

Submission

to House of Commons Standing Committee on Justice and Human Rights

Re: Bill C-78 (An Act to amend the Divorce Act, et al)

Fixing the Divorce Act and Family Courts accessibility, effectiveness and best interests of the child

By: Canadian Equal Parenting Council

The aims of this submission are to improve and fix the bill before you to achieve the objectives of accessibility and effectiveness and so that the outcomes are in the interest of children affected.

From the standpoint of parents, the current system is inaccessible as it is too costly, too slow, too adversarial, too legalistic and too procedural. From my discussions with parents across Canada over three decades, and now as president of a national parents organization, parents feel that the courts, the lawyers, the judges and the law do not treat them with respect, fairness or have their interests at heart. They are convinced that the system does not act in the interests of their children, does not resolve conflict but plunders family assets to line the pockets of vested interests.

In diagnosing problems, we note that the Manitoba Attorney General Stefanson has admitted that the current family courts cause harm to children. (Winnipeg Free Press, Oct 19, 2017)

There are alternatives to the existing system and we are proposing some of them herein, but we are also proposed a method for this committee and Parliament to determine which approaches work, which claims are supported by fact and research and which claims cannot be supported and which cause harm to children.

The major alternative proposed here, equal shared parenting, is supported by an extensive body of peer-reviewed professional social science research. Some of that documentation is listed

in the back of this submission. We note that in 2014, 110 of the leading researchers in the area of child custody and parenting signed a proclamation stating that the research overwhelmingly supports shared parenting as producing better outcomes for children as well as parents.

Nevertheless, we recognize that various interests in this area claim that their approaches, theories, law reforms, and procedures/regulations are in children's best interest. So how is this committee to decide?

Recommendation #1: That the Committee commit to reviewing accepted, reviewed social science in this area to determine which changes/status quos are in children's interests, in particular to resolve competing claims regarding the adversarial/sole custody system versus non-adversarial/consensual/shared parenting reforms. We have listed selected published science references at the end of this submission.

The issues: The evidence that the current family law system is inaccessible and unaffordable is strong: The Access to Justice report (Cromwell, 2013), the fact that only a tiny percentage of very wealthy Canadians can afford full court processes on custody matters, that the majority of cases involve self-represented litigants disillusioned by the adversarial legal profession, that even the CBA Access to Justice report on the matter agrees on the inaccessibility.

The increased demand on courts as a result of the Supreme Court criminal case time limits has increased waiting times and costs in family courts. Without equal shared parenting changes, too slow and too costly courts will get worse, further discrediting the Canadian legal system in the eyes of parents, the public and a world increasingly moving to shared parenting.

The Cromwell report called for consensual agreements to reduce waiting times and costs. Research in various jurisdictions supports the conclusion that shared parenting in various forms, as effective in getting consensual parental agreements, largely as it ensures fit parents do not need inaccessible adversarial courts to retain their parenting responsibilities.

Research shows that shared parenting and equality of parents promote the best interests of the child, while the adversarial, primarily sole custody status quo is responsible for harm and disadvantage suffered by children.

Equal shared parenting better addresses family violence, abuse and conflict, while the existing adversarial system of primarily sole custody shows outcomes of higher risk of abuse, neglect, harm and violence to children.

Equal shared parenting (ESP) reduces child poverty in three ways: parents retain more of the family assets as ESP involves less court and legal time, particularly with ESP as a starting point. Sole physical custody increases conflict and costs both parents more. Secondly with ESP, both parents are investing more time and money in their children, so children are less parent-poor and less standard of living poor. Thirdly, ESP ensures extended family and grandparents are more involved with children, which increases family investment, reducing child poverty.

The dirty secret of the current family law system is that parents and children at most get a court order, not conflict resolution, or problem resolution. The system is so slow and costly that only a very small percentage of Canadians can afford the promised “completely individualized” full hearing. Those Canadians who can afford that high cost are increasingly “voting with their feet” and choosing private arbitration, working out their own agreements, using collaborative law and consensual processes. The current system is not efficient, so parents and the majority of the public have no confidence that it operates in children’s interests, that it is able or willing to come to a decision supported by proper scientific evidence, that it resolves conflict or that it does more good than harm.

While the differences between a family law with a rebuttable presumption, one putting an onus on a parent opposing joint custody, a “two homes” default, or joint physical custody as a starting point for deliberations appear small, any of these options have much better outcomes and evidence in support than sole physical custody.

Recommendation #2 That the Committee amend C-78 to include a rebuttable presumption of equal shared parenting.

The Issue: Experience from other jurisdictions suggests that advocacy for Equal Shared Parenting as a default position raises strong opposition from vested interests in what has been a predominantly sole custody system. Much has been promised to those parents forced to endure

Canada's family court system, but little has changed. Parents expect governments to ensure these promises are fulfilled.

We review the promises that Parliament and legal authorities have made to Canadians and to parents, and how these commitments have been sidelined and sandbagged by vested interests.

In the 1968 Divorce Act reforms, parents were promised a "no-fault system" but received instead an adversarial system which the 1970s Law Reform Commission subsequently stated was not working. A real change to a no-fault system would mean adding a rebuttable presumption of equal shared parenting to Bill C-78.

The 1986 Divorce Act reforms (by a collaboration between Liberal and Conservative ministers) promised joint custody in the form of a "friendly parent rule" (Section 16.10) but this enlightened provision was undermined and disregarded by judges by various strategies, including the claim that parents would have to be 100% cooperative for it to work. The way to ensure that judges and the legal profession honestly implement the friendly parent rule is to expand it by putting in a rebuttable presumption of equal shared parenting.

The friendly parent rule should be strengthened, not diminished by relegating it to part of a "shopping list" in a family violence section.

The 2001 Joint Senate Commons Committee on Child Custody and Access made 48 recommendations, but all were blocked by vested interests. Parents view Parliament's commitment as an unfulfilled promise to our children. The Justice Committee can fulfill this promise by putting a rebuttable presumption of equal shared parenting into Bill C78.

On March 28th Prime Minister Justin Trudeau rose in the House of Commons and committed his government to "supporting equal parenting". The government could fulfill that commitment by amending Bill C-78 to include a rebuttable presumption of equal shared parenting.

Justin Trudeau knows the benefits, his parents both had some problems, but were the best parents he had. He would not be the man he is now if his parents had allowed family law to remove one of his parents. Now is the time to bring Canada into the modern age with real equal parenting so that all separated children benefit as he did.

Reforms will not succeed unless parents are recognized as stakeholders and are part of the process of reform. That means collaborating with parents to fix the problems of the current system, as the Government collaborates with First Nations communities to fix the problems generated by the Native Residential Schools.

Justice Canada is engaged in a continuing consultation with First Nations on fixing the problems arising from the Native Residential Schools harm to children. Parents are here to tell this committee and the government that what is happening in family court is similar: while typically children lose one parent in Canada's courts versus the loss of both native parents in those schools, but the numbers of de-parenting are much larger in family courts. Parents are asking for consultations so that we can work with government to fix the courts and ameliorate the problems caused by Court de-parenting. Parents want to work on solutions to the harm caused to their children.

Recommendation #3: That the Committee recommend to Justice Canada to recognize parents as stakeholders, engage in ongoing consultations with parents and other recognized communities with the aim of collaboration to improve outcomes for children resulting from family law and courts.

Selected References (each paper refers to many other references):

1. Summary of recent research on shared physical custody: Linda Nielsen (2018), Journal of Divorce & Remarriage, <https://doi.org/10.1080/10502556.2018.1455303>
2. Advantage of shared parenting in outcomes for children: Linda Nielsen (2018): Joint Versus Sole Physical Custody: Children's Outcomes Independent of Parent-Child Relationships, Income, and Conflict in 60 Studies, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2018.1454204
3. Advantage of Children's overnights with both parents: Richard A. Warshak (2018): Night Shifts: Revisiting Blanket Restrictions on Children's Overnights With Separated Parents, Journal of Divorce & Remarriage doi.org/10.1080/10502556.2018.1454193

4. Shared Parenting better even in high conflict situations: Nicole E. Mahrer, Karey L. O'Hara, Irwin N. Sandler & Sharlene A. Wolchik (2018): Does Shared Parenting Help or Hurt Children in High-Conflict Divorced Families?, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2018.1454200
5. Shared Parenting in Sweden, better outcomes: Emma Fransson, Anders Hjern & Malin Bergström (2018): What Can We Say Regarding Shared Parenting Arrangements for Swedish Children?, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2018.1454198
6. Children benefit from extended family with shared parenting: Maaïke Jappens (2018): Children's Relationships With Grandparents in Married and in Shared and Sole Physical Custody Families, Journal of Divorce & Remarriage, DOI:10.1080/10502556.2018.1454199
7. Experts in child development support shared parenting: Sanford L. Braver & Michael E. Lamb (2018): Shared Parenting After Parental Separation: The Views of 12 Experts, Journal of Divorce & Remarriage, DOI:10.1080/10502556.2018.1454195
8. Arguments against shared parenting not supported by evidence: Edward Kruk (2018): Arguments Against a Presumption of Shared Physical Custody in Family Law, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2018.1454201
9. Normalizing shared parenting in Australia: Patrick Parkinson (2018): Shared Physical Custody: What Can We Learn From Australian Law Reform?, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2018.1454197
10. Legal professionals positively evaluate Arizona custody law as a SP presumption: William V. Fabricius, Michael Aaron, Faren R. Akins, John J. Assini & Tracy McElroy (2018): What Happens When There Is Presumptive 50/50 Parenting Time? An Evaluation of Arizona's New Child Custody Statute, Journal of Divorce & Remarriage, DOI:10.1080/10502556.2018.1454196
11. Onus needs to be on parent restricting other parent's time: William G. Austin (2018): Parental Gatekeeping and Child Custody Evaluation: Part III: Protective Gatekeeping and

the Overnights “Conundrum”, Journal of Divorce & Remarriage
doi.org/10.1080/10502556.2018.1454202

12. Shared parenting causes better child outcomes, not selection bias: Sanford L. Braver & Ashley M. Votruba (2018): Does Joint Physical Custody “Cause” Children’s Better Outcomes?, Journal of Divorce & Remarriage, DOI:10.1080/10502556.2018.1454203
13. Shared parenting should not be limited by conflict: Linda Nielsen (2017) Re-examining the Research on Parental Conflict, Coparenting, and Custody Arrangements; Psychology, Public Policy and Law, dx.doi.org/10.1037/law0000109
14. Moveaways disrupting shared parenting cause harm to children: William V. Fabricius and Sanford L. Braver, Matthew Stevenson, Jeffrey T. Cookston, Associations Between Parental Relocation Following Separation in Childhood and Maladjustment in Adolescence and Young Adulthood; Psychology, Public Policy and Law, dx.doi.org/10.1037/law0000172
15. Family Justice needs complete overhaul, law profession changes have not worked: Supreme Court Justice Thomas Cromwell, 2013, Meaningful Change for Family Justice: Beyond Wise Words.

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