since these legislative changes were undertaken and the FRCs established. The use of lawyers has also declined somewhat, but not nearly as much as court filings. Most of those who resolve their cases through the FRCs express satisfaction with the outcomes.¹⁰⁷

Given the number and complexity of the changes in Australia, it is difficult to disentangle the effects of law reform from the changes in process, increased support for mediation and broader social changes. One thing is clear, however: The vast majority of separated parents in Australia continue to settle their cases without a trial. In a major study of the reforms, only 3% of parents identified the court as their main pathway for parenting issue resolution.¹⁰⁸

Nonetheless, the increased use of mediation has not been problem free. Concerns continue to be raised about victims of domestic violence accepting unfavourable settlements and being exposed, along with their children, to greater danger. There are also continuing questions about the training of mediators and the extent to which mediated agreements reflect legal entitlements, in particular for women.¹⁰⁹

Advocates for abused women have argued that there has been an increase in parenting arrangements that expose children to a risk of harm

106. See Patricia Karvelas, "Family Service Wants Boost to Its Centres", *The Australian* (5 November 2013), online: <www.theaustralian.com.au>.

107. See generally Patrick Parkinson, "The Idea of Family Relationship Centres in Australia" (2013) 51:2 Fam Ct Rev 195. For an evaluation of the FRCs, see Lawrie Moloney et al, "Evaluating the Work of Australia's Family Relationship Centres: Evidence from the First 5 Years" (2013) 51:2 Fam Ct Rev 234. On the relationship of FRCs to legal services, see Lawrie Moloney et al, "Family Relationship Centres: Partnerships with Legal Assistance Services" (2013) 51:2 Fam Ct Rev 250.

108. Kaspiew et al, *supra* note 105 at 66.

109. *Ibid* at 104. One small study on cases resolved in court reported that over one third of cases resulted in an arrangement of at least 35% overnights with each parent, a level that affects child support in Australia. *Ibid* at 117–20. But see Parkinson, "Laws that Encourage Shared Parenting", *supra* note 86. Other research indicates that under 10% of *contested* cases result in "substantially equal time", defined as at least 45% of nights being spent with each parent. Among the broader population, which includes those who agreed informally, settled or litigated their cases, 16% reported at least 35% of time with each parent, and only 7% reported substantially equal time. *Ibid* at 327–32.

as a result of the new legal regime.¹¹⁰ This issue is difficult to study and no research has established a link between legislative change and substantiated abuse. Even case-based research on the possibility of increased risk of harm arising from the Australian reforms is difficult because the vast majority of cases are resolved by negotiation or mediation rather than in the courts.¹¹¹

Patrick Parkinson, a leading Australian family law scholar, offers some key “lessons” from the experience in that country:

It is important that, as far as possible, the law of the land commands confidence and general acceptance. . . . Even if legislation is only amended to state principles and values that align with the case law, that may in itself improve public confidence in the family justice system. . . . [L]egislation [should] . . . help parents and their advisers settle disputes . . . [and] [e]mphasize the importance of maintaining children’s relationships with both parents and with others who are important to them. [The Legislation should also] [a]void presumptions about time [and] avoid bifurcation in the law of parenting after separation: The amendments to the *Family Law Act* adopted . . . [only two] primary considerations . . . one involving the maintenance of relationships with parents that are meaningful to the child, the other involving protection from harm . . . [T]his bifurcation is unfortunate [as other factors may also be very significant].¹¹²

Parkinson’s comments are directed at the issue of legislative reform, but he has also done extensive work on Australia’s FRCs. His work recognizes that the establishment of appropriate consensual dispute resolution services is important for an effective family justice system.

One of the sobering lessons of the Australian research is that a significant number of parents, especially those with limited resources, make largely informal arrangements for the care of children with little or no professional or judicial involvement. This led one Australian law professor, John Wade, to observe that there is “widespread harm to

110. See Renata Alexander, “Behind Closed Doors: Family Violence Cases Under the *Family Law Act* Outlined and Analysed” (2009) 20:4 *Australian Family Lawyer* 1 at 12. See also Renata Alexander, “Moving Forwards or Back to the Future?: An Analysis of Case Law on Family Violence Under the *Family Law Act 1975 (Cth)*”, (2010) 33:3 *UNSWLJ* 907 at 919.

111. See Parkinson, “Laws that Encourage Shared Parenting”, *supra* note 86 at 334.

112. *Ibid* at 337–42.

children [from parental separation], no matter what is the ‘law’”.¹¹³ He points out that many children experience adverse effects due to parental mental health, addiction or conflict issues. The issue for these children is not the parenting arrangements per se, but the lack of parenting capacity. Family law reform is limited in its ability to help these vulnerable children.

VI. Reforming Canada’s Parenting Laws

Before proposing reform to the parenting provisions of the 1985 *Divorce Act*, it is instructive to consider previous efforts at reform.

A. Bill C-22

As a result of the controversy arising out of the introduction of the *Child Support Guidelines* in 1996, a Special Parliamentary Committee was established to consider changes to better protect the interests of children and parents in the context of divorce.¹¹⁴ Committee hearings were held across the country, with fathers’ rights groups and women’s advocates often bitterly attacking one another.¹¹⁵ In 1998, the Committee issued its report, *For the Sake of the Children*, with forty-eight recommendations for legislative reform and a broad range of proposals for changes to the family justice system that were intended to increase the role of non-custodial parents in the lives of their children and encourage consensual resolution of family disputes.¹¹⁶ The report, however, gave inadequate attention to issues like domestic violence, so further consultations were undertaken by the Department of Justice after its release. Proposed amendments to the *Divorce Act* were introduced by the Liberal government through Bill

113. John Wade, “The Failed Experiment with Legal ‘Equal Parenting’ in Australia: Any Possible Lessons for Canada?” (Lecture delivered at the College of Law, University of Saskatchewan, 11 February 2014), online: YouTube <www.youtube.com/watch?v=KccLQABF1Ds>.

114. See Nicholas Bala, “A Report From Canada’s Gender War Zone: Reforming the Child-Related Provisions of the *Divorce Act*” (1999) 16:2 Can J Fam L 163.

115. *Ibid* at 186–88.

116. Canada, Special Joint Committee on Child Custody and Access, *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access* (December 1998) (Chairs: The Honourable Landon Pearson & Roger Gallaway).

C-22 in late 2002, which would have supported shared parenting and replaced the concepts of custody and access with parental responsibility and “contact”.¹¹⁷ Perhaps, inevitably, Bill C-22 was criticized both by fathers’ rights groups because it did not sufficiently advancing their rights, and by feminists because it inadequately dealt with domestic violence.¹¹⁸ Arguably, it also failed to adequately articulate new principles or recognize the rights of children. However, there was significant support for the reform project, and after the Bill died on the order paper—due to the end of the Parliamentary Session—Irwin Cotler, the Minister of Justice at the time, pledged to bring back a revised version of the Bill.¹¹⁹ Before this could occur, however, the Liberals were voted out of office.

B. Bill C-560

Backbench Conservative Member of Parliament Maurice Vellacott introduced Bill C-560 in 2013 with significant support from fellow members of the Conservative caucus.¹²⁰ The Bill would have established a statutory presumption that equal parenting time is in the best interests of children.¹²¹ It had vocal support from fathers’ rights and equal parenting groups,¹²² but the Bill was opposed by the Canadian Bar Association and

117. Bill C-22, *supra* note 6.

118. See Linda C Neilson, “Putting Revisions to the *Divorce Act* Through a Family Violence Research Filter: The Good, the Bad, and the Ugly” (2003) 20:1 Can J Fam L 11; Boyd, “Demonizing Mothers”, *supra* note 9.

119. “Cotler Likes Custody Reform Package”, *The Lawyers Weekly* 23:39 (20 February 2004).

120. Bill C-560, *supra* note 7. Bill C-560 also proposed a presumption against parental relocation and stipulated that the coming into force of the Bill would have been a ground for variation of prior orders. There were also serious concerns about these aspects of Bill C-560, but a discussion of them is beyond the scope of this article. *Ibid*, cl 9.

121. *Ibid*. Bill C-560 resulted in considerable media coverage and public debate. See e.g. Brian Ludmer, “Speaker’s Corner: Time for Canada to Embrace Equal Shared Parenting”, *Law Times* (5 May 2014), online: <www.lawtimesnews.com>; Edward Kruk, “Equal Shared Parenting: Best for Parents, Best for Children”, *National Post* (25 March 2014), online: <www.nationalpost.com>; Tasha Kheiriddin, “‘Equal Shared Parenting’ Law Doesn’t Put Kids First”, *National Post* (20 March 2014), online: <www.nationalpost.com>; Nicholas Bala, “‘Equal Time’ for Custody of Children Is a Simplistic Solution”, *Toronto Star* (10 March 2014), online: <www.thestar.com>.

122. See e.g. Boyd, *Child Custody*, *supra* note 22.

many family justice groups.¹²³ The fathers' rights agenda that was reflected in the Bill was clearly at odds with the historical approaches of the Department of Justice and the views of most family judges and lawyers. So, although Bill C-560 had significant support in the Conservative caucus, the Cabinet did not support it, nor did the Liberals or New Democrats. The Bill was defeated without Committee hearings at second reading on May 27, 2014.

Of note here is a 2014 survey of family lawyers and judges that indicated that while 78% of respondents favoured reform of the *Divorce Act* that would see the concepts of *custody* and *access* replaced with terms like *parental responsibility* and *parenting time*, only 23% of respondents supported the "equal parenting presumption" of Bill C-560.¹²⁴ The opposition to this Bill was related to problems inherent in the presumption of equal parenting. Most Canadian parents who cohabit do not have an arrangement where child care is divided equally, so there is no reason for equal parenting to be the presumed best post-separation parenting arrangement. Further, for many separated parents, an equal parenting time plan is not feasible. It is clear from the experience in Canada and elsewhere that parental work schedules, relative location of residences and new relationships make equal parenting time practical in only a minority of situations. As discussed above, social science research does *not* support the enactment of such a presumption, particularly in higher conflict cases.

An additional concern is how to deal with domestic violence. Bill C-560 provided little protection for victims of domestic violence. This Bill stipulated that family violence was merely an "additional consideration". Further, domestic violence was deemed only relevant if children directly witnessed it.

While a *presumption* of equal time is not appropriate, there are cases where this is an arrangement that is practicable and in a child's best interests. As intact Canadian families move toward greater equality in child care, it is expected that the trend toward a gradual increase in the number of equal parenting time arrangements will continue.

123. Canadian Bar Association, National Family Law Section, "In the Interests of Children: Response to Bill C-560" (Ottawa: CBA, May 2014) at 1.

124. Bala et al, National Family Law Survey, *supra* note 21.

VII. Proposal for Reforming the *Divorce Act*

A. Parenting Concepts

The concepts of custody and access in the *Divorce Act*, as noted earlier, are archaic and are not appropriate tools for parents or courts to use when making plans for a child. Most jurisdictions have adopted more child-focused terminology and concepts that reflect the real issues that parents need to address in order to structure their planning and decision making. These include concepts such as division or sharing of “parenting responsibility” and “parenting time”¹²⁵ through the making of a voluntary parenting plan or, if parents cannot agree, through a court-imposed parenting order.

Parenting plans and orders establish a schedule for a child’s time in the care of each parent and will typically have provisions dealing with issues such as decision making about education, extracurricular activities, religious upbringing, health care, parental involvement with schools and health care providers, communication between parents and contact with children while in the care of the other parent. These plans normally provide for consultation between parents before significant decisions are made.

In some cases, it is sufficient to specify that parents will consult and decide together. In cases with higher levels of conflict, a method for resolving disagreements will be necessary. In higher conflict cases, these

125. See Bill C-560, *supra* note 7, cl 16.2. The Bill provided useful definitions of parental responsibility, parenting time and equal parental responsibility:

[E]qual parenting responsibility includes joint responsibility for long-term decision-making and responsibility for daily care during allocated parenting time, but does not include major decisions made by one parent during an emergency situation. [P]arental responsibility means responsibility for: (a) making long-term decisions with respect to the health, education, welfare, development, religion, culture, name and changes to the living arrangements of a child; (b) carrying out the everyday tasks that are associated with the care and activities of a child; and (c) making emergency decisions in respect of a child. . . . [P]arenting time means, with respect to a particular spouse and child, the days and times that the spouse is given primary care and responsibility for the daily needs of the child.

Ibid [emphasis added].

plans may require lower expectations for agreement, or may require that one parent has final responsibility for certain decisions, after consultation with the other; or disputes may be referred for resolution by a third party.

In most cases though, the parent with responsibility for the care of the child at the relevant time should be making day-to-day decisions about such matters as daily routine, diet, discipline and religious observance. While communication, consultation and co-ordination between parents about such routine matters is desirable and can occur in many cases, in higher conflict cases discussion about these issues may not be productive and can exacerbate tensions.

In the minority of cases that are brought to the courts for resolution, each parent should be expected to file a proposal for a parenting plan. Judges required to impose a parenting regime are likely to be less nuanced, detailed and flexible in making a parenting order than parents who are making their own plans. Nonetheless, the court must address the same basic issues, and judges benefit in knowing each parent's position on a complete plan.

B. Principled Articulation of the "Best Interests of the Child"

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*.¹²⁶ 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.¹²⁷ The articulation of clear principles will, undoubtedly, help

126. *Supra* note 2.

127. See e.g. Robert Mnookin, "Child Custody Revisited" (2014) 77:1 Law & Contemp Probs 249 at 252, 264; Elizabeth S Scott & Robert E Emery, "Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard" (2014) 77:1 Law & Contemp Probs 69 at 69, 75-76.

structure decision making and negotiation of parenting arrangements, recognizing that there must always be discretion to make individualized parenting arrangements. These principles should reflect current social science knowledge and Canadian values. Unlike the *Divorce Act*, provincial and territorial statutes in Canada have detailed lists of factors that courts are to consider in making best interests decisions,¹²⁸ and the federal statute should provide similar direction.

C. Support for “Co-parenting”

Subsection 16(10) of the *Divorce Act* presently establishes the maximum contact principle to guide decision making, but the provision is vague and somewhat circular.¹²⁹ It also uses the unfortunate term *contact*, which suggests a limited role rather than explicitly focusing on the best interests of children in having two parents actively involved in their care and upbringing. This important provision should be rearticulated, recognizing that: It is usually in the best interests of children whose parents are divorcing to have a co-parenting arrangement that allows for both parents to have a significant role in parental responsibilities and decision making, and for each parent to have regular and significant involvement in the care of their children.

There should *not* be a legislative provision that specifies the expected amount of parenting time, as parenting time arrangements must be based on the individual circumstances of each child and may be altered as children get older and their circumstances change. However, adoption of this version of the Australian “meaningful involvement” provision would be appropriate to indicate that where it is reasonably practicable and consistent with the child’s best interests, parenting time would include care not only on weekends and during holiday periods, but also some parenting time during the week.

This statement of principle about co-parenting is not intended to establish the kind of presumptions found in Bill C-560, rebuttable only if it can be established that another arrangement would *substantially enhance* the interests of the child. Rather these principles are to be a starting place for considering an individual case, effectively codifying practices

128. See e.g. *Alta FLA*, *supra* note 3, s 18; *BC FLA*, *supra* note 3, ss 37–38.

129. *Supra* note 1, s 16(10).

that presently occur in most cases, and that are consistent with the social science research summarized in the AFCC *Think Tank Report*.¹³⁰ The proposed principle is not intended to be a “default rule”; it is meant only to reflect common experiences and current understandings of what is best for most children.

A “co-parenting principle” always needs to be balanced with the consideration of other best interests factors, which also should be identified in legislation, such as the level of conflict between the parents, a history of family violence, the ability of the parents to communicate and co-operate, the age and developmental needs of the child, the distance between the parents’ homes, and the closeness of the child’s relationship with each parent. Adopting a principle that it is normally in the best interests of children to have a co-parenting arrangement is consistent with widely shared Canadian values about the importance of both parents in the lives of their children, the social science research on the value of continuing and significant involvement by both parents in the lives of their children, and current Canadian post-separation parenting practices.

The co-parenting principle may be viewed as a clearer articulation of the *maximum contact* and *friendly parent* provisions of the *Divorce Act*.¹³¹ Indeed, as discussed in this article, this principle is consistent with Canadian appellate jurisprudence on joint custody, but it provides a clearer and more accessible articulation of the approach of these cases.

D. Parenting Principles and Factors

Other statements of principle about the promotion of the best interests of children that should be articulated in legislation include the following:

- Parents have a responsibility to reduce their conflict and should be encouraged to negotiate their own parenting plans. Conflict that affects a child may result in a reduction of the offending parent’s contact and involvement with the child.
- Parents have a responsibility to support a child’s relationship with the other parent and family members, unless such relationships are detrimental to the child’s well-being.

130. *Think Tank Report*, *supra* note 55.

131. *Supra* note 1, s 16(10).

- If a parent has not lived with and cared for a child, the parent's time with the child should be increased gradually, having regard to the child's age and adjustment.
- Parents should be discouraged from taking unilateral actions or steps without notice to the other parent, unless this is necessary to protect a child from significant harm.
- Parenting arrangements should be appropriate to a child's age, stage of development and special needs.
- Parenting arrangements should take account of parenting capacity, including issues of impairment of parenting capacity by drugs, alcohol or mental illness.
- Parenting arrangements must not expose a child or parent to a risk of abuse or family violence.
- Parenting arrangements should take into account the perspectives and preferences of children, but children should only be involved in decision making in a manner consistent with their maturity and vulnerabilities.
- Parenting arrangements should recognize the importance of the culture and heritage of both parents.
- Parenting arrangements should be reviewed and revised as children grow older and the needs of children and circumstances of parents change.¹³²

All of these principles are recognized in Canadian case law and are reflective of social science research, but their articulation in legislation would benefit parents and their professional advisors, as well as the courts.¹³³

132. See e.g. *Wiegiers v Gray*, 2008 SKCA 7, 291 DLR (4th) 176. Some Canadian cases have taken a narrow view of the jurisdiction to "vary" prior custody orders, holding that the "mere passage of time" (in that case six years) since the making of a prior order, is not a basis for a variation application. Other cases seem to take a broader perspective. See e.g. *Bromm v Bromm*, 2010 SKCA 149, 91 RFL (6th) 268. While courts should have a high standard for "variation" of a prior judicially imposed order after a contested hearing, if the initial order is made on consent, there should be a broader scope for "review" as children mature and circumstances change. Normally parents should be encouraged to provide for the possibility of review in an initial parenting plan, and to undertake such review themselves without judicial involvement. *Ibid.*

133. Some of these principles are adapted from a list proposed by Patrick Parkinson, see Parkinson, "Laws that Encourage Shared Parenting", *supra* note 86 at 337-42.

E. Relocation

Some of the most challenging cases for the family justice system relate to requests for parental relocation with children. These cases are more difficult to settle than other family law cases because there may be no middle ground for a compromise. If relocation occurs (or a parent relocates without a child), relations between a child and parent will be permanently altered. In Canada,¹³⁴ relocation disputes are governed by the 1996 Supreme Court decision *Gordon v Goertz*.¹³⁵ The judgment sets out a non-exhaustive list of factors for courts to weigh when making these best interests based decisions, but articulates no priorities or principles, except that judges should only consider the reasons for the move in “exceptional cases”. However, this is generally disregarded by judges in lower courts, as the reasons for the relocation are generally deemed relevant to assessing its effect on the child. *Gordon v Goertz* has been widely criticized for the uncertainty that it creates and its lack of guidance,¹³⁶ resulting in

134. For British Columbia’s provision dealing with relocation applications made under provincial law—generally those involving unmarried parents, see e.g. BC *FLA*, *supra* note 3, s 46.

135. *Supra* note 25. Justice McLachlin, as she then was, noted:

The focus is on the best interests of the child, not the interests and rights of the parents. More particularly the judge should consider, *inter alia*:

- a) the existing custody arrangement and relationship between the child and the custodial parent;
- b) the existing access arrangement and the relationship between the child and the access parent;
- c) the desirability of maximizing contact between the child and both parents;
- d) the views of the child;
- e) the custodial parent’s reason for moving, *only in the exceptional case* where it is relevant to that parent’s ability to meet the needs of the child;
- f) disruption to the child of a change in custody;
- g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

Ibid at para 49 [emphasis added].

136. See e.g. DA Rollie Thompson, “Presumptions, Burdens and Best Interests in Relocation Law” (2015) 53:1 Fam Ct Rev 40 [Thompson, “Presumptions”]; Phil Epstein, “Season’s Greetings”, *Family Law Newsletters* (24 December 2014) (WL Can).

significant unpredictability about how relocation cases will be decided.¹³⁷ Clearer direction in the context of the application of the best interests test for relocation cases would facilitate judicial resolution of such cases, promote settlements, reduce costs for litigants and the justice system, and help parents to make post-separation plans for their children.

While relocation decisions should be based on the best interests of the child and governed by the same concepts and general principles as other cases, recognizing the unique nature and special challenges of these cases is important. Relocation cases are much more likely to be litigated than other parental disputes and often present stark and permanent choices, so providing more structure for decision making is highly desirable.

A key characteristic of many relocation cases is the relocating parent's concern for his own well-being rather than a concern for the child's welfare. This is most apparent in cases where new partners are a factor in relocation. This observation does not mean that relocation should not be permitted in such cases, since children may indirectly benefit from such moves, and parents' interests cannot be disregarded. However, there should be principles and procedures to govern these cases in addition to those in place for other types of parenting disputes.

In relocation cases, parents will often have unequal access to certain types of information, and placing an onus on one parent for adducing evidence on certain issues is appropriate. These onuses should *not* be viewed as dispositive rules but rather as starting points that are consistent with existing Canadian case law and the general best interests principles.¹³⁸ The *Divorce Act* should have provisions that govern relocation and specify the following:

- *Relocation*: A change in the location of the residence of a child that can reasonably be expected to have a significant impact on the child's

137. See Nicholas Bala & Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" (2012) 30:3 Can Fam LQ 271 at 287; DA Rollie Thompson, "Heading for the Light: International Relocation from Canada" (2011) 30:1 Can Fam LQ 1 at 9-10.

138. For further development on the argument in favour of onuses for some relocation cases, see Bala & Wheeler, *supra* note 137 at 20; Thompson, "Presumptions", *supra* note 136. There are some who argue against establishing onuses or presumptions for relocation cases. See e.g. Patrick Parkinson & Judy Cashmore, "Reforming Relocation Law: An Evidence-Based Approach" (2015) 53:1 Fam L Court Rev 23.

relationship with the non-relocating parent or an existing parenting plan or order.

- *Notice of relocation*: A parent who plans to relocate with a child must give to the non-relocating parent at least sixty days written notice of the planned relocation and provide a proposal for maintaining the child's relationship with the non-relocating parent. In cases of domestic violence or a grave risk of harm to a child, a court may grant an exemption from the requirement to give notice, if satisfied that doing so is in the best interests of the child.

- *Onus of proof*:

- A. In the event of a relocation application, there shall be a rebuttable onus on the relocating parent to establish that the relocation is in the best interests of the child if:

- i. the parents substantially share care of the child;¹³⁹
- ii. the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views, and the child expresses a clear preference against the move to an independent professional;¹⁴⁰ or
- iii. the relocating parent has acted unilaterally in defiance of a court order or written objection to the relocation.

- B. In the event of a relocation application, there shall be a rebuttable onus on the non-relocating parent to establish that it is in the best interests of the child to not relocate if:

- i. the relocating parent has clearly been the primary caregiver of the child; or

139. See e.g. Bala & Wheeler, *supra* note 137. It can be argued that it would be desirable to define terms like "substantially share care" (as at least 30%, 33% or 40% of nights in the past year) and "predominant primary caregiver" (as at least 80% or 90% of nights in the past year), in order to provide greater certainty. However, experience with the 40% threshold for "shared custody" for the purposes of the *Child Support Guidelines* raises concerns about the effect that such precision might have on initial formulation of parenting plans and its restraint on judicial flexibility when making later relocation orders.

140. *Hague Child Abduction Convention*, *supra* note 82. This terminology is consistent with the *Hague Child Abduction Convention* concerning the views of children. While children, especially older children, may have definite views about relocation, many children will have difficulty in understanding the implications of relocation and expressing definite views.

ii. the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views, and the child expresses a clear preference in favour of the move to an independent professional.

C. If there are conflicting onuses, each parent will bear an onus to establish the best interests of the child concerning relocation.

• *Best Interests of the Child:*

In determining any matter involving the relocation of a child, the court shall consider all matters relevant to the best interests of the child, including the following additional relevant matters:

- a) whether the relocating parent gave notice to the non-relocating parent;
- b) whether the relocating parent has proposed reasonable and workable arrangements for the non-relocating parent or important persons in the child's life (including such persons as the child's grandparents) to have parenting time with the child after relocation;
- c) whether the proposed arrangements for parenting time by the non-relocating parent after relocation are realistic, affordable and not too burdensome;
- d) whether any restrictions upon relocation are contained in a parenting order or agreement;
- e) whether the relocating parent has complied with previous court orders or parenting plans, especially the provisions for parenting time with the non-relocating parent; and
- f) the reasons for the proposed move.

The relocation proposal is consistent with the general best interests principles concerning the importance of continuity of care and stability. In cases where the non-relocating parent has had a near equal ongoing involvement in the child's care and can provide a viable parenting alternative for care in the event of a move, there should be an onus on the relocating parent to justify disruption of this relationship. Conversely, there should be an onus on the non-relocating parent to justify the denial of a relocation plan when the non-relocating parent has had limited

contact with the child, there is good reason for the move and a plan has been developed that will allow for a continuing parent-child relationship.

The proposed presumptions are based on the importance of the views of children—particularly *mature* children—and adopt the *Hague Child Abduction Convention*¹⁴¹ terminology, which is consistent with Canadian jurisprudence. Further, the proposed onus in cases of unilateral relocation reflects current policy concerns about the effects of unilateral action by discouraging “self-help” and hastily arranged or unplanned moves, which are often highly disruptive for a child and devastating for the non-relocating parent.

This proposal only establishes a rebuttable onus of proof about the best interests of a child. While the enactment of these provisions should help resolve or settle some relocation cases—and provide for a less expensive approach—it will not resolve the most challenging relocation cases where individualized judicial determinations will still be necessary.

VIII. Reforming the *Divorce Act* and Changing Culture

A. Objectives of Legislative Reform

When considering possibilities for law reform (or advocating for keeping the present legal regime in place), it is important to appreciate that there is no “perfect” parenting law. A law reform proposal should be assessed based on whether it is likely to: (a) promote parental co-operation and increase consensual dispute resolution, (b) reduce costs for parents and the justice system, and (c) promote better outcomes for as many children as possible, without increasing exposure of any children to increased risk of harm.

Certainly, there should be research into the effects of any reforms undertaken. In theory, empirical data should establish whether reforms will achieve these objectives. However, even in Australia, with its relatively well-funded research program into the effects of its legislative reform, not all of these indicia of improvement could be effectively measured. Despite the absence of precise assessments of success,

141. *Supra* note 82.

experiences in other countries and jurisdictions—such as Alberta and British Columbia—indicate that Canada could have a better legal regime than the present *Divorce Act*.

One of the primary objectives for the reforms proposed in this article is to support efforts to increase the use of consensual dispute resolution for family cases, including mediation, collaborative law and negotiated resolution. More cases can, and should, be dealt with through these methods of consensual dispute resolution. However, moves toward widespread implementation of these methods should be premised on an understanding that some cases must be dealt with by the courts; in particular, cases involving serious issues of domestic violence, alienation, parental mental health and/or substance abuse. A number of recent major reports, including the 2013 report of the Action Committee on Access to Justice in Civil and Family Matters (Cromwell Committee Report),¹⁴² have emphasized the need for *transformative change* in the family justice system aimed at promoting accessibility, reducing costs and improving outcomes, with particular emphasis on increasing use of consensual dispute resolution methods. The Cromwell Committee Report recognized that procedural change is inseparably related to the substantive law, and it recommended changes in post-separation parenting legislation based on abandonment of the concepts of custody and access, which tend to heighten adversarial tensions.¹⁴³

Research from Australia suggests that changing the law can help reduce the use of courts to resolve family disputes. As discussed above, the reforms in Australia went beyond legislative change to include increased government funding for consensual dispute resolution services and educational efforts to change the culture among the family bar and other professionals. This illustrates that the interrelationship between

142. Canadian Forum on Civil Justice, *Access to Civil & Family Justice: A Roadmap for Change* (October 2013).

143. See e.g. Action Committee on Access to Justice in Civil and Family Matters, “Meaningful Change for Family Justice: Beyond Wise Words—Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters” (April 2013) at 9; Canadian Bar Association, “Reaching Equal Justice: An Invitation to Envision and Act” (Ottawa: CBA, 2013); Law Commission of Ontario, “Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity” (Toronto: LCO, 2013).

legislative reform and cultural change, for both parents and professionals, is complex and multidirectional.¹⁴⁴

The reforms proposed in this article both reflect and reinforce changes that are already occurring in Canadian social and legal culture toward increased use of consensual dispute resolution and co-parenting. Even without amendment to the *Divorce Act*, in many cases judges, lawyers, mediators and parents are using such concepts as co-parenting, parental responsibility, parenting time and parenting plans in making arrangements for children.¹⁴⁵ These concepts better reflect the reality of most parenting situations, and their use is more likely to produce personalized plans than is the use of the blunt concepts of custody and access. Indeed, on its website, the Department of Justice already encourages and supports the making of parenting plans, and the use of concepts such as parenting time and “parenting schedules”.¹⁴⁶ Enacting the type of reforms proposed in this article will reinforce the trend toward non-adversarial dispute resolution, encouraging lawyers, judges and other professionals to seriously pursue the possibility of a consensual co-parenting plan.

While there must be recognition that in most cases some form of shared parental responsibility is in the best interests of children and parents, an important premise of these proposals is that there are cases where co-parenting, or even contact, pose grave risks and should not occur. In appropriate cases, lawyers need to be able to resist the sharing of parental responsibilities and time by adducing evidence of ongoing concerns of domestic violence, parental mental health, substance abuse issues or serious alienating behaviour. Even in cases where there are no physical violence, abuse or mental health concerns, there may be such a high level of parental conflict that it is necessary to resist co-parenting. It is crucial to recognize that exposure to prolonged high conflict is harmful to children, and that ultimately neither courts nor mental health professionals can get

144. See Smyth et al, *supra* note 97.

145. Presently, there is no legal requirement to use the terms custody and access in a separation agreement or other legal document, though it may be helpful to include a term specifying who has custody rights for the purposes of the *Hague Child Abduction Convention*. *Supra* note 82. In a co-parenting situation, this normally will be both parents.

146. See e.g. Department of Justice, *What Happens Next?*, *supra* note 83; Department of Justice, *Making Plans*, *supra* note 83.

all parents to effectively co-parent.¹⁴⁷ In these cases, it may be appropriate to consider whether a child should have some type of ongoing relationship with a physically or emotionally abusive or incapacitated parent, or whether there might be circumstances that allow for such a relationship in the future. The proposals made here clearly recognize concerns about domestic violence and child safety, both of which are missing from the present *Divorce Act*. Hopefully, their enactment will stimulate further efforts at educating all who work in the family justice system.

Children have the right under the *UNCRC* to have their voices heard. A final objective of these proposals is to recognize that children should be heard by ensuring that judges, lawyers, mediators and other professionals sensitively consider their involvement. While children should never be pressured into involvement in the process, they often have significant perspectives and insights, and can be important advocates for consensual resolution.

B. The Way Forward

The types of statutory reforms proposed here have been undertaken in many countries and, if enacted in Canada, will provide a law that more adequately reflects the rights and interests of children. Parliamentarians may ask why they should consider undertaking reforms when Bill C-22 was not enacted in 2003. Although in some respects similar to Bill C-22, the proposals made here differ significantly and are more nuanced and child-focused. Further, since 2003, many provincial and federal laws and policies have changed to give greater protection to victims of intimate partner violence, allowing for organic changes to parenting laws that will promote co-parenting without necessarily exposing victims of violence or their children to greater risk.

Since 2003, there has been greater recognition of the value of various forms of alternative and consensual dispute resolution in Canada. This is a result of the considerable research now available on family law and familial arrangements, and the wider acceptance of the concepts of joint custody, shared parenting and co-parenting in Canada. There are now a number of examples from other countries and provinces such as British Columbia

147. See Jennifer McIntosh, "Legislating for Shared Parenting: Exploring Some Underlying Assumptions" (2009) 47:3 Fam Ct Rev 389.

and Alberta that support the types of reforms proposed here. While it must be recognized that any legislative reform in the area of parenting will attract criticism from some advocacy groups, it is significant that opinion polls reveal high levels of public support in Canada for shared parenting laws.¹⁴⁸

Reforming the parenting provisions of the *Divorce Act* is important, but it is only one aspect of the changes needed to the family dispute resolution process. Reforming the *Divorce Act* will not be a panacea, but it will be an improvement, and will hopefully stimulate other systemic and cultural changes to parenting in Canada.

148. See Ludmer, *supra* note 121.