

# **SUBMISSION**

TO THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

RE: BILL C-78 (An Act to Amend the *Divorce Act, et al*)

**BEST INTERESTS = PRESUMPTIVE EQUAL SHARED PARENTING**

## **SUBMITTED JOINTLY BY:**

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

**2018-11-01**

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## I INTRODUCTION

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

However laudable these changes may be, we submit that they are an inadequate response to an antiquated and conflict promoting family justice system that has for years been routinely described as being “broken” or in “crisis” by Canadians, jurists, academics and parliamentarians alike<sup>1</sup>. The 33-year-old federal divorce regime, despite some changes over the years<sup>2</sup>, has been rendered out-of-date both by social science research findings regarding the “best interests of the child” and changes in societal norms and attitudes. We recognize that making required root-and-branch legislative, structural and funding changes in a coordinated manner for divorce/separation matters involves federal/provincial/territorial cooperation. While we encourage the government to pursue these longer-term changes beyond Bill C-78, we submit that the government can and should use this generational opportunity of Bill C-78 to make overdue changes to the *Divorce Act*, particularly with reference to how we define “best interests of the child”.

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

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

<sup>2</sup> “Best interests of the Child” criteria were added to the *Divorce Act* in 1985. In 1997, *Child Support Guidelines* were created with a statutory requirement to report to Parliament in 5 years. The most ambitious change was the modernization of family law via Bill C-22 attempted in 2002. The Bill was heavily criticized for failing to include shared parenting recommendations of the 1998 “For the Sake of the Children Report” authored by the Joint Select Committee on Custody and Access and died on the order paper. Bill C-78 contains many structural similarities and omissions to Bill C-22.

- 1) fully justified by social science research as the preferred child arrangement post-dissolution barring issues of abuse, neglect or violence;
- 2) overwhelmingly and consistently supported by Canadians regardless of gender, age, geographical region or party affiliation;
- 3) was recommended by the Special Joint Committee on Child Custody and Access as far back as 1998 (but not a rebuttable presumption);
- 4) has been successfully implemented in numerous jurisdictions; and,
- 5) has been tabled in 20 states in the U.S.A. in 2018.

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

We have spoken with many MPs over the last ten to fifteen years. We believe that in your hearts you actually support the concept of equal shared parenting. In a sample informal statistical poll of MPs that we conducted during a previous parliamentary session, we determined that equal shared parenting would pass in a free vote unhindered by political positioning. Since then, shared parenting has been included in policy platforms of both the Conservative and Green parties. For the Liberal party, former leader Michael Ignatieff is on record supporting shared parenting<sup>3</sup>, as is Prime Minister Justin Trudeau<sup>4</sup>.

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

<sup>4</sup> Response by Prime Minister Trudeau in parliament, <https://youtu.be/zlKhsgJhLL0> at 0.55 mark (... “we can continue to ... lay a solid foundation for our children’s future by ...supporting equal parenting...”).

Our simple message on equal shared parenting is: “It’s time...indeed, it’s past time.”

We define equal shared parenting along the following parameters:

Equal Shared Parenting is:

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

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

We propose amendments only in two areas:

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

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<sup>5</sup> Scott ES & Emery RE, “Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard” (2014) 77 Law Contemp Probs 69 at 69 ( vague, indeterminate); Rodham Clinton H, “Children Under the Law” (1973) Harv Educ Rev at 21 (empty vessel); Charlow A, “Awarding Custody: The Best Interests of the Child and Other Fictions” (1987) 5 Policy Rev 25 at 1 (Because the “best interests of the child” standard is more a vague platitude than a legal or scientific standard, it is subject to abuse both by judges who administer it and parents who use it to further their own interests.); Bala, N, “A Report From Canada’s ‘Gender War Zone’: Reforming The Child- Related Provisions Of The Divorce” 67 at 199 (concept of the “best interests of the child” is highly malleable and advocates for almost any position in this area can usually cast their arguments in terms of promoting this objective.); Bala, N, “Bringing Canada’s Divorce Act into the new millennium: enacting a child-focused parenting law” (2014) 40 Queens LJ 425 at 470 (vague).

2. Relocation/mobility. The proposed amendment that extends presumptive rights to a “primary” parent where the child enjoys but minimal time with the other parent, shifts the focus from the best interests of the child to the interests of the primary parent and, arguably, judicial expediency. We recommend that ***the onus should always be on the relocating parent to establish that the move is in the best interests of the child***, regardless of the parenting time that the child currently enjoys with the other parent.

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

## **II SHARED PARENTING**

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

Shared Parenting is defined in modern research as joint legal custody (shared parental responsibility) and joint physical custody (parenting time) where children live with each parent at least 35% of the time<sup>6</sup>. However, research clearly demonstrates that the closer to 50% of the time that the children enjoy with each parent, the better the outcomes.<sup>7</sup>

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

<sup>7</sup> Fabricius WV, “Equal Parenting Time: The Case for a Legal Presumption” (2019) Handbook of Children and the Law (ed:Dwyer JG) Oxf Univ Press (Manuscript with Brief authors). Note: bolded italicized portions added by the authors.

## 1. Social Science Evidence

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

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– at page 8 of the manuscript:

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

At manuscript, p. 11:

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

At manuscript, p. 15:

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

At manuscript, pp. 15 – 16:

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

At manuscript, p. 16:

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

At manuscript, pp. 16 - 17:

**Equal parenting time appears to protect children from insecurity about parent conflict. This evidence has only recently become available because only recently have we been able to study larger samples of high conflict families with equal parenting.**

maternal custody model setting the basis for increased paternal involvement in U.S. and European custody legislation.

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

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

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

<sup>9</sup> In contrast, the less favourable correlations for single parent families have been documented as far back as 1998: 63% of teen suicides, 70% of juveniles in state-operated institutions, 71% of high school drop-outs, 75% of children in chemical abuse centers, 85% of those in prison, 85% of children who exhibit behavioral disorders, and 90% of homeless and runaway children. See National Parents Organization, “National Parents Organization Celebrates Landmark Kentucky Shared Parenting Law”, (27 April 2018), online: *GlobeNewswire News Room* <<http://globenewswire.com/news-release/2018/04/27/1489324/0/en/National-Parents-Organization-Celebrates-Landmark-Kentucky-Shared-Parenting-Law.html>>. For a detailed analysis, see Rebecca O’Neill, “Experiments in Living: The Fatherless Family” (2002) 20, online: <<http://civitas.org.uk/pdf/Experiments.pdf>>.

Likewise, shared parenting, including overnights, has been scientifically proven to be beneficial to infants and toddlers (even under 1 year), even when parents disagree<sup>10</sup>.

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

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

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<sup>10</sup> Warshak RA, “Social science and parenting plans for young children: A consensus report.” (2014) 20:1 Psychol Public Policy Law 46, online: <<http://doi.apa.org/getdoi.cfm?doi=10.1037/law0000005>>; Fabricius WV & Go Woon Suh, “Should infants and toddlers have frequent overnight parenting time with fathers? The policy debate and new data.” (2017) 23:1 Psychol Public Policy Law 68, online: <<http://doi.apa.org/getdoi.cfm?doi=10.1037/law0000108>>.

<sup>11</sup> Warshak RA, “Stemming the tide of misinformation: International consensus on shared parenting and overnighting” (2017) 30 J Am Acad Matrim Law 177.

<sup>12</sup> *Ibid* at 203.

<sup>13</sup> McIntosh JE, Smyth BM & Kelaher MA, “Responding to concerns about a study of infant overnight care postseparation, with comments on consensus: Reply to Warshak (2014).” (2015) 21:1 Psychol Policy Law 111, online: <<http://psycnet.apa.org/buy/2015-03981-005>>.

Note that *McIntosh’s own work has been deconstructed and proven unreliable*. See Nielsen L, *supra* note 8 at 260,261; cf. Nielsen L, “Re-examining the research on parental conflict, coparenting, and custody arrangements.” (2017) 23:2 Psychol Public Policy Law 211, online: <<http://doi.apa.org/getdoi.cfm?doi=10.1037/law0000109>> at 215,217; Linda Nielsen, “Pop Goes the Woozle: Being Misled by Research on Child Custody and Parenting Plans”

explicitly identified any errors in the report or disputed any of its conclusions and recommendations”<sup>14</sup>

The social science community has rapidly evolved its position on presumptions in shared parenting. Shared parenting was supported<sup>15</sup> at the January 2013 Association for Family & Conciliation Courts (AFCC) Think Tank and a majority of convened experts supported a presumption of joint decision-making but not parenting time<sup>16</sup>. The remaining step to a presumption of shared parenting including parenting time was made just three years later by a convened panel of experts at the 2017 International Conference on Shared Parenting (SP)<sup>17</sup>:

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

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

<sup>14</sup> Warshak RA, *supra* note 11 at 207.

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

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

<sup>17</sup> Braver SL & Lamb ME, “Shared Parenting After Parental Separation: The Views of 12 Experts” (2018) 59:5 J Divorce Remarriage 372, online: <<https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1454195>> at 8.

The panel of experts went on to say:<sup>18</sup>

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

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

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

## **2. Adoption by Other Jurisdictions**

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

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

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<sup>18</sup> *Ibid* at 9.

<sup>19</sup> Kelly J, "Examining resistance to joint custody" in *Jt Custody Shar Parent* (Guilford, 1991) 55 at 56 (As early as 1991, the researcher noted: "It is ironic, and of some interest, that we have subjected joint custody to a level and intensity of scrutiny that was never directed toward the traditional post-divorce arrangement [sole legal and physical custody to the mother and two weekends each month of visiting to the father] ...despite mounting evidence that traditional sole custody arrangements were less nurturing and stabilizing for children and families. ").

11% in Slovakia, 17% in France. In the US, the known rate is 35% in Wisconsin, 46% in Washington State, 30% in Arizona, 27 % in California.<sup>20</sup>

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

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

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

<sup>21</sup> HB 528. Online:< <http://www.lrc.ky.gov/record/18RS/HB528.htm>>

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

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

<sup>23</sup> National Parenting Organization, “2014 Shared Parenting Report Card”, (2014), online: <<https://nationalparentsorganization.org/information-resources/2016-06-21-19-01-25>> (based on analysis of report data).

<sup>24</sup> “Even in Legislative ‘Short Session’ – Number of States Pursuing Shared Parenting Remains Strong”, online: *Leading Women for Shared Parenting* <<http://lw4sp.org/blog/>> (1. Kansas 2. Missouri 3. New York 4. Vermont 5. Michigan 6. New Jersey 7. New Hampshire 8. West Virginia 9. South Carolina 10. Connecticut 11. Alabama 12. Massachusetts 13. Minnesota 14. Illinois 15. Maryland 16. Iowa 17. South Dakota 18. Wisconsin 19. Washington, and 20. North Carolina).

<sup>25</sup> <http://lw4sp.org/definition-of-equally-shared-parenting/> - Resources – 2018 Legislative PDF

With about 95% of cases settled outside of court, statistics indicate that Canadians are increasingly gravitating to shared parenting arrangements with a national rate estimated at 22% with high regional variation<sup>26</sup>: BC-30%, AB, 9%, ON: 5-14% and QC<sup>27</sup>:22-26%.

### 3. Public Support

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

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

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

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

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

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

<sup>28</sup> Pollara Report, 2000 (Commissioned by federal government and obtained under Freedom of Information request. Copy made available to authors.).

<b>CANADA (2007-2017): PRESUMPTIVE SHARED PARENTING POLLS</b>					
QUESTION – Do you strongly support, somewhat support, somewhat oppose or strongly oppose federal and provincial legislation to create a presumption of equal parenting in child custody cases?					
Year	Strongly/Somewhat Support	Strongly/Somewhat Oppose	Unsure	Support among Decided	Ratio Support/Oppose
2007	79.1%	14.1%	6.9%	85.0%	5.6
2009	78.0%	9.7%	12.3%	88.9%	8.0
2017	69.5%	13.2%	17.3%	84.0%	5.3
<b>TOTAL</b>	<b>73.8%</b>	<b>11.5%</b>	<b>14.8%</b>	<b>86.6%</b>	<b>6.4</b>

Here is a more detailed view using the same question wording as above for two Canadian polls broken down by region, gender, age and for 2014, party voted:

<b>2017</b>		<b>BY REGION</b>		<b>BY GENDER</b>		<b>BY AGE</b>		<b>BY PARTY VOTED</b>	
(Nanos)	Atlantic	75%	Male	78%	18-34	68%	Liberal	N/A	
	Quebec	66%	Female	62%	35-54	72%	Conservative	N/A	
	Ontario	71%			55 plus	68%	NDP	N/A	
	West	70%					Bloc	N/A	
	(undecided)	16%	(undecided)	17%	(undecided)	17%	Green	N/A	
	CANADA	70%	CANADA	70%	CANADA	70%	CANADA		

<b>2014</b>		<b>BY REGION</b>		<b>BY GENDER</b>		<b>BY AGE</b>		<b>BY PARTY VOTED</b>	
(Omnipoll)	Atlantic	68%	Male	75%	18-34	71%	Liberal	72%	
	Quebec	67%	Female	69%	35-54	71%	Conservative	76%	
	Ontario	73%			55 plus	74%	NDP	72%	
	West	73%					Bloc	61%	
	(undecided)	16%	(undecided)	18%	(undecided)	18%	Green	71%	
	CANADA	72%	CANADA	72%	CANADA	72%	(undecided)	17%	
						CANADA	72%		

Here is a partial extract of polling done worldwide:<sup>29</sup>

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

#### 4. Opposing Arguments<sup>30</sup>

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

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

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

<sup>29</sup> All results extracted from Leading Women 4 Shared Parenting ([http://lw4sp.org/polling-voting/#USAND2017\\_V](http://lw4sp.org/polling-voting/#USAND2017_V) ). Also results from commissioned surveys- Pollara by the federal government and the others by private organizations.

<sup>30</sup> Kruk E, "Arguments Against a Presumption of Shared Physical Custody in Family Law" (2018) 59:5 J Divorce Remarriage 388, online: <<https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1454201>>.

- b. Fathers pursue shared parenting only to **reduce child support obligations**. Research showed paternal and maternal instincts are equally strong refuting this. In addition, proponents asserted child support savings based on reduced child support transfers but failed to include direct costs of maintaining a second child residence as offsetting cost factor. The argument was fatally flawed from the outset as out-of-pocket child costs (transfers plus direct household costs) for child support are higher for shared parenting due to the fixed costs of maintaining an additional child residence.
- c. The “**Yo-Yo**” **argument** asserted that children would be psychologically harmed by “bouncing” between two households. This was refuted by research showing most children adjusted easily and had equal or superior outcomes in a dual residence environment.
- d. While acknowledging shared parenting may be beneficial in some circumstances, opponents argue it is **not appropriate for young children**. As mentioned above, there is now strong consensus that shared parenting is not only appropriate but provides a protective factor for infants, toddlers and young children<sup>31</sup>.

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

- a. Shared Parenting is generally the best option in most cases without mitigating factors and should not be automatically precluded where those factors exist;
- b. Types of violence need to be distinguished in arriving at parenting decisions with recognition given the fact that fully half of first-time violence occurs during dissolution and is transient<sup>33</sup>;

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<sup>31</sup> Warshak RA, *supra* note 10; McIntosh JE, Smyth BM & Kelaheer MA, *supra* note 13; Warshak RA, *supra* note 11.

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

<sup>33</sup> Kruk E, *supra* note 30 at 8.

- c. While extreme conflict precludes shared parenting, children in hi-conflict situations fare no worse in shared parenting than in sole custody and often times better. The key factor is the strength of the parent-child relationship<sup>34</sup>;
- d. Special interventions like parallel parenting, therapeutic mediation, parenting education programs, and parental coordination should be considered in hi-conflict situations<sup>35</sup>.

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

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

- a. “One Size Fits All” is too narrow. This argument suggests that any presumption will over-constrain judicial discretion or individualized decision-making. It overlooks that a presumption is a legal starting point within a generally applicable framework that may be countered by case-specific evidence. Certainly, the presumption of innocence as the basis of law has not interfered with findings of guilt. Rebuttable presumptions are already commonly used in family law in equalization, child support guidelines, and *de facto* in the *Spousal Support Advisory Guidelines*. In child support, for example, more than 40% of awards differ from the presumptive *Federal Child Support Guidelines*<sup>36</sup>. This oft-invoked and unsubstantiated expression rings hollow.
- b. “Not in the best interests of the child”. This common unsubstantiated allegation represents an emotional argument devoid of logical substance. Since BIOC is undefined (See Section C below), it is equally valid to posit the opposite making this an empty argument.

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<sup>34</sup> Nielsen L, *supra* note 13 (meta-analysis of conflict in deciding parenting arrangements).

<sup>35</sup> Kruk E, *supra* note 30 at 8.

<sup>36</sup> Bertrand, LD et al, *Phase 2 of the Survey of Child Support Awards: Final Report (2004-FCY-7E)*, 2004-FCY-7E (Ottawa, Canada: Department of Justice) at vi.

- c. Risks increase in litigation. This old trope, used in attempts to discredit either shared parenting or a rebuttable presumption, has yet to be supported by facts and smacks of scaremongering. In point of fact, available data supports the opposite conclusion.<sup>37</sup>
- d. Presumption increases focus on Parental Rights. No data supports this allegation which invites the false inference that parental and child rights are somehow binary rather than complementary as stated in the UN *Convention on the Rights of the Child*<sup>38</sup>. Neither does a presumption trump the paramount welfare considerations of a child.

In short:

A legal presumption of shared parenting based on a firm foundation of research evidence defining children's needs and interests in the divorce transition provides a clear and consistent guideline for judicial decision making. This presumption provides a clear-cut default rule, removes speculation about future conduct as a basis for making custody decisions, limits judicial discretion, enhances determinacy and predictability of outcome, and reduces litigation and ongoing conflict between parents.<sup>39</sup>

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<sup>37</sup> Kaspiew R et al, *Family law court filings 2004-05 to 2012-13* (Melbourne, Vic.: Australian Institute of Family Studies, 2015) at 22–23“matters involving children...reflect a decrease of some 25%...filings for all categories...decreased by 14%”; Fabricius WV et al, “What Happens When There Is Presumptive 50/50 Parenting Time? An Evaluation of Arizona’s New Child Custody Statute” (2018) 59:5 J Divorce Remarriage 414, online: <<https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1454196>> at 12,13 Although not written as such, the “new law is functioning as a rebuttable presumption of equal parenting time”...and “has neutral impact on parental conflict and legal conflict”. Both sources note changing mix in filing types with relative increases in domestic and substance abuse allegations.

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

<sup>39</sup> Kruk E, *supra* note 30 at 10.

### III “BEST INTERESTS OF THE CHILD” DEFINITION

The *Divorce Act* is predicated on the paramount consideration of the “best interests of the Child” (BIOC). However, prior to Bill C-78 no definition was provided for BIOC leading to charges by many critics over the years that the standard is arbitrary, unfair, and indeterminate among other descriptions<sup>40</sup>. Apologists defend the undefined status of BIOC on the basis saying that each case must be treated on a case-specific basis thereby adding fuel for critics who rightly argue that unfettered discretion not only violates basic principles of law but also usurps the constitutional role of Parliament as the law-making body. Simply stated, open-ended laws are inherently unconstitutional, and Parliament may not abdicate or delegate its authority – directly or indirectly - to other branches of government.

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

*(1) It is in the best interests of the child to enjoy equal time with each parent; and,*

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

We submit that this definition is consistent with social science consensus discussed above and the United Nations Convention on the Rights of the Child (UNCRC)<sup>41</sup>, specifically:

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

<sup>41</sup> 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [UNCRC].

- Article 3: States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents (...); Article 7: The child shall (...) have (...) the right to (...) be cared for by his or her parents;
- Article 9: States Parties shall ensure that a child shall not be separated from his or her parents (...), except when (...) such separation is necessary (...). Such determination may be necessary in a particular case (...) where the parents are living separately (...);
- Article 12: States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities (...).<sup>42</sup>

#### IV RELOCATION/MOBILITY

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

#### V SUMMARY

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

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

<sup>43</sup> See proposed sections 16.9 to 16.95 in Bill C-78.

Our submission – together with suggested legislative wording in Annex A - makes the following recommendations:

1. Adoption of a rebuttable presumption of equal shared parenting consistent with social science research and strong public support;
2. Incorporation of a definition for the heretofore undefined best interests of the child standard as mandating an equal shared parenting presumption while still considering the other factors mentioned in Bill C-78;
3. Reconsider the relocation considerations by always placing the burden of proof on the relocating party.

In addition, academic references in this document are available online<sup>44</sup> at:

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

Respectfully submitted on behalf of the following six organizations:

<p><a href="#">ANCQ</a></p>	<p>Action des nouvelles conjointes et des nouveaux conjoints du Québec</p> <p>ANCQ is a non-profit Quebec organization dedicated to addressing social and legal discrimination against repartnered families, most notably in family law. Founded in 1999, ANCQ currently has 3,500 members. ANCQ is a strong advocate for the rebuttable presumption of shared parenting.</p> <p>Contact: Ms. Lise Bilodeau  <a href="mailto:lise_bilodeau@yahoo.ca">lise_bilodeau@yahoo.ca</a>            418-847-3176</p>
<p><a href="#">CAFE</a></p>	<p>Canadian Association for Equality</p> <p>CAFE is an educational charitable organization committed to achieving equality for all Canadians, regardless of sex, sexual orientation, gender identity, gender expression, family status, race, ethnicity, creed, age or disability. Its current focus is on areas of gender equality understudied in contemporary culture such as, for example, the status, health and well-being of boys and men.</p> <p>Contact: Mr. Brian Ludmer  <a href="mailto:brian@ludmerlaw.com">brian@ludmerlaw.com</a>            416-781-0334</p>

<sup>44</sup> Google Drive does not support all browser types and works best with Internet Explorer or Chrome. Need help: contact [gwpiskor@gmail.com](mailto:gwpiskor@gmail.com) .

<p><a href="#"><u>CEPC</u></a></p>	<p>Canadian Equal Parenting Council (Conseil Canadien Pour Le Rôle Parental Égal)</p> <hr/> <p>CEPC is an advocacy federation of 26 Family Rights organizations representing children, mothers, fathers, grandparents, second spouses with four core goals: equal shared parenting post-dissolution; family law reform based on gender equality; recognition of domestic violence as a genderless social dysfunction; recognition of parental and child rights in accordance with UN declarations.</p> <p>Contact: Mr. Glenn Cheriton  <a href="mailto:president@canadianepc.com"><u>president@canadianepc.com</u></a>  613-523-2444</p>
<p><a href="#"><u>L4SP</u></a></p>	<p>Lawyers for Shared Parenting</p> <hr/> <p>L4SP is an association of lawyers advocating for a Canada-wide legislated rebuttable presumption in favour of equal shared parenting for children of divorce or separation.</p> <p>Contact: Mr. Gene C. Colman  <a href="mailto:gene@complexfamilylaw.com"><u>gene@complexfamilylaw.com</u></a>  416-635-9264</p>
<p><a href="#"><u>LW4SP</u></a></p>	<p>Leading Women For Shared Parenting (Canada)</p> <hr/> <p>LW4SP is an international organization of 150 influential women in media and politics lending their time and names in support of equal shared parenting as the default model for divorcing or separating parents.</p> <p>Contact: Ms. Paulette MacDonald  <a href="mailto:kidsneed2parents@gmail.com"><u>kidsneed2parents@gmail.com</u></a>  289-240-0665</p>
<p><a href="#"><u>R.E.A.L</u></a></p>	<p>Real Women of Canada</p> <hr/> <p>REAL Women of Canada is a national women's organization, incorporated in 1983, whose mission is to promote the equality, advancement and well-being of women, whether in the home, the workplace or the community. It is an NGO in consultative status with the Economic and Social Council of the United Nations, a member of the Family Rights NGO caucus at the UN, and an active partner in the World Congress of Families.</p> <p>Contact: Ms. Diane Watts  <a href="mailto:realwcna@rogers.com"><u>realwcna@rogers.com</u></a>  613- 236-4001</p>

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## **ANNEX A: PROPOSED AMENDMENTS TO SECTION 16 OF BILL C-78**

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

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

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

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

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

#### **Rebutting Presumptions**

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

#### **Rebutting Factors**

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

- (a) A parent currently lacks basic parenting capacity by reason of substance abuse, mental illness or other material impairment;
- (b) The proposed order would expose a child or parent to a risk of family violence;
- (c) The parents live too far from each other to facilitate an equal time sharing regime.

#### **Adherence to Principles**

(8) Where the circumstances under subsection (7) require a departure from the presumptive principles stated in subsection 16 (2), then the court:

(a) shall nonetheless entrust to each spouse the maximum amount of time and parental responsibility as is possible under the circumstances; and,

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

### **Written Reasons**

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

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

#### **Burden of Proof - relocation**

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

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

(1) and (2)

## SUBMISSION SUMMARY (as per Submission Guide)

### RECOMMENDATIONS<sup>45</sup>

1. **Primary Recommendation:** Rebuttable Presumption - Equal Shared Parenting (“RPESP”).
2. **Best Interests of the Child (“BIOC”):** RPESP should anchor BIOC test.
3. **Repair the BIOC Definition:** Open-ended nature of BIOC standard should be repaired by **defining the standard in terms of two presumptive principles:**
  - (1) *BIOC = to enjoy equal time with each parent; and,*
  - (2) *BIOC = each parent to assume equal parental responsibility for major decisions that affect child’s welfare.*
4. **2<sup>nd</sup> Recommendation:** Relocation should have consistent burden of proof – on parent who proposes to move.

### SOCIAL SCIENCE RESEARCH ESTABLISHES -

5. **Separation:** Routine separation of a “fit parent” from child should not be deemed BIOC.
6. **Time %:** The closer we get to 50% residential time = better outcomes for children.
7. **Outcomes axes:** ESP = better outcomes on multiple axes: academic, cognitive, depression, anxiety, over satisfaction, self-esteem, peer behaviour, substance abuse, hyperactivity, health and psychosomatic problems, parent-child or family relationships. You name it!
8. **ESP outcomes are better, even independent of other factors:** Joint physical custody (JPC) produces superior outcomes to sole physical custody (SPC) independent of:
  - a. Quality of parent-child relationship (i.e. even marginal fit parents are beneficial),
  - b. Parental incomes ( i.e. JPC benefits not tied to standard of living),
  - c. Level of conflict (low to high but not extreme conflict situations warrant JPC).

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<sup>45</sup> Recommended legislative text included in Annex A.

**9. Warshak Consensus Report = Gold standard on ESP:** Widely translated, downloaded many times, and has informed legislation in several countries.

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

- a. Single Attachment Theory—leading proponent of theory himself acknowledged error;
- b. Father's motivation is to reduce child support – Out of pocket child costs for child support actually higher with ESP;
- c. Yo-yo argument – most adjust easily to two homes;
- d. Not appropriate for young children – ESP is protective factor for infants, toddlers, young children;
- e. ESP too dangerous - risks of violence, abuse, mental health or conflict – Factors that affect minority should not dictate policy for majority;
- f. ESP might be beneficial, but we should not employ presumptions:
  - i. One size fits all is too narrow – other legal presumptions do work;
  - ii. Not in BIOC – BIOC is undefined;
  - iii. Increased litigation risk – no support in facts. ESP reduces litigation;
  - iv. ESP focuses on parents' rights – Parental and child rights are not binary as per U.N. Convention on the Rights of the Child (particularly articles 3, 9 & 12).

**11. ESP advantages:**

- a. clear-cut default rule,
- b. removes speculation about future conduct as basis for decisions,
- c. limits judicial discretion,
- d. enhances determinacy, predictability of outcome,
- e. reduces litigation and conflict between parents.

**AND IT'S GOOD POLITICS!**

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

**13. Canadian Public Support for RPESP: 70 to 74% of those surveyed; 87% amongst the decided. Support strong regardless of party affiliation, gender, age, location.**