

# child

CUSTODY,  
ACCESS AND  
PARENTAL  
RESPONSIBILITY

**The Search  
for a Just and  
Equitable  
Standard**

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The University of  
British Columbia

December, 2008



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The intent of this paper is to promote informed dialogue and debate. The views expressed are those of the author and do not necessarily reflect the views of FIRA or of other researchers/collaborators associated with FIRA. Communications can be addressed to the author.

## About the Author

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## EXECUTIVE SUMMARY

Child custody and access law and policy remain among the most contentious areas of family law and family practice. A rights-based discourse dominates the field; as Mason (1994) has argued, the “best interests of the child” standard has historically reflected a struggle between mothers’ and fathers’ rights, with children’s needs considered to be commensurate with either position. Children are viewed at different times as fathers’ property, as requiring the “tender care” of mothers, and as rightfully “belonging” to one or the other parent.

In recent years, however, with increasing scrutiny of the indeterminacy of the “best interests of the child” standard (Bala, 2000), a new ethic has emerged, one that recognizes the fact that children’s needs and interests are separate from (although related to) the rights of their parents. Thus a new “parental responsibility” discourse is gradually being introduced into legal statutes, public policy and, at the level of practice, mainly outside of Canada. Any analysis of child custody and access policy, then, must take into account both the limitations of the dominant “parental rights” discourse and the emergence of the new “parental responsibility” framework.

Unlike previous examinations of child custody and access in Canada, this paper proceeds from the perspective that the “best interests of the child” during and after parental separation are, essentially, a matter of recognizing and addressing the child’s most fundamental needs in this time of family transition. These needs are, according to child development experts such as Penelope Leach and Gordon Neufeld, best addressed by supporting parents in the fulfillment of their parental responsibilities, a goal to which social institutions such as legislatures and the judiciary are bound. Such a focus on children’s needs, parental responsibilities, and the responsibilities of social institutions to support parents in meeting their parental obligations is largely absent in current Canadian socio-legal discourse. This paper aims to shift the current rights-based discourse of Canadian feminist and fathers’ rights groups to a responsibility-based framework focused on children’s needs.

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A child-focused perspective on the socio-legal issues of child custody and access, informed by child development and family systems theory, will go against the grain of analyses that focus on the competing perspectives of women’s groups and fathers’ rights organizations. Children’s needs are considered paramount within such a perspective, and the vast literature on children’s adjustment to the consequences of parental separation is used as a foundation for the development of a new approach to child custody determination. Research is clear that children fare best in post-separation relationships in which they maintain meaningful routine *parental* relationships with both of their parents beyond the constraints of a “visiting” or “access” relationship, in which they are shielded from destructive parental conflict, and in which they are protected, to the highest degree possible, from a marked decline in their standard of living. Contrary to current practice and dominant socio-legal discourse in Canada, when parents disagree over the living arrangements of their children after separation, new evidence suggests that these conditions are best achieved by means of a legal shared parental responsibility presumption, defined as children spending at least 40 per cent of their time with each parent, rebuttable only when a child is in need of protection from a parent. The current framework of sole physical custody in contested cases is associated with high rates of father (and sometimes mother) absence, increased inter-parental conflict, and a marked reduction in children’s standard of living.

A child-focused analysis of child custody determination must also include a careful consideration of the issues of child abuse and family violence, which warrants against a “one shoe fits all” approach, even though the majority of contested cases of child custody, including high-conflict cases, do not involve the type of “intimate terrorism” necessitating the removal of a parent (as a routine parent) from a child’s life via sole custody. Contrary to current practice and dominant socio-legal discourse, children are not shielded from post-separation violence and abuse by means of sole custody. Although it is clear that shared parental responsibility is contraindicated in cases of established family violence, research shows that inter-parental conflict increases with court-mandated sole physical custody in cases with no previous violence, as fully half of first-time battering occurs after separation. New research evidence makes clear that inter-parental conflict decreases within a shared parental responsibility custody arrangement, as neither parent is threatened by the loss of the children and parental identity. The current framework of primary

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residential custody in disputed custody cases, contrary to dominant discourse, exposes both parents and children to violence.

The most recent research strongly supports a shift away from the “one size fits all,” “winner take all” sole custody framework toward the notion of shared parental responsibility. This report highlights the following research findings in this regard:

1. Sole maternal custody often leads to parental alienation and father absence, and father absence is associated with negative child outcomes. Eighty-five per cent of youth in prison are fatherless; 71 per cent of high school dropouts are fatherless; 90 per cent of runaway children are fatherless; and fatherless youth exhibit higher levels of depression and suicide, delinquency, promiscuity and teen pregnancy, behavioural problems and illicit and licit substance abuse (Statistics Canada, 2005; Crowder and Teachman, 2004; Ellis *et al.*, 2003; Ringback Weitoft *et al.*, 2003; Jeynes, 2001; Leonard *et al.*, 2005; McCue Horwitz *et al.*, 2003; McMunn, 2001; Margolin and Craft, 1989; Blankenhorn, 1995; Popenoe, 1996; Vitz, 2000; Alexander, 2003). These studies also found that fatherless youth are more likely to be victims of exploitation and abuse, as father absence through divorce is strongly associated with diminished self-concepts in children (Parish, 1987).
2. Children of divorce want equal time with their parents and consider shared parenting to be in their best interests. Seventy per cent of children of divorce believe that equal amounts of time with each parent is the best living arrangement for children, and children who have had equal time arrangements have the best relations with each of their parents after divorce (Fabricius, 2003).
3. A recent meta-analysis of the major North American studies comparing sole and joint physical custody arrangements has shown that children in joint custody arrangements fare significantly better on all adjustment measures than children who live in sole custody arrangements (Bauserman, 2002). Bauserman compared child adjustment in joint physical and joint legal custody settings with sole (maternal and paternal) custody settings, and also intact family settings, examined children’s general adjustment, family relationships, self-esteem, emotional and behavioral adjustment, divorce-specific adjustment, as well as the

*“... children in joint custody arrangements fare significantly better on all adjustment measures than children who live in sole custody arrangements.”*

*(Bauserman, 2002).*

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*Canada lags behind ... in reforming child custody law and practice in a manner that positions children's need for the responsible involvement of both parents in their lives at the forefront of child custody legislation.*

degree and nature of ongoing conflict between parents. On every measure of adjustment, children in joint physical custody arrangements were faring significantly better than children in sole custody arrangements: "Children in joint custody arrangements had fewer behavior and emotional problems, higher self-esteem, and better family relations and school performance than children in sole custody arrangements." The positive outcomes of joint custody were also evident among high-conflict couples.

4. Inter-parental conflict decreases over time in shared custody arrangements, and increases in sole custody arrangements. Inter-parental cooperation increases over time in shared custody arrangements, and decreases in sole custody arrangements. One of the key findings of the Bauserman meta-analysis was the unexpected pattern of decreasing parental conflict in joint custody families and the increase of conflict over time in sole custody families. The less a parent feels threatened by the loss of her or his child and the parental role, the less the likelihood of subsequent violence.
5. Both U.S. and Canadian research indicates that mothers and fathers working outside the home now spend comparable amounts of time caring for their children. According to the most recent Health Canada research (Higgins and Duxbury, 2002), on average, each week mothers devote 11.1 hours to child care, fathers 10.5 hours. According to Statistics Canada (Marshall, 2006), men, although still less involved in primary child care, have significantly increased their participation in recent years. As the gender difference in time spent in child care has diminished, shared parenting after separation has emerged as the norm among parents who are not involved in a legal contest over the custody of their children (Statistics Canada, 2004).

Although recent research on Canadian child custody outcomes in contested cases is largely lacking, court file analysis data (Department of Justice, 1990) reveal that in 77 per cent of contested custody cases, child custody is awarded solely to the mother, and solely to the father in only 8.6 per cent of cases. The fact that sole maternal custody is the norm in contested custody cases in Canada is obfuscated by the fact that the label of "joint custody" is often applied by both judges and researchers to post-separation living arrangements



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in which children remain in the primary care of one parent. From the perspective of children, such *de facto* sole custody arrangements are woefully inadequate, often resulting in the loss of one of their primary caregivers. From the perspective of both international conventions (U.N. Convention on the Rights of the Child) and reports such as that of the Special Joint House of Commons-Senate Committee on Child Custody and Access (1998), such arrangements undermine children’s fundamental need for both parents actively and responsibly involved in their lives. Canada lags behind several U.S. jurisdictions, Australia, France, Sweden and other countries in reforming child custody law and practice in a manner that positions children’s need for the responsible involvement of both parents in their lives at the forefront of child custody legislation. Children and other family members remain at risk of abuse, parental alienation, and depression within the dominant sole custody framework.

The shared parental responsibility approach to child custody determination is presented here as a viable alternative to sole custody in contested cases, and as the arrangement most compatible with the stated objectives of Canadian legislative family law reform, as outlined in the Special Joint Committee on Child Custody and Access report, the Federal/Provincial/Territorial Family Law Committee report, and the Child-centred Family Justice Strategy: to promote meaningful relationships between children and their parents following separation and divorce, to encourage parental cooperation, and to reduce parental conflict and litigation.

The shared parental responsibility model of child custody determination for the Canadian context is detailed herein as “A Four Pillar Approach to Child Custody Determination In Canada,” as follows:

1. *Legal Presumption of Shared Parental Responsibility (Rebuttable Presumption of Joint Physical Custody in Family Law)*: the first pillar establishes a legal expectation that existing parent-child relationships will continue after separation; in cases of dispute, shared parenting, defined as children spending equal time with each of their parents, would be the legal presumption in the absence of established family violence or child abuse. This expectation provides judges with a clear guideline and will avoid placing judges, in the absence of expertise in this area, in the position of adjudicating children’s “best interests” in non-violence cases. It will preserve meaningful parental

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*Shared parental responsibility is in keeping with current caregiving patterns, as the majority of mothers and fathers are now sharing responsibility for child care in two-parent families.*

relationships between children and both of their parents, maximize parental cooperation and reduce conflict, and prevent serious family violence and child abuse. It will divert parents from a destructive court battle over their children's care, and will provide an incentive for parents to engage in therapeutic family mediation focused on the development of cooperative parenting plans. Shared parental responsibility is in keeping with current caregiving patterns, as the majority of mothers and fathers are now sharing responsibility for child care in two-parent families.

2. *Parenting Plans, Mediation, and Support/Intervention in High Conflict Cases:* the second pillar establishes a legal expectation that parents jointly develop a parenting plan before any court hearing is held on matters related to post-separation parenting. The court's role would then be to ratify the negotiated plan. Through direct negotiation, parent education programs, court-based or independent mediation, or lawyer negotiation, a detailed parenting plan that delineates the parental responsibilities that will meet the needs of the children would be developed before any court hearing is held. With a legal presumption of shared parental responsibility as the cornerstone, mediation could become the instrument whereby parents could be assisted in the development of a child-focused parenting plan. High conflict couples would be helped, with therapeutic intervention, to achieve more amicable shared parenting arrangements over the long term.
3. *Shared Parenting Education:* shared parenting education within the high school system, in marriage preparation courses, and upon divorce, is an essential element of a much-needed program of parent education and support. Public education about various models of shared parenting, including models for "high conflict" couples, would replace the current focus on seeking partisan legal representation in an effort to "win" the custody of one's children.
4. *Judicial Determination in Cases of Established Abuse; Enforcement of Shared Parental Responsibility Orders:* a rebuttable presumption of shared parental responsibility means that proven cases of family violence would be exempt, and those cases involving either a criminal conviction, such as assault, in a matter directly related to the parenting of the children, or a

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finding that a child is in need of protection from a parent by a statutory child welfare authority, would be followed by judicial determination of child custody. It may be appropriate in such cases, argue Jaffe *et al.* (2006), for one or both parents to have limited or no contact with the children because of potential harm. In child custody situations in which assault is alleged, a thorough, informed and expeditious comprehensive child welfare assessment is required. The criminal prosecution of those family members who are alleged to have been violent toward any other member of the family would hold accountable perpetrators of violence as well as those who are found to have alleged abuse falsely. In such cases the family court would retain its traditional role in the determination of custody.

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## PREFACE

*“At certain moments in our lives, we are faced with a choice – either transform violence into suffering, or suffering into violence.”*

– Simone Weil

*“Pain that is not transformed will be transmitted.”*

– Richard Rohr

Writing, as a way of codifying human experience, sets obstacles to “reading” the inner experience of people; in the case of divorced fathers, the experience of being removed as a loving parent from the life of one’s child via a sole custody order strikes at the heart of one’s being. Some strike out in retribution against such uprooting; most fathers, however, seek constructive ways to stay involved in their children’s lives while bringing public attention to their plight, such as the civil disobedience efforts of groups such as Fathers for Justice. The physical, psychological and social repercussions of child absence are prodigious, yet have been largely ignored by policymakers, and the views of non-custodial parents are largely absent in the literature. Child custody and access-related problems represent not only legal challenges, but also a “bio-psycho-social-spiritual” affliction for fathers and children, and in some cases mothers and children, who are separated from each other. Raising public awareness in regard to both the harms of the adversarial sole custody system and to viable alternatives, such as shared parenting, is critical, given the prevalence of separation and divorce in Canada.

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This paper will document the drawbacks of the current sole custody system, and outline a viable alternative in the form of shared parenting responsibility (rebuttable joint physical custody) in cases where family violence and child abuse are not present. The paper will apply a social analytical perspective to the issues, and will focus on children’s needs and paternal (and parental) responsibilities to these needs, as well as the responsibilities of social institutions to support fathers (and parents) in the fulfillment of their parenting responsibilities. The number of fathers who voluntarily disengage from their children’s lives is a serious problem; however, the involuntary and unnecessary estrangement of fathers who want to maintain an active role in the care of their children and are prevented from doing so via sole custody decrees is tragic. This paper is an attempt to find viable solutions to this state of affairs.

*“It is not about nonviolence; it is not about civil disobedience. It is about transforming one of the greatest pains a person can carry—being separated from your kids—into a loving self-sacrifice to transform the observers around us.”*

*– divorced father*





# 1

## I Introduction

The primary focus of this report is the determination of child custody when parents cannot agree on post-separation parenting arrangements, and negotiation efforts have failed in this regard. The primary recommendation of the report is the establishment of a legally rebuttable physical joint custody presumption for such cases, also known as the “shared parental responsibility” approach. Shared parental responsibility is defined as children spending at least 40 per cent of their time with each parent after separation and divorce. It will be argued that this is the most effective means to ensure that children maintain existing attachments with each of their parents, irrespective of parental status (cohabiting or maintaining separate residences), assuming there is no investigated finding that the child is in need of protection from a parent. The same standard that is currently applied to abused children in non-divorced families, it is argued, should be applied to children of divorced parents.

Disputes involving child custody can be highly complex. But as Howard Irving and others have argued, amid all the talk of rights for children, one basic need must be asserted: children of divorce need both parents responsibly involved in their lives, with social institutions supporting parents in their respective roles. The present “winner-take-all” sole custody approach, applied to cases where family violence is not a factor, removes one fit and loving parent. Proposals such as the “primary caregiver” presumption, which would award custody to one “primary parent,” overlook the reality of shared care arrangements in the majority of two-parent families, and the existence of primary attachment bonds between both parents and their children, even when one parent has assumed most of the day-to-day caregiving. There is merit to the “approximation standard” proposal in which post-separation parenting arrangements are set as equal in terms of proportionate time to pre-separation parenting arrangements. However, when parents both claim to be primary caregivers, the pattern in most disputed cases, joint physical custody, it is argued, should apply.

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In May, 1997, when the current federal Divorce Act came into effect, Minister of Justice Allan Rock proposed that a joint committee of the House of Commons and Senate make recommendations regarding child custody and access. After 55 hearings and more than a year of study and research, the committee made 48 recommendations to Parliament, all with an underlying theme: the sole custody-based adversarial system, as it pertains to the majority of custody and access disputes, puts families, especially children, at risk, and shared parenting should be established in law. Years later, prime minister Stephen Harper's 2006 election platform promised to implement "a presumption of shared parental responsibility, unless determined to be not in the best interests of the child," and to promote mediation as an alternative method of conflict resolution. These were the cornerstones of the Joint Committee Report in 1998, yet meaningful child custody law reform has yet to occur.

Most family law matters are resolved without court orders, and a judge determines post-separation custody in only a small minority of cases. Yet the influence of these decisions goes well beyond the decisions themselves. Contested cases define legal norms; the repercussions of contested cases of child custody go well beyond the cases themselves, as they serve as a baseline for the legal determination of all cases of custody disagreements, including the balance of uncontested cases. They collectively form the basis of a body of law upon which others are advised. Legal negotiations are governed by expected results in the courtroom, and those fathers who actually file for custody and force a court decision are not representative of all the men who want custody of their children; the actual percentage of fathers who want custody is much higher than the number of men who take their case to court. In Canada, 64 per cent of divorce cases involving children start out as contested on the issue of custody, yet only 4 per cent are brought to trial (Department of Justice, 1990). The spouse who expects to be awarded child custody (and its associated support) is the one more likely to initiate court proceedings (Brinig and Allen, 2000). In Canada, two-thirds of proceedings are initiated by mothers, and there is a clear imbalance in the awards of custody to mothers (Millar and Goldenberg, 2004).

Many parents still manage, however, to agree on joint physical custody before going to court, and shared parenting, not sole custody, has emerged as the norm in Canada in non-litigated cases (Statistics Canada, 2005). When judges become

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involved in divorce cases, however, shared parenting is judged not to be in children's best interests; sole maternal custody remains the norm in judicial determinations (Department of Justice, 1990; Millar and Goldenberg, 2004).

According to child development experts, a major reason law reform is needed in the child custody realm relates to the need of children to maintain meaningful relationships with both parents, beyond the constraints of a "visiting" or "access" relationship (Wallerstein and Kelly, 1980). A second reason is the need to promote parental cooperation and reduce conflict, and to shield children from family violence and child abuse. The incidence of family violence rises dramatically in situations where adversarial means are used to "win" court-ordered care and control of children. Such outcomes have profound long-term consequences for children and their development.

Although lawyers and judges are not professionally trained in child development and family dynamics, judges continue to make child custody determinations largely without the benefit of credible social science evidence. Kelly and Lamb (2000) found that decisions regarding child custody and access are most often made without reference to research on child development, although this research directly concerns children's needs and "best interests." Melton (1989) presents a startling account of how little social science knowledge trickles down into the public policies that are intended to benefit children in the child custody realm. Yet as studies of family violence, shared versus joint custody outcomes, and fatherhood involvement reveal emerging trends, an emergent consensus on child custody and family violence reveals that shared parenting can prevent violence in cases with no previous history of marital violence or abuse.

The issue of family violence lies at the centre of debates regarding child custody and access, and shared parenting. Although some claim that joint custody endangers women and children, it is clear from current research that shared parenting prevents parental abuse (Bauserman, 2002), as 50 per cent of first-time violence happens after separation, within the adversarial sole custody system (Statistics Canada, 2001; Corcoran and Melamed, 1990). As the threat of losing one's children heightens fear and fuels anger, such outcomes are not surprising. Joint physical custody can thus prevent violence in cases where there is no prior history of violence, as both

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parents continue to be equally valued and involved in children's lives. In cases where violence is present and has been established via criminal conviction or a finding that a child is in need of protection, however, joint custody is not appropriate (Jaffe, Crooks, and Bala, 2005). Within the sole custody system, the risk of abuse after separation is lower for previously abused women than for previously non-abused women (Spiwak and Brownridge, 2005).

The research is clear that joint physical custody is salutary for children and parents in non-violent cases (Bauserman, 2002), even when highly conflicted parents are initially opposed to it and are seeking sole custody (Gunnore and Braver, 2001). Research is reinforced by strong public support for shared parenting. Yet a sole custody ideology continues to prevail in judicial decision-making and this ideology is reflected in assumptions that mothers are naturally better caregivers, that fathers petitioning for sole or joint custody are manipulative or seeking to avoid child support payments, or that children are better off in the care of one parent only.

Child custody and access law and policy are among the most contentious areas of family law and family practice. A gender- and rights-based discourse dominates the field, and this heightens conflict; as Mason (1994) has argued, the "best interests of the child" standard has historically been a struggle between mothers' and fathers' rights, with children viewed as rightfully "belonging" to one parent only, via "sole custody" judgments. This view continues to be reflected in Canadian judicial practice (Department of Justice, 1990).

In sum, the "winner-take-all" sole custody approach to child custody falls prey to the following disadvantages: it is adversarial in nature; the focus on the competing rights of parents overshadows the responsibilities of parents and social institutions to address the needs of children; one parent is a clear "winner" and the other a "loser" in parental status, with the designation of a "primary" and a "secondary" parent; and child custody and post-divorce parenting matters are seen as a one-time dispute to be resolved rather than a long-term process that will change and evolve over time.

In recent years, with increasing scrutiny of the indeterminacy of the current "best interests of the child" standard in Canada and judicial lack of expertise in this

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regard (Bala, 2000), a new ethic has emerged, which recognizes that children's needs and interests are related to, yet distinct from, those of their parents, and that these needs, physical and psychological, social and spiritual, should be used as the foundation to determine their "best interests." Thus a new parental "responsibility-to-needs" discourse is being introduced gradually into socio-legal policy. Both the limitations of the dominant "parental rights" discourse and the emergence of the new "parental responsibility-to-needs" framework are factors driving the alternative shared parental responsibility framework.

The disengagement and alienation of non-custodial fathers (and some mothers) from their children's lives is well documented (Kruk, 1993). Many of these parents are also at risk of poverty and violence, yet "rights-based" women's and men's groups have tended to proceed from either the perspective of mothers or fathers in isolation from each other. Both mothers and fathers are affected by child absence, poverty and violence (Fiebert, 2004; Archer, 2002; McNeely *et al.*, 2001; Strauss, 1993), and have more in common than many interest groups assume. Unfortunately, a child custody and family violence policy overview from a "parental responsibility" framework has yet to be undertaken. This framework considers first and foremost the importance of clearly defining children's "best interests" in terms of their essential needs in the separation and divorce transition, enumerating parental responsibilities vis-à-vis these needs, and outlining the responsibilities of social institutions such as the courts and legislatures to support parents in the fulfillment of their parental obligations. It is with such a lens that this policy paper will proceed.

# 2

## I The Needs of Children During and After Parental Separation, and Parental and Social Institutional Responsibilities

In general, relationships with parents play a crucial role in shaping children's social, emotional, personal and cognitive development, and there is substantial literature documenting the adverse effects of disrupted parent-child relationships on children's development and adjustment (Lamb, 1999; Lamb, Hwang, Ketterlinus and Fracasso, 1999). The evidence further shows that children who are deprived of meaningful relationships with one of their parents are at greater risk psychologically, even when they are able to maintain relationships with the other parent. Children are more likely to attain their psychological potential when they are able to develop and maintain meaningful relationships with both parents, whether the two parents live together or not. A large body of research documents the adverse effects of severed father-child relationships in particular, including father-infant relationships, as well as the positive contributions that fathers make to their children's development (Lamb *et al.*, 1999).

Two benchmark longitudinal studies on children's needs in the separation and divorce transition have followed a cohort of children of divorce from childhood to adulthood, and remain a key source of information about children's adjustment to the consequences of parental separation and divorce. The main findings of Hetherington *et al.* (1978), a sophisticated study in the single-parent research tradition, and Wallerstein and Kelly (1980), which utilized the perspectives and methods of clinical research with a sample of "normal" children and parents of divorce, tend to be corroborative. Both studies found that, particularly during the first year after separation, the parenting capacities of both mothers and fathers deteriorated significantly. During separation and after, parents tend to ascribe their own feelings to their children and are often unaware of and relatively insensitive to their children's needs. In the midst of their own feelings of anger, rejection and

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bitterness, parents may not have the emotional capacity to cope with their children's feelings as well; the emotional strain engendered by the process of divorce is strongly associated with parental unresponsiveness to children's emotional needs. At the same time children often deliberately hide their distress from their parents.

The multiple transitions that accompany divorce for parents affect children acutely. The form and severity of children's reactions depend on factors such as age, gender, and particular circumstances, and although some disagreement exists as to which age group tends to show which symptoms, studies continue to show that children of divorced families frequently exhibit behavioural difficulties, poor self-esteem, depression and poor school performance.

Children of different ages and developmental stages react differently to separation and divorce; the stage of children's emotional development is an important factor in how they will perceive the divorce. Children under the age of five are the most adversely affected by the divorce transition. They manifest vulnerability to depression (the opposite is true for intact families), confusion about the nature of families and interpersonal relationships, a tendency to blame themselves for the divorce (which is highly resistant to therapeutic intervention), regression in behaviour and general development, a fear of being sent away or replaced, joyless play, a preoccupation with trying to fit objects together, and a yearning for the absent parent – and they are the group most at risk of losing contact with non-custodial fathers. Early latency-age children exhibit a pervasive sadness and sense of loss, feelings of fear and insecurity, acute longing for the absent parent/ intense desire for the reconciliation of their parents – believing the intact family is absolutely necessary for their continued safety and growth. Late latency-age children evidence feelings of shame and embarrassment, active attempts to reconcile their parents while trying to break up any new social relationships, divided loyalties and taking sides between the parents, conflicting feelings of grief and intense anger – usually directed toward the custodial parent (especially by boys), and a two-level functioning (hiding their painful feelings in order to present a courageous front to the world). Adolescents show continuing anger, sadness, a sense of loss and betrayal, shame and embarrassment, and a concern about their own future marriages and relationships.

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Wallerstein and Kelly found that no children under the age of thirteen in their sample wanted the divorce to happen. Mitchell (1985) found similar results: less than half of the children in her sample were even aware of any parental conflict within the marriage, and even those who had been aware of conflict thought their family life to have been happy and did not view their parents' conflict as a sufficient reason to divorce. Those children who were unhappy in were often so due to the implied threat of divorce. Wallerstein and Kelly also found that the degree of conflict within the marriage prior to the divorce was not related to children's post-divorce adjustment: marriages that were unhappy for the adults were generally perceived as comforting and gratifying for the children. Not only did children not concur with their parents' decision or express any relief at the time of divorce, but five years after, while adults were generally satisfied with having made the right decision, children still wished for the reconciliation of their parents and wanted to return to the pre-divorce state.

In recent years, studies have examined what specific factors associated with divorce most trouble children. Both Wallerstein and Kelly and Hetherington *et al.* concluded that the absence of the non-custodial parent is a very significant factor; they describe the intense longing of children for their non-custodial fathers: all of the 131 children in the Wallerstein and Kelly sample longed intensely for their father's return. Both studies found that two factors, the amount and severity of conflict between the parents, and the degree to which children are able to maintain meaningful relationships with each parent, play a major role in determining the outcome of divorce for children. They also found that associated with the prolonged distress of children after divorce are children being the focus of parental conflicts, children experiencing loyalty conflicts, the poor emotional health of either parent, lack of social supports available to parents, poor quality of parenting, lack of or inappropriate communication to children about the divorce, and child poverty.

Amato (2000) provided an in-depth examination of five major perspectives that have been used to account for children's adjustment to divorce. These include the absence of the non-custodial parent, the adjustment of the custodial parent, inter-parental conflict, economic hardship, and stressful life changes. The most salient factor in children's adjustment, according to Amato, is the impact of inter-parental conflict. Amato proposed the development of a new "resources and stressors"



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model in understanding children's experience. This model suggests that children's development is facilitated by the possession of certain classes of resources (such as parental support and socio-economic resources). Also, marital dissolution can be problematic because it involves a number of stressors that challenge children's development (such as inter-parental conflict and disruptive life changes) and because it can interfere with children's ability to utilize parental resources (losing contact with one parent and access to income). According to Amato, the total configuration of resources and stressors, rather than the presence or absence of a particular factor, needs to be considered.

There has been considerable debate in the literature about whether children fare better in "stable" single-parent families with minimal or no contact with the non-custodial parent, or in situations where they maintain regular contact with both parents but are exposed to ongoing inter-parental conflict. In cases where conflict between parents persists after divorce, is it in children's best interests to maintain regular contact with both parents, or to limit or cease contact with one? A British study (Lund, 1987) isolated the variables of parental harmony/conflict and father involvement/absence to assess their relative impact on children's post-divorce functioning. The study utilized a large sample, a longitudinal design, and multiple measures of children's adjustment. Interviewing both sets of parents (and also children's classroom teachers and others to gain an independent rating of children's post-divorce functioning), Lund divided post-divorce families into three groups: harmonious (or neutral) co-parents, conflicted co-parents, and single parent (or father-absent) families. Her results indicate that children fare best in harmonious co-parental families and fare least well in single parent families. The benefits of non-custodial father involvement for children were evident in both the harmonious and conflicted co-parenting groups. Conflict between the parents was not as strong a predictor of poor outcome for children as was the absence of the father after divorce.

More recent studies (Gunnoe and Braver, 2002; Laumann-Billings and Emery, 2000; Amato and Gilbreth, 1999; Lamb, 1999; Lamb *et al.*, 1997; Pleck, 1997; Bender, 1994; Warshak, 1992; Bisnaire *et al.*, 1990) have demonstrated the salutary effects of father involvement and physical joint custody on children's divorce-specific and general adjustment. Kelly (2000), in reviewing a decade of research on child outcomes, concluded that "joint custody led to better child outcomes overall," and that inter-

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parental conflict in itself was not detrimental to children, only child-focused conflict to which children were directly exposed. Kelly and Lamb (2000) found that, almost by definition, custody and access disputes involve “high conflict,” but concluded that such (non-violent) conflict in and of itself was not necessarily harmful. Amato (2000) concluded that divorce has significant negative impacts on children; however, moderating factors include children’s coping skills, and the presence of joint custody.

The evening and overnight periods that children spend with each parent in co-parenting arrangements are important psychologically, according to Kelly and Lamb (2000), not only for young children and toddlers, but for infants as well. Evening and overnights provide opportunities for crucial social interactions and nurturing activities that “visits” cannot provide, including bathing, soothing hurts and anxieties, bedtime rituals, comforting in the middle of the night, and the reassurance and security of snuggling in the morning after awakening. These everyday activities create and maintain trust and confidence in the parents while deepening and strengthening parent-child attachments. When mothers are breastfeeding, there is sometimes maternal resistance regarding extended overnight or full-day separations. Breastfeeding is obviously one of the important contexts in which attachments are promoted, although it is by no means an essential context, as there is no evidence that breastfed babies form closer attachments than bottle-fed babies. A father can feed an infant with the mother’s expressed milk, particularly after nursery routines are well-established.

No studies have found that children in sole custody fare better in their psychological adjustment than children in joint custody families, although Clarke-Stewart and Hayward (1996) and Warshak (1992) found that children (especially boys) did significantly better in paternal custody than in maternal custody situations. Children in father custody had the advantage over children in maternal custody of maintaining a more positive relationship with the nonresidential parent (*ibid.*).

Sole maternal custody often results in father absence (Kruk, 1993), and father absence is associated with the following: 85 per cent of youth in prison are fatherless; 71 per cent of high school dropouts are fatherless; 90 per cent of runaway children are fatherless; and fatherless youth exhibit higher levels of depression and suicide, delinquency, promiscuity and teen pregnancy, behavioural problems and illicit and

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licit substance abuse (Statistics Canada, 2005; Crowder and Teachman, 2004; Ellis *et al.*, 2003; Ringback Weitoft *et al.*, 2003; Jeynes, 2001; Leonard *et al.*, 2005; McCue Horwitz *et al.*, 2003; McMunn, 2001; Margolin and Craft, 1989; Blankenhorn, 1995; Popenoe, 1996; Vitz, 2000; Alexander, 2003). These studies also found that fatherless youth are more likely to be victims of exploitation and abuse, and the *Journal of Ethnology and Sociobiology* recently reported that preschoolers not living with both of their biological parents (in two-parent homes and equal shared parenting situations after divorce) are 40 times more likely to be sexually abused. Finally, father absence through divorce is strongly associated with diminished self-concepts in children (Parish, 1987).

More recent studies on children's needs in the divorce transition have uncovered important new data directly relevant to policymakers and legislators in the field of child custody. In particular, four important new findings call into question present child custody socio-legal policies and practices.

1. *Children of divorce want equal time with their parents, and consider shared parenting to be in their best interests. Seventy percent of children of divorce believe that equal amounts of time with each parent is the best living arrangement for children, and children who had equal time arrangements have the best relations with each of their parents after divorce.* Studies that have attempted to examine the issue of child custody from the standpoint of children themselves have tended to rely on clinical samples (Wallerstein, Lewis, and Blakeslee, 2000), or simply have neglected to ask children about their desires or needs respecting living arrangements (Smart, 2002). A new large-scale (n=829) U.S. study of children who have lived through their parents' divorces concludes that children want equal time with each of their parents, and consider shared parenting to be in their best interests, as well as in the best interests of children generally. Fabricius (2003) and Fabricius and Hall (2000) shed light on the child custody debate with their focus on the perspective of children in divorce. Three out of four young adults who grew up in divorced families thought that the best parenting plans were those that gave children equal time in each parent's home; the authors found that equal time is what most children desire and consider as being in their best interests. The authors sought the perspectives of adults on their post-divorce living arrangements as children, and also gathered data from adults who were

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children in non-divorced families, between 1996 and 1999. Their findings are consistent with earlier research focused directly on children of divorce (Lund, 1987; Derevensky and Deschamps, 1997). Fabricius (2003) and Fabricius and Hall (2000) compared children's actual post-divorce living arrangements with the living arrangement they wanted, the living arrangement their mothers wanted, the living arrangement their fathers wanted, the living arrangement they believed best for children of divorce, the living arrangement they believed best for children of divorce if both parents are good parents and live relatively close to each other, the relative number of days in a typical week with each parent they believe best for children of divorce for children at different ages, how close they now felt toward their mothers and fathers, the degree of anger they now felt toward their mothers and fathers, the degree to which each of their parents wanted the other parent to be involved as a parent, and the degree to which each of their parents undermined the other parent as a parent. The authors noted the fact that although children of divorce perceive a large gender gap in their parents' generation on the issue of child custody, there was no evidence of this gap in their generation. As young adults who lived through the divorce of their parents, they are arguably, in a sense, the real "experts" on the "best interests" of children of divorce. They certainly felt an injustice in not being allowed to have an equal voice in the proceedings. Finally, Fabricius (2003) found that children in sole custody arrangements, who experience a history of unavailability of the non-custodial parent, articulate feelings of insecurity in their relationship with that parent, have a perception of rejection by that parent, and feel anger toward both parents. Consistent with this finding, Amato and Gilbreth (1999), in their meta-analysis of the father-child post-divorce relationship, found that children who were less close to their fathers after divorce had poorer behavioral and emotional adjustment, and lower school achievement.

2. *Not only do children of divorce want equal time, but equal time works. A review of 33 major North American studies comparing sole with joint physical custody arrangements has shown that children in joint custody arrangements fare significantly better on all adjustment measures than children who live in sole custody arrangements.* This meta-analysis of the major North American studies over the past decade, which compares outcomes in joint versus sole custody homes, found that joint custody is associated

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with more salutary outcomes for children. Bauserman (2002) compared child adjustment in joint physical and joint legal custody settings with sole (maternal and paternal) custody settings, and also intact family settings. He examined children's general adjustment, family relationships, self-esteem, emotional and behavioral adjustment, divorce-specific adjustment, as well as the degree and nature of ongoing conflict between parents. On every measure of adjustment, children in joint physical custody arrangements were faring significantly better than children in sole custody arrangements: "Children in joint custody arrangements had less behavior and emotional problems, had higher self-esteem, better family relations and school performance than children in sole custody arrangements."

Although many of the studies reviewed by Bauserman compared "self-selected" joint custody families with sole custody families, some examined families with legally mandated joint physical custodial arrangements, where joint custody was ordered over the objections of the parents. These families fared as well as the self-selected samples, reinforcing the findings of earlier studies that joint custody works equally well for families in which parents are vying for custody (Benjamin and Irving, 1989; Brotsky, Steinman, and Zimmelman, 1988). Gunnoe and Braver (2001) also found that, compared with sole custody families, children in joint custody families had fewer adjustment problems, and this finding was not moderated by level of pre-separation parental conflict.

3. *Shared custody works for parents too. Inter-parental conflict decreases over time in shared custody arrangements, and increases in sole custody arrangements. Inter-parental cooperation increases over time in shared custody arrangements, and decreases in sole custody arrangements.* One of the key findings of the Bauserman meta-analysis was the unexpected pattern of decreasing parental conflict in joint custody families, and the increase of conflict over time in sole custody families. The less a parent feels threatened by the loss of her or his child and the parental role, the less the likelihood of subsequent violence. It may be argued that the current "best interests" framework and sole physical custody determinations have done little to prevent the 46 per cent of first-time battering cases that emerge after parental separation (Corcoran and Melamed, 1990), within the sole custody system.

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4. *Both U.S. and Canadian research indicates that mothers and fathers working outside the home now spend about the same amount of time caring for their children. According to research by Health Canada, on average each week mothers devote 11.1 hours to child care; fathers devote 10.5 hours. According to Statistics Canada (Marshall, 2006), men, although still less involved in primary child care, have significantly increased their participation. Although research on child-to-parent attachment has revealed that children form primary attachment bonds with each of their parents (Rutter, 1995), until recently there has been very little evidence that fathers contribute to child care to the same degree as mothers, and popular beliefs about the division of child care activities assume primary maternal responsibility. The attachment theory-based research is now reinforced by data from both Statistics Canada and Health Canada. Examining patterns of primary child care in the 2005 General Social Survey, Statistics Canada found that, on average, men 25 to 54 spent 1.8 hours a day on direct child care, while women spent 2.5 hours (Marshall, 2006). The Health Canada study (Higgins and Duxbury, 2002), utilizing a representative sample of 31,571 Canadian workers, found that employed fathers and mothers are roughly equal partners with respect to the amount of time they devote to child care, as measured by the number of hours spent in the previous week on activities related to child care. Although this finding runs counter to popular beliefs about gender differences in the division of family labour, these data are consistent with time use data from the United States (Bianchi, 2000). In her U.S.-based research, Bianchi (2000) attributes the decline in maternal child care to six factors: (1) the reallocation of mothers' time to market work outside the home (child-care time declines as work time has increased); (2) over-estimations of maternal time with children in previous research (it was assumed that time at home was all invested in child care when in reality a large amount was given to household chores not involving children); (3) smaller families have reduced total time with young children; (4) more pre-school children spend time in daycare and play group settings, regardless of the mother's employment status; (5) women's reallocation of their time has facilitated a relative increase in fathers' involvement in child care; and (6) technology such as cell phones has allowed parents to be "on call" without being physically present with children. Thus, as the gender difference in time spent in child care has diminished, shared parenting is emerging as the norm in U.S. and Canadian two-parent families. In divorced families, sole custody*

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is no longer the dominant post-separation custodial arrangement in Canada, as there has been a significant increase in joint custody among parents who are not involved in a legal contest over the custody of their children (Statistics Canada, 2004).

# 3

## I Family Violence and Child Abuse

Given the finding that inter-parental conflict is a key factor in children's adjustment to divorce, it is not surprising that family violence is an integral issue in the child custody and access debate. There is general agreement on the part of family violence and divorce scholars and practitioners that shared parenting or joint physical custody is not appropriate in cases of proven violence and substantiated abuse, either toward a child or a parent, as the witnessing of parental abuse is recognized as a serious form of child abuse (Jaffe, Crooks, and Bala, 2006; Trocme *et al.*, 2005). There is considerable disagreement, however, about the claim of some feminist scholars that a mere allegation of abuse on the part of a woman (not a man), should be sufficient to proceed as if that abuse has occurred, as is the practice of Canadian law enforcement bodies (Brown, 2004). This is not a position that is supported by research. Family violence should be considered a serious criminal matter, so false allegations of violence should be seen as a form of legal abuse of a parent.

In the child custody realm, there are ongoing debates about the definition and determination of family violence and abuse: what exactly constitutes "abuse" and "violence?" Physical and sexual abuse seem clear, but what about emotional abuse, legal abuse, and "parental alienation?" The latter are much harder to prove and establish.

There are also debates regarding situations in which shared parenting is not appropriate, as "high conflict" is almost universal in contested child custody disputes (Dutton, 2005). The position taken in this paper is that family violence is a serious criminal matter and must be treated as such, and a criminal conviction of assault against a spouse, or a finding that a child is in need of protection from a parent, may be sufficient to deny joint custody. An unproven allegation of abuse, however, even in the context of a "high-conflict" divorce, is not. And it is not uncommon for spouses in high-conflict separations to make false or exaggerated allegations of abuse (Bala, Jaffe, and Crooks, 2007).



## General Family Violence Research

Family violence and abuse after divorce is set in the context of family violence in general. In much of the domestic abuse literature, males are represented as primary perpetrators of physical abuse, although data from meta-analytic studies show otherwise. The most recent meta-analytic review of family violence research (Fiebert, 2004), which examined 155 scholarly investigations, 126 empirical studies and 29 reviews or analyses, concluded that women and men perpetrate and receive abuse at comparable levels. Earlier studies, such as Archer's (2002 and 2000) meta-analytic reviews, found that women are slightly more likely than men to use aggression toward their heterosexual partners, and slightly more likely to be injured by their male partners. Archer described an overlooked norm: that men should restrain themselves from physical aggression towards a woman, even when women are themselves are guilty of assault. Data from the U.S. National Family Violence Survey, reported by Stets and Straus (1992), showed that 28.6 per cent of married couples were female violent (with a non-violent male) and 48.2 per cent were mutually abusive physically. Stets and Henderson (1991) found that women are 6 times more likely than men to use severe violence in dating relationships and inflict more severe violence in cohabiting and married relationships; and Stets and Straus (1992) and Straus (1995) found that violence by women is not primarily defensive, and yet is less disapproved of than male to female violence. Hampton *et al.* (1989) report steady rates of male to female violence, but an increase of 33 per cent in female to male violence over a ten-year period. McNeely *et al.* (2001) concluded that domestic violence is a human, not gender, issue, as women are as violent as men in domestic relationships, and the researchers comment specifically on men's "legal and social defenselessness."

Canadian data show similar patterns. According to Statistics Canada (2004) and the Canadian Centre for Justice Statistics (2000), in a national sample, 8 per cent of women and 7 per cent of men reported abuse by their intimate partners. Of these, 23 per cent of females and 15 per cent of males suffered severe violence. The nature, severity and consequences of violence are similar, although 33 per cent of the men and 66 per cent of the women reported being injured. Other Canadian data, however, indicate that there is twice as much wife-to-husband as husband-to-wife severe violence (Brinkerhoff and Lupri, 1988; Sommer, 1994). In 2004, there were 74 spousal homicides in Canada; 62 of these were female victims. From 1974 to 2004, the rate for female victims of spousal homicide dropped 57 per cent, from 16.5

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per million women in spousal relationships to 7.1, while the rate for male victims dropped 68 per cent from 4.4 to 1.4.

Johnson (1995) points out that while domestic violence rates between men and women in intimate relationships are similar, it is important to distinguish between levels of severity, and that of the three types of partner violence, situational couple violence (the most common type), violent resistance, and intimate terrorism (the type most likely to be frequent and brutal), intimate terrorism is primarily male-perpetrated and best understood through a feminist theory of domestic violence. A wide range of studies (Ehrensaft, Moffitt and Caspi, 2004; Moffitt, Caspi, Rutter and Silva, 2001; Dutton, 2006) indicate that this type of intimate partner violence is relatively rare; violence at this degree of severity occurs in only 2 to 4 per cent of the cases of domestic abuse to which police respond (Statistics Canada, 2004; Brown, 2004), and the great majority of such domestic violence is bilateral (Dutton, 2005). Contrary to Johnson's assertions about higher rates of intimate terrorism by males, the research data say otherwise: Stets and Straus' (1992) national survey data indicated that "unilateral severe violence" against non-violent partners was three times as common for female perpetrators as for male perpetrators. Archer's (2002 and 2000) meta-analytic finding was that there were minor differences in violence by gender and in injuries. From the Canadian General Social Survey, Laroche (2005) found a rate of 2 per cent of female intimate terrorists compared to 3 per cent of male intimate terrorists.

When police respond to cases of domestic abuse, men are treated more harshly by the law-enforcement system at every step of the process, with the disparity most noticeable in cases where Statistics Canada reports the greatest equality in perpetration: low-level disputes where neither party suffered any injury. In this category of cases, men are 19 times more likely to be charged than women (Brown, 2004); men are more likely to be criminally charged even when they report that their partners have abused them, and thus men are less likely to report abuse than women (*ibid.*). Men are only one-tenth as likely to call police when assaulted as are women (Stets and Straus, 1992), because police refuse to take violence against men seriously (Buzawa *et al.*, 1992; Brown, 2004).

## Research on Family Violence in Child Custody Situations

Despite powerful findings from meta-analytic studies that family violence is committed by both genders at the same frequency and with about equal consequences (Laroche, 2005; Pimlott-Kubiak and Cortina, 2003; Serbin *et al.*, 2004), the prevailing assumption is that the overwhelming majority of instances of severe marital violence involve women as victims and men as perpetrators, and this has had a profound impact on child custody determinations (Dutton, 2005). Having made this assumption, Jaffe *et al.* (2003, 2005) and Bala *et al.* (2007), key figures in the training of Canadian judges in family law matters, instruct judges to suspect fathers' denial of abuse. The recommendations offered by Jaffe and Bala, including those related to child custody and access, are based on the assumption that severe interpersonal violence is overwhelmingly directed by men toward women. One model of family violence predominates: the father is the batterer, the mother is the victim, and the child is victimized by observation of the father's violence. When abuse perpetrators are not male, the abuse is largely dismissed as either not serious or in self-defense. When the abuse is non-retaliatory, the argument is made that male abuse is more serious. Yet extreme violence is rare, a total of 3 per cent of males and 2 per cent of females (Laroche, 2005; Dutton, 2005). Female-initiated violence is far more common than is asserted, and levels of severity of violence are similar (Stets and Straus, 1992). The most common form of domestic violence is bilateral (*ibid.*).

The discrepancy between meta-analytic findings and studies that report that women are disproportionately the victims of severe violence is striking. Dutton (2005) offers this explanation: almost without exception, the research literature upon which many investigators found their assertions is based on samples drawn from battered women's shelters or from treatment groups for men who batter, and then generalized to the general population. As Magdol *et al.* (1997) point out, "the expectation that rates of partner violence by men would exceed rates by women stems from the sampling choices of previous studies." Research based on self-selected samples of extreme cases is highly problematic, as research conducted in women's shelters is typically vetted by feminist directives that preclude asking questions about women's role in the violence, as this is considered to be a form of "victim blaming" (Dutton, 2005).

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Unwarranted generalizing from non-representative samples creates the perception that only men are abusers and only women are victims, and this becomes enshrined in child custody policy and eventually in practice. If inter-parental conflict and violence are conceived in a one-sided manner, with attention focused solely on the possibility of abuse by a male perpetrator, child safety may well be compromised (Dutton, 2005). In the arena of child custody, most cases of high conflict involve no violence. When spousal violence does exist, it usually involves two violent partners, and there are cases where the female partner is the primary or sole instigator of violence (Dutton, 2005; Johnston and Campbell, 1993). Johnston and Campbell (1993) offer a useful typology of cases of family violence in the context of child custody disputes, including ongoing or episodic male battering, female initiated violence, male controlling interactive violence, separation and divorce violence, and psychotic and paranoid reactions. They conclude that mutual violence in the most common type, with male battering (the classic “cycle of violence” paradigm) constituting less than one-fifth of cases of violence.

Apart from interpersonal violence directed toward a partner, there also exists, in the dominant discourse about male violence against “women and children,” erroneous information about child abuse. A key source of data on child abuse in Canada is the Canadian Incidence Study of Reported Child Abuse and Neglect 2003 (Trocme *et al.*, 2005), which indicates that the abuse of children is about equally perpetrated by fathers and mothers, although mothers pose a slightly greater risk, with boys more frequently abused than girls. Unsubstantiated allegations of child abuse are also commonplace, especially in the context of child custody disputes. Although reports are not necessarily intentionally fabricated (Trocme and Bala, 2005), there are many more cases of unsubstantiated allegations of sexual abuse relative to substantiated allegations. Of child sexual abuse reports in Canada, only 24 per cent are substantiated. The same holds true for other forms of abuse (Trocme *et al.*, 2005).

The questionable claims of Jaffe *et al.* (2005, 2003) and Bala *et al.* (2007) have profound repercussions, and the biases they have generated are troublesome. According to Jaffe and Bala, false denials by (male) abusers are more common than false allegations by (female) alleged victims, and the act of fathers petitioning the courts for joint custody is “often an attempt of males to continue their dominance over females.” “Many batterers pursue visitation as a way of getting access to their ex-

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partners. They may seek custody to engage in prolonged litigation, during which their legal counsel and the court process mirrors the dynamics of the abusive relationship.” Neither claim is supported empirically. Relatively few contested child custody cases involve substantiated cases of child abuse, including the child witnessing abuse of a parent; only one-quarter of child abuse allegations are substantiated after investigation (Trocme *et al.*, 2005). Yet the threat of losing one’s children in a custody contest exacerbates and creates violence, as 40 to 46 per cent of first-time severe violence occurs after separation, within the “winner take all” sole custody system (Statistics Canada, 2004; Corcoran and Melamed, 1990). Whereas in most cases in which there has been violence during cohabitation, conflict and violence decrease after separation (with sole custody) (Spiwak and Brownridge, 2005), in non-violence cases sole custody determinations are associated with increased violence. Thus of great concern is the assertion that “an essential principle in the high-conflict divorce arena is that joint custody and shared parenting are not viable options” (Jaffe *et al.*, 2005). In fact, joint physical custody is associated with lower inter-parental conflict levels than sole custody, even in court-determined joint custody (Bauserman, 2002), as a high-conflict case not involving violence has a much higher likelihood of transforming into violence when one’s relationship with one’s child is threatened by loss of custody. The sole custody regime elevates the risk of spousal abuse, and elevates the number of children who witness the abuse.

Jaffe *et al.* (2006) do not discuss the application of the “child in need of protection” standard to divorced families, as it is applied for non-divorced families, although they suggest this approach in calling for a comprehensive child welfare assessment in alleged cases of family violence where child custody is at issue. If this standard is applied in a consistent fashion, the problem of violence in custody cases is effectively addressed via investigations by trained professionals; without it, the current sole custody framework will continue to increase the likelihood of violence in families with no previous abuse. The call for judicial determination of custody in cases of established family violence is sound; it is erroneous, however, to assume that “high-conflict” cases, where parents disagree on custodial arrangements for children after separation, commonly involve serious family violence. This places children at risk of losing one of their parents via sole custody, and increases the risk of family violence in the majority of contested custody cases that did not previously involve violence.

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Sole custody in cases where child abuse is not present is thus a flawed and dangerous policy which has markedly increased the risk of post-separation violence in families with no previous history of violence. The present system of judicial determination of child custody is sound in cases where violence has been established. But it can and does harm families with no previous child abuse or serious violence history.

Finally, suicide rates are reported to be of “epidemic” proportions among separated and divorced fathers struggling to maintain a parenting relationship with their children (Ksopowa, 2002); and “legal abuse” has been noted in non-custodial father suicide cases (such as the widely reported case of Darren White). No studies have examined the impact of legal abuse; that is, using a legal advantage to remove a parent from a child’s life via sole custody, and subsequent parental alienation. Uprooting children in this manner and alienating the parent may themselves be forms of child abuse, as suggested by Justice Konigsberg of the B.C. Supreme Court (commenting on the Gettliffe case).

In sum, where there are findings of severe family violence via criminal conviction or a finding that a child is in need of protection from a parent, it may be appropriate, as Jaffe *et al.* (2005) recommend, for one parent to have more limited, supervised, or no contact with children because of potential harm to the children and the spouse. In the absence of such a finding, however, sole custody as an approach clearly poses serious risk to children and parents. In the absence of investigation and clear determination of abuse and violence by the criminal court or child protective services, the family court should not assume the role of adjudicating conflicting allegations of abuse by the two parents. The majority of high-conflict child custody cases do not involve family violence, although a high proportion do involve unsubstantiated allegations of abuse. While parents with a proven history of severe violence will need different resolutions, the majority of litigating parents in conflict over the care and custody of their children are best served, in the interests of prevention of severe violence, by a shared parenting approach to child custody.

# 4

## I Research on Canadian Child Custody Outcomes

The legal/judicial mode of child custody resolution may be seen as comprised of three interrelated yet distinct elements: the adversarial nature of the legal model itself, the actual practices of legal practitioners and the courts in regard to issues of custody and access, and the experience of the participants themselves in the process. It has been suggested that while the legal model in itself may be adversarial, developments in divorce law have resulted in procedural changes to the extent that the law as practised is not adversarial at all but administrative, or mediating. Others argue, however, that while certain developments in divorce law, such as simplified procedures, changes in the pattern of grounds for divorce, and “no-fault” divorce have represented a movement away from an adversarial model, an adversarial approach still forms the basis of procedure in matters of custody and access. With the introduction of no-fault divorce, it is argued that child custody is left as the only sphere in which “fault” is still relevant, where contested cases involve a prolonged litigation process of filing suits and countersuits and represent “some of the most volatile, hostile, and destructive transactions in court” (Coogler, 1978). In uncontested cases, where judges may simply “rubber-stamp” decisions made prior to the court hearing (an administrative function), the process of negotiation leading to such decisions may be highly adversarial: the use of threats and counter-threats filed by both parties in the form of affidavits and the behaviour of legal practitioners have been associated with escalation of conflict. Finally, there is little question that the participants in these processes experience legal resolution of custody and access disputes as highly adversarial.

The history of child custody shows that court decisions have been guided by presumptions that have varied over time, originating with a paternal presumption that gradually changed over time to a maternal presumption in the nineteenth century, through legislation such as the British Talfourd’s Act (1839), which allowed mothers to petition for the custody of their young children and led to the judicially developed maternal case law presumption called the “tender years doctrine,” which

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held that young children should reside with their mothers (Millar and Goldenberg, 2004). This presumption appears to have been in place in Canada since at least the beginning of the twentieth century, and remained in place until the formal introduction of the “best interest of the child” standard through Canada’s second Divorce Act (1986), whose wording reflects a careful consideration for gender neutrality. Paradoxically, the new act coincided with a proportionally larger share of cases of sole maternal custody, resulting from the introduction of social context education of the judiciary that emphasized the unfairness to mothers of legal custody outcomes (*ibid.*). Since 1986, a major expansion of family law has occurred, with considerable reliance on parental gender for custody decisions, in the absence of predictors of the “best interests of the child” (Millar and Goldenberg, 2004).

Canadian family law uses the “common law” legal tradition, which derives law from both written statutes and from common law, also known as case law, precedent or judge-made law (Boyd, 1995), allowing judges to make new rules for new situations as they arise. Although child custody law derives from both legislation and precedent, precedent is the stronger of the two. In this way, Canada has maintained a maternal custody preference throughout most of its history, as the legal environment relating to child custody has been mainly shaped and controlled through judge-made law, legal concepts and presumptions developed through precedent rather than by legislation. This is evident from data examining outcomes in contested child custody cases.

## Statistics Canada Data

The latest data from Statistics Canada (2005, 2004), which examines divorce and child custody outcomes from 2003 and 2002, indicate that 38 per cent of all marriages are likely to end in divorce before the thirtieth wedding anniversary. In cases involving dependent children, in 2003 (based on Central Registry of Divorce Proceedings data on court orders), custody was awarded to mothers in 49.5 per cent of cases, joint custody to both parents in 41.8 per cent of cases, and to fathers in only 8.5 per cent of cases (Statistics Canada, 2005). It should be noted that these cases exclude common-law parents, and that a decree of “joint custody” is often made with “principal residence” with one parent only, meaning that joint decision-making without physical shared custody is awarded. Further, to say that “joint custody was awarded” in 41.8 per cent of cases is somewhat misleading, as this statistic includes “judge-



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ratified” non-contested custody cases (those decisions made by parents themselves and “rubber-stamped” by a judge). This statistic comprises all “custody arrangements that were part of the divorce judgment,” which includes a majority of cases which are mere ratifications. These are not all litigated cases of child custody.

What is interesting about these statistics, however, is the decrease in sole maternal outcomes and joint custody outcomes in court orders. Again, most of these joint custody outcomes are in non-contested cases ratified by the court, where parents have themselves decided on joint custody. Joint custody has been steadily increasing in non-litigated cases in Canada, which reflects the emerging norm in two-parent families of shared parental responsibility as, in the great majority of cases, both parents are employed outside the home.

Even though shared caregiving has emerged as a norm in two-parent families, and this is reflected in the huge increase in joint physical custody arrangements in non-litigated divorce cases, joint custody is virtually non-existent in judge-adjudicated cases. For many years, the vast majority of contested or litigated custody awards have been made solely to mothers (Millar and Goldenberg, 2004). It has been argued, however, that in more than 95 per cent of cases, it is the family and not the court that determines who will have custody of the children. The great majority of child custody decisions are made out of court; only a small percentage of parents fail to reach an agreement and are brought to trial (Department of Justice, 1990). In the vast majority of cases, the court appears simply to ratify the existing arrangements made by the parties. Thus Polikoff (1982) argues that most children remain with their mothers by the mutual consent of the parents: “The final court award, rubber stamping the arrangement of the parties themselves, does not reflect a bias on the part of the court system toward mothers because the court system plays an entirely passive role.”

## Court File Analysis Data

Outcomes in contested child custody cases, however, suggest that such “parental agreements” may not be as uncontentious as is generally assumed. Contested case outcomes are instructive inasmuch as they inform how lawyers advise their clients in potential child custody cases. Although reasons for judgment in contested cases reflect a wide range of views among judges as to what constitutes “the best interests

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of the child,” a scrutiny of contested cases of child custody provides an explanation for the relatively low levels of legally disputed custody cases. Canadian courts, according to the latest court file analysis data, continue to grant maternal custody in the majority of contested cases. The *Evaluation of the Divorce Act* (Department of Justice, 1990) found, in an analysis of the 1988 court file data, that where there was a trial, custody was awarded to mothers in 77 per cent of cases and to fathers in only 8.6 per cent. The evaluation report concluded that, “where fathers were granted sole custody, this was almost invariably because the mother did not want or could not cope with the custody of the children,” and “there has been no appreciable or consistent change in the basic patterns of awarding sole custody since at least the early 1970s . . . [although] what does seem to have changed since the 1970s is that in the late 1980s, men are *less* likely to receive sole custody when they request it or it is disputed than was previously the case” (my emphasis). Finally, the evaluation found that the reason that sole custody is the norm in court-determined arrangements is that joint physical custody is seen to be unworkable by the judiciary for parents who disagree on parenting arrangements. Sole custody is regarded by judges to be in children’s best interests in litigated cases.

The impact of judicial decisions in contested cases goes well beyond the cases themselves. They define legal norms and form the basis of a body of law upon which others are advised, including the bulk of “uncontested” cases where fathers want at least joint custody but “settle” for access (Kruk, 1993). “Bargaining in the shadow of the law” refers to legal negotiations framed and shaped by the perception of the parties of what results might be achieved if they resorted to greater legal involvement. Although the majority of court orders for child custody are “consent” orders (and included by Statistics Canada as court determinations), this should not imply that these orders are entered into freely (Millar and Goldenberg, 2004).

The fact that there has been little national family court or family justice data available, from 1988 until the present, is problematic. This lack of research is at least in part due to judicial resistance to non-court sanctioned research by academic scholars. However, recent unpublished research of Ontario Court of Appeal judgments (Jenkins, 2006) provides evidence indicating that when children are living with their mothers at the time of the Court of Appeal child custody hearings, it is extremely rare for the courts to upset the status quo. When they are living with

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their fathers the status quo is not such a potent force. According to Jenkins, the “mother-factor” generally outweighs the “status quo” consideration: courts are more likely to disturb the status quo when children are living with their father.

Studies in the United States (Fox and Kelly, 1995; Maccoby and Mnookin, 1988) consistently point to gender stratification within the custody award process, with sole maternal custody being awarded in jurisdictions with a similarly indeterminate “best interests of the child” standard as in Canada.

### National Longitudinal Survey of Children and Youth

The *National Longitudinal Survey of Children and Youth* (NLSCY), which tracks a large sample of Canadian children as they grow up, utilizes data from parents themselves, although the “person most knowledgeable” about the child is surveyed and, more than 90 per cent of the time, this person is a woman, in most cases the mother of the child. In addition, mothers’ and fathers’ perceptions of child custody differ markedly (LeBourdais *et al.*, 2001). NLSCY data track both married and co-habiting couples, as the proportion of children born to co-habiting couples in Canada is now 22 per cent (Juby *et al.*, 2004). Data reveal that by the age of 15, 30 per cent of Canadian children born to a couple in the early 1980s had experienced their parents’ separation, and shared parenting is much more frequent when settled outside the court. The NLSCY found that the proportion of children in non-litigated post-separation joint custody arrangements has increased markedly (*ibid.*). However, the study also found, consistent with Maccoby and Mnookin (1992), that custody and access arrangements put in place when parents separate are far from static, evolving in response to developments in the lives of the individuals involved, the most conspicuous change being the declining proportion of children in shared custody, from 8 to 1 per cent. However, this did not necessarily mean less contact with the father, since approximately 40 per cent were living with the father full-time at the end of the two-year period separating the cycles of the study. The fact of the reported change from joint to sole custody did not, the authors concluded, hinder the continued long-term involvement of both parents after separation. Shared custody, even for a limited period, is associated with the continued long-term involvement of both parents in children’s lives (Juby *et al.*, 2004).

# 5

## I Child Custody Legislation in Canada

Legislative responsibility for child custody and access in Canada is shared among the federal, provincial and territorial governments. The federal *Divorce Act* applies in divorce proceedings when custody and access are at issue, although custody and access issues may also be resolved under provincial legislation. Provincial and territorial statutes govern non-divorce cases that fall within provincial constitutional responsibility, including separation proceedings involving custody and access. The provinces and territories also deliver programs and services that support separating and divorcing parents, although the federal government co-funds some of these programs.

This section will provide an overview of federal and provincial statutes respecting child custody and access, with a focus on implications for post-divorce paternal involvement. It begins with a brief overview of articles of the U.N. Convention on the Rights of the Child that are pertinent to child custody.

### U.N. Convention on the Rights of the Child

The 1989 U.N. Convention on the Rights of the Child, according to legal scholar Barbara Woodhouse (1999), was the most rapidly and universally accepted human rights document of the past century. Within a decade after its promulgation, it had been ratified by every nation but two. Canada is a signatory. The Convention's philosophy is embodied in Article 3: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration."

In addition, the UN Convention, in Article 5, emphasizes the primacy of parents in their children's lives ("States Parties shall respect the responsibilities, rights and duties of parents...") and in Article 9 ("States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent

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authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”). Two key principles underlying the Convention are that parents have the primary responsibility for nurturing children, and the role of governments and communities is to support children and their families; these are both seen to be “in the best interests of children.”

Article 19 of the Convention refers to needed measures to protect children from all forms of violence, injury or abuse, neglect, maltreatment or exploitation—and it refers to actual violence and maltreatment, not risks of violence and maltreatment. To remove child custody from a parent because of “risk” rather than proof of harm is not in keeping with the Convention. Article 12 states that the views of the child be given due weight in accordance with the age and maturity of the child, on all matters affecting the child. Finally, Article 8 stipulates the child’s right to preserve his or her identity, as all children are entitled to have their human rights respected, including children of separation and divorce.

## Federal Legislation

In keeping with the U.N. Convention, federal divorce legislation holds the “best interests of the child” as the paramount criterion in determining post-separation parenting arrangements, trumping even constitutional provisions. The Divorce Act, however, uses the terms *custody* and *access* to describe post-separation parenting arrangements. *Custody* includes “care, upbringing and any other incident of custody.” *Access* is not specifically defined. Either or both spouses, or any other person, may apply for custody of, or access to, a child. The Divorce Act permits the court to make interim and final (sole or joint) custody and access orders and enables it to impose terms, conditions and restrictions in connection with those orders.

Section 16 (8) of the Divorce Act states, “the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.” Section 16 (10) reads, “the 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

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consideration the willingness of the person for whom custody is sought to facilitate such contact” (the so-called “friendly parent” rule).

Although the Divorce Act identifies “the best interests of the child” as the sole criterion in child custody determination and reflects the primacy of parents in the child’s life, it does not identify the specific “needs and other circumstances of the child” that must be considered in determining custodial arrangements, and thus the standard remains indeterminate and subject to judicial discretion. In addition, no mention is made of the primacy of both parents in the child’s life.

A custody determination pursuant to divorce is not so much a decision to award custody, but a decision regarding from whom to remove it (Millar and Goldenberg, 2004).

## Provincial/Territorial Legislation

Provincial and territorial child and family legislation relevant to child custody and access includes the British Columbia Family Relations Act (Section 24), Alberta Family Law Act (Section 17.1), Saskatchewan Children’s Law Act (Sections 8 and 9), Manitoba Family Maintenance Act (Section 2.1), Ontario Children’s Law Reform Act (Sections 19-24), Quebec Civil Code (Article 33), New Brunswick Family Services Act (Section 129); Nova Scotia Maintenance and Custody Act (Section 18); Prince Edward Island Custody Jurisdiction and Enforcement Act (Section 8.1); Newfoundland Children’s Law Act (Section 31); Yukon Children’s Act (Sections 29 and 30); Northwest Territories Children’s Law Act (Section 18); and Nunavut Family Law Act (Section 8). All cite “the best interests of the child” as the sole criterion in child custody and access determination, yet provide minimal indicators of these best interests, and neither are “custody” and “access” clearly defined. The following criteria are considered in each province to determine “best interests.”

*British Columbia:* the health and emotional well-being of the child including any special need for care and treatment; where appropriate, the views of the child; the love, affection and similar ties that exist between the child and other persons; education and training for the child; and the capacity of each person to whom

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guardianship, custody or access rights and duties may be granted to exercise these rights and duties adequately.

*Alberta:* welfare of the minor; the conduct of the parents, and the wishes of the mother and the father.

*Saskatchewan:* the quality of the relationship that the child has with the person who is seeking custody and any other person who may have a close connection with the child; the personality, character and emotional needs of the child; the physical, psychological, social and economic needs of the child; the capacity of the person who is seeking custody to act as legal custodian of the child; the home environment proposed to be provided for the child; the plans that the person who is seeking custody has for the future of the child; and the wishes of the child, to the extent the court considers appropriate, having regard to the age and maturity of the child.

*Manitoba:* the views and preferences of the child where appropriate.

*Ontario:* the love, affection and emotional ties between the child and, (i) each person entitled to or claiming custody of or access to the child, (ii) other members of the child's family who reside with the child, and (iii) persons involved in the care and upbringing of the child; the views and preferences of the child, where such views and preferences can reasonably be ascertained; the length of time the child has lived in a stable home environment; the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child; any plans proposed for the care and upbringing of the child; the permanence and stability of the family unit with which it is proposed that the child will live; and the relationship by blood or through an adoption order between the child and each person who is a party to the application.

*Quebec:* the moral, intellectual, emotional and material needs of the child, environment, and other aspects of his situation.

*New Brunswick:* the mental, emotional and physical health of the child and his need for appropriate care or treatment, or both; the views and preferences of the child, where such views and preferences can be reasonably ascertained; the effect upon

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the child of any disruption of the child's sense of continuity; the love, affection and ties that exist between the child and each person to whom the child's custody is entrusted, each person to whom access to the child is granted and, where appropriate, each sibling of the child, and, where appropriate, each grandparent of the child; the merits of any plan proposed by the Minister under which he could be caring for the child, in comparison with the merits of the child returning to or remaining with his parents; the need to provide a secure environment that would permit the child to become a useful and productive member of society through the achievement of his full potential according to his individual capacity; and the child's cultural and religious heritage.

*Nova Scotia:* the welfare of the child is the paramount consideration.

*Prince Edward Island:* the child's views and preferences.

*Newfoundland:* the love, affection and emotional ties between the child and, i) each person entitled to or claiming custody of or access to the child; ii) other members of the child's family who live with the child; and iii) persons involved in the care and upbringing of the child; the views and preferences of the child, where the views and preferences can reasonably be ascertained; the length of time the child has lived in a stable environment; the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and the special needs of the child; the ability of each parent seeking the custody or access to act as a parent; plans proposed for the care and upbringing of the child; the permanence and stability of the family unit with which it is proposed that the child will live; and the relationship by blood or through an adoption order between the child and each person who is a party to the application.

*Yukon:* the bonding, love, affection and emotional ties between the child and, i) each person entitled to or claiming custody of or access to the child; ii) other members of the child's family who reside with the child, and iii) persons involved in the care and upbringing of the child; the views and preferences of the child, where such views and preferences can be reasonably ascertained; the length of time, having regard to the child's sense of time, that the child has lived in a stable environment; the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessities of life and any special needs of the child;



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any plans proposed for the care and upbringing of the child; the permanence and stability of the family unit with which it is proposed that the child will live; and the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child.

*Northwest Territories:* the welfare of the child; the conduct of the parents; and the wishes of each parent.

The British Columbia Family Relations Act uses the terms “custody” and “access,” but neither is defined, and the Old English statute of “guardianship,” which confers powers and rights over a child. It parallels the federal Divorce Act’s emphasis on the child’s best interests in Section 24 (1), which reads, “a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child’s needs and circumstances: the health and emotional well being of the child including any special needs for care and treatment; the love, affection, and similar ties that exist between the child and other persons; education and training for the child; the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.” Again, the “best interests of the child” remains a largely indeterminate standard, and judicial discretion prevails in child custody and access determination. Further, although Section 27 (1) of the Act states that, “whether or not married to each other and for so long as they live together, the mother and father of a child are joint guardians unless a tribunal of competent jurisdiction otherwise orders,” meaning that when parents live together they share parental duties and, upon separation, according to Section 27 (2), “the one of them who usually has care and control of the child is sole guardian of the person of the child.” Where the parents have never lived together or shared joint guardianship, the mother is the sole guardian of the child. The same statutory regime also applies to custody. The *Family Relations Act* thus removes joint parenting rights and responsibilities upon parental separation, and essentially imposes sole custody. The legal assumption is that only one parent “usually has care and control of the child,” and that sole custody is in fact in “the best interests of the child.” Lower court discretion is not open to appeal; judicial errors regarding the state of current child development and family dynamics research cannot be corrected by the Court of Appeal, and are carried into the future as legal precedents. In British Columbia courts

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typically award custody to one parent and joint guardianship. In B.C. Provincial Court, for unmarried parents, courts make custody orders under the federal *Divorce Act*. In B.C. Supreme Court hearings, for married parents, a custody order made under the *Family Relations Act* gives the custodial parent guardianship of the child as well, unless the court decides otherwise. However, frequently a *Family Relations Act* claim for guardianship is joined with the *Divorce Act* proceeding so that the court can make a guardianship order at the same time as it makes a custody order.

The Ontario Children's Law Reform Act similarly establishes "the best interests of the child" as the determining criterion in child custody in Section 27 (1), but it does state that a father and mother are equally entitled to custody. Also unlike B.C. courts, Ontario courts, in assessing a person's ability to act as a parent, also consider whether the person has at any time committed violence or abuse toward another family member. Again, the legal assumption is that after parental separation only one parent usually has care and control of the child although, unlike in British Columbia, custody is more often granted to more than one person, and physical joint custody between the parents is possible in law.

Whereas only a few jurisdictions, most notably British Columbia and Yukon, provide a presumption that a court must order the physical care of a child to one parent over the other in contested custody cases, even in jurisdictions that allow for custody to more than one parent, *de facto* sole custody arrangements continue to prevail. In Alberta, which defines neither custody nor access, unless a court expressly removes powers of guardianship, the non-custodial parent, whether or not that parent is an access parent, retains all of the powers of guardianship, except those that are required by the custodial parent for purposes of day-to-day living. Manitoba defines "custody" as "the care and control of a child by a parent of that child" and "access" is not specifically defined; Manitoba adopts Alberta's view on guardianship. In New Brunswick, "parent" is defined as a mother or father and includes a guardian and a person with whom the child ordinarily resides who has demonstrated a settled intention to treat the child as a child of his or her family. On application, the court may order that either or both parents, or any person, either alone or jointly with another, shall have custody of a child, on the basis of "the best interests of the child." In Newfoundland the father and the mother are equally entitled to custody of the child, and a parent of a child or other party, with grandparents specifically

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mentioned, may apply to a court for an order respecting custody of or access to the child (neither is defined). In Nova Scotia, the legislation states that the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise provided by the *Guardianship Act* or ordered by a court, yet legislation also defines guardian as a head of a family and any other person who has in law or in fact the custody or care of a child; a parent, in the case of a child of unmarried parents, is a person who has been ordered by a court of any law district to pay maintenance for the child. In the Northwest Territories, legislation provides that a father and mother of a child are equally entitled to custody, but also states that the right of a parent to exercise the entitlement and incidents of custody are suspended until an agreement or order provides otherwise when the parents are living separate and apart and the child lives with the other parent or the parent has consented (expressly or by implication) or acquiesced in the other parent having sole custody of the child. In Nunavut, the father and the mother of a child are equally entitled to custody, with the right of a parent to exercise the entitlement to custody of a child being suspended until a parental or separation agreement or a court order otherwise provides where “(a) the parents of the child live apart and the child lives with the other parent; and (b) the parent has consented, either expressly or by implication, or acquiesced to the other parent having sole custody of the child.” In P.E.I., legislation provides that except “as otherwise ordered by a court, the father and the mother of a child are joint guardians of a child and are equally entitled to custody of the child,” but again, the custodial rights of “the parent with whom the child does not reside” are suspended until an agreement or court order provides otherwise. In Quebec, custody may be awarded to either parent or a third party, but the custodial parent has the right to determine the residence of the child and make the day-to-day decisions, and the non-custodial parent “retains the right to participate in major decisions about the child’s upbringing as a consequence of the exercise of parental authority.” The Civil Code uses the terms parental authority and custody and, although neither is specifically defined, parental authority is a much broader concept and includes the full range of parental rights and duties. In Saskatchewan custody means personal guardianship of a child and includes care, upbringing and any other incident of custody having regard to the child’s age and maturity, but access is not defined by the act. The authority to make major decisions regarding health, education and religion rests with the custodial parent. When making, varying or rescinding an order for custody or access of a child, the court shall have regard only

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for the best interests of the child. Unlike other provinces, Saskatchewan includes a list of considerations in determining “the best interests,” and joint custody is one option available to the court. Yukon has a rebuttable presumption of sole custody: that the court “award the care of the child to one parent or the other and that all other parental rights associated with custody of that child ought to be shared by the mother and the father jointly.” Although “the father and the mother of a child are equally entitled to custody of the child,” joint custody is not an option. “Custody” and “care” are defined in the legislation, but “access” is not.

Courts in all provinces continue to award child custody to one parent only in the great majority of cases, despite the legal recognition that when both parents reside together, custody is held equally by both of them. Sole physical custody (or “primary residence”) to one parent and access to the other is the normal court practice across all provinces, including litigated cases designated as “joint custody.” Seven provinces have implemented a unified family court system to deal with matters of child custody and access after parental separation and divorce.

# 6

## I Government Research Reports on and Proposed Changes to Child Custody Law and Policy

The majority of custody and access policy research papers and reports of the Canadian federal government, as well as of some provincial governments, have neither sought to clarify the “best interests of the child” standard nor have addressed the issue of children’s need for both parents after divorce. Most have focused to a much greater degree on the issue of child support. Above all, federal and provincial/territorial reports expressly endorse the need for judicial discretion in custody and access determination. The Federal-Provincial-Territorial Report on Child Custody and Access, for example, recommends that “legislation not establish any presumptive model of parenting after separation, nor contain any language that suggests a presumptive model.” Despite empirical support for shared parental responsibility, federal and provincial reports on child custody and access have fallen short of recommending a rebuttable legal presumption of joint physical custody or shared parental responsibility and encouraging equality between parents in regard to parental status.

Much of the focus of government reports on child custody and access has been on the need for additional training for judges in family law matters, and the expansion of support services for parents, while recommending leaving judicial discretion regarding the “best interests of the child” and the present sole custody framework intact. Although additional training for judges is often recommended, the source and nature of the training is not addressed. Few if any reports have offered discussion about refining or clarifying what is meant by a child’s “best interests,” despite the views of legal commentators such as Bala (2000) who have found that the indeterminacy of the “best interests of the child” criterion renders it “almost useless” in child custody proceedings. No reports have asked, “What are the core needs of children during and after the divorce transition, the responsibilities in addressing these needs, and the responsibilities of social institutions to support parents in the

fulfillment of their parental responsibilities?” It seems legitimate to question why a matter as important as the best interests of children remains subject to judicial discretion, as judges are not trained in child development or family dynamics.

## Special Joint Committee Report

A plethora of federal government reports on child custody and access have been completed over the years, and occupy several shelves in the National Library. The most comprehensive research-based report done to date, however, the Special House of Commons Senate Joint Committee on Child Custody and Access (1998) report, *For the Sake of the Children*, more than any previous examination, sought to assess current research and its implications for child custody and access in Canada. This report, unlike others before and since, focused on shared parenting, parent education and mediation, and defining children’s needs and paternal responsibilities in the divorce transition based on the U.N. Convention on the Rights of the Child, and thus remains a benchmark report in regard to examining the core issues related to child custody and access, going well beyond the cosmetic changes recommended by the other reports.

Many briefs to the Joint Committee, from legal practitioners, mental health specialists, parents’ groups, and children’s representatives, stressed that a new divorce act affirm that both parents are responsible for the care of their children after separation and divorce, and this is reflected in the Committee’s statement that “parents’ relationships with their children do not end upon separation or divorce . . . divorced parents and their children are entitled to a close and continuous relationship with one another,” and that a “shared parenting” approach replace sole custody and access determinations. The Committee recommended the use of “parenting plans,” developed according to the best interests of the children, “setting out details about each parent’s responsibilities for residence, care, decision making and financial security for the children . . . All parenting orders should be in the form of parenting plans.” Finally, the problem of family violence highlighted the need for non-adversarial means of dispute resolution, including “parent education programs” and the requirement that parents “attend at least one mediation session to help them develop a parenting plan for their children.”

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In sum, the Joint Committee found that the current Divorce Act requires revision in a number of key areas. A new act, according to the Committee, should assume the existence of two-parenting households and reflect shared responsibility. It should also take into account the importance of grandparents, siblings and other extended family members in children's lives. Family mediation should exist alongside rather than replace the legal system. Attending at least one confidential mediation session should be mandatory; indeed, the Committee stressed that the law should affirm that mediation and other methods of dispute resolution be the first choice in cases of marital breakdown.

It was noted that for the recommendations of the Joint Committee to be realized, the federal and provincial governments must commit adequate resources to run parent education programs, offer family mediation and clarify the "best interests of the child," particularly in regard to the involvement of both parents in children's lives. Finally, lawyers, judges and mediators should see themselves as parts of a single team, co-operating to help divorcing parents formulate workable and effective parenting plans.

### Response to the Special Joint Committee Report

In response to the Special Joint Committee report, the Federal-Provincial-Territorial Family Law Committee report, *Putting Children First* (2002), set out a list of guiding principles for the reform of child custody and access law. This report, inasmuch as it focused on the essential needs of children in the divorce transition, establishes guidelines for the development of a new approach to child custody determination, as follows: (1) ensure that the needs and well-being of children are primary; (2) promote parenting arrangements that foster and encourage continued parenting responsibilities by both parents, when it is safe to do so; (3) provide clarity in the law with respect to specific factors of what is in "the best interests of the child"; (4) promote alternative dispute resolution mechanisms to allow conflicts to be resolved in a non-adversary forum and cooperative fashion; (5) ensure that conflicts are resolved in an accessible, fair and timely manner; and (6) encourage the participation of extended family and grandparents in the child's life, when it is safe to do so.

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Also in 2002, Justice Canada embarked on a Child-centred Family Justice Strategy. The purpose of the strategy is to help parents focus on the needs of their children following separation and divorce. It is composed of three pillars: family justice services, legislative reform, and expansion of Unified Family Courts. The strategy proposes that the “best interests of the child” principle be reaffirmed and strengthened by adding a list of best interest criteria to the *Divorce Act*, as follows:

- the child’s physical, emotional and psychological needs, including the child’s need for stability, taking into account the child’s age and stage of development;
- the benefit to the child of developing and maintaining meaningful relationships with both spouses and each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse;
- the history of care for the child;
- any family violence, including its impact on:
  - the safety of the child and other family members,
  - the child’s general well-being,
  - the ability of the person who engaged in the family violence to care for and meet the needs of the child, and
- the appropriateness of making an order that would require the spouses to cooperate on issues affecting the child;
- the child’s cultural, linguistic, religious and spiritual upbringing and heritage, including aboriginal upbringing or heritage;
- the child’s views and preferences to the extent that those can be reasonably ascertained;
- any plans proposed for the child’s care and upbringing;
- the nature, strength and stability of the relationship between the child and each spouse;
- the nature, strength and stability of the relationship between the child and each sibling, grandparent and any other significant person in the child’s life;



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- the ability of each person in respect of whom the order would apply to care for and meet the needs of the child;
- the ability of each person in respect of whom the order would apply to communicate and cooperate on issues affecting the child; and
- any court order or criminal conviction that is relevant to the safety or well-being of the child.

This proposed reform is based on a parental responsibility model, and its underlying concept is that both parents will be responsible for the well-being of their children after separation or divorce. How they carry out their obligations to their children is largely a matter for them to decide, using the “best interests” criteria as a guide. The parenting arrangements they make will include allocating parenting time based on a residential schedule that sets out the time that each child spends with each parent, and decision-making responsibilities regarding the children’s health, education, and religious upbringing. Where a judge is needed to make a decision, the judge will issue a “parenting order” allocating parental responsibilities. The work of the Child-centred Family Justice Strategy continues to the present day.

Taking the guiding principles of the Federal-Provincial-Territorial Family Law Committee as well as the guidelines of the Child-centred Family Justice Strategy as the foundation for legislative reform, Bill C-22, Reform of the Divorce Act Respecting Child Custody and Access, was introduced by the former Liberal government, but has been shelved by the new Conservative government. Essentially, Bill C-22 endorsed a “parental responsibility model,” in which the terms “custody” and “access” would be eliminated and the term “parental responsibility” introduced to allow the court to allocate child care-giving responsibilities between the parents. The law would encourage regular interaction between children and both parents, but would not require that parenting responsibilities be divided on a shared or equal basis between parents. The “best interests of the child” would still be subject to judicial discretion.

The promotion of responsible fathering after separation and divorce is one of the stated aims of the Conservative Party’s policies on child custody and access. The Conservatives’ position during the 2006 federal election was to implement the Special Joint Committee’s recommendation that the rights and responsibilities of child-rearing be shared between the parents, unless demonstrated not to be in the

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best interests of the child. The terms “custody” and “access” would be removed from the law and replaced with the term “shared parenting.” This option would utilize a “parenting plan” approach to allocate parental responsibilities, and would legislate a shared parenting presumption in disputed cases, unless not in the best interests of the child.

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## I International Child Custody Policy

A number of jurisdictions are, like Canada, presently considering the revision of their family law statutes, with a particular emphasis on the reform of custody and access legislation. Those chosen for review here are the United States, United Kingdom, France, Sweden and Australia.

### United States

Some U.S. states are well advanced in the reform of their child custody and access laws and policies, as child custody is under state, not federal, jurisdiction. More socially progressive states have advanced new child custody and access laws. At least six states have now enacted some form of legal joint physical custody presumption (substantially equal shared custody or similar language). These include Iowa (“If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent. If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child”), Kansas (“joint physical custody is the first order of preference”), Oklahoma (“the court shall provide substantially equal access to both parents . . . unless the court finds that such shared parenting would be detrimental to the child. The burden of proof that such shared parenting would be detrimental to the child shall be upon the parent requesting sole custody”), Texas (where the Family Code contains a presumption of “joint conservatorship,” which provides a minimum of 42 per cent time with the non-custodial parent and by exercising other parts of Texas statutes, the time allocation may be extended to 50 per cent), Wisconsin (“the court shall presume that joint legal custody is in the best interest of the child”), and Arkansas (“when in the best interests of the child, custody shall be awarded . . . to ensure the frequent and continuing contact of the child with both parents”). The U.S., however, is a study in contrasts in the area of custody and

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access legislation: 20 other states include “frequent and continuing contact with both parents,” or similar language, 2 utilize case law, 3 have only a preference for joint legal custody, 7 presume joint custody when both parents agree, and 13 have no statutes that promote shared parenting.

*Washington State:* in this state’s legislation, the primary tool used to structure post-separation parenting is the “parenting plan.” When parents are unable to agree on a parenting plan and court proceedings are necessary, the court order (called a “parenting order”) is made in the form of a parenting plan. The parenting plan is the vehicle by which “parenting functions” are allocated between the parents, and include parents maintaining a stable, consistent and nurturing relationship with the child, attending to the daily needs of the child, attending to the child’s education, and providing financial support for the child. Since the passage of the *Washington State Parenting Act* in 1987, research studies indicate that, while there appears to be strong policy support for the goals of the act, it does not appear that the act has had a significant impact on the reality of post-separation parenting. For the most part, children continue to live with one parent following divorce and it is that parent who exercises control over significant decisions concerning the child. Litigation rates have not declined. Thus it appears that parenting plans, by themselves, without a shared parenting presumption, are going to have little effect on post-separation family structure or parental conflict levels.

*New York State:* at present, New York State has no statutory language promoting shared parenting and sole custody is the norm. It is, however, at the vanguard of child welfare law reform; with a population as large as that of Canada, it has half the rate of children in government care and half the rate of substantiated child abuse. Currently under consideration is Bill A330, which would “require the court to award custody to both parents in the absence of allegations that shared parenting would be detrimental to the child”; it also establishes an order of preference in awarding custody (with the first preference being joint custody), and “shared parenting” and “parenting plan” are clearly defined. New York is seen as a “battleground state” for family law reform as what happens there is anticipated to have a strong impact on the family law of other states. The bill would establish a clear physical joint custody presumption, with a statement that this is in “the best interests of the child,” and a burden of proof that shared parenting would be detrimental is placed upon a

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parent requesting sole custody. Most important, say proponents, is that the bill recognizes that the alleged primacy of maternal influence in the lives of children is an unbalanced perspective and not in children's best interests, and the bill communicates that both parents are of equal status in the eyes of the law.

*Michigan:* the Bill to Amend the Child Custody Act simply amends the Child Custody Act of 1970 to create a presumption that parents who divorce maintain joint custody of their minor children. Both parents would retain the legal right to authorize medical treatment and have access to school records, and both would have physical custody of their children for alternating and substantially equal periods of time. The legislation makes provision for rebutting the presumption of joint custody in cases where a parent is "unfit, unwilling or unable" to exercise joint physical custody.

*California:* on the other end of the spectrum, although "frequent and continuing contact" for both parents is encouraged in California legislation, this has not reversed the pattern of sole custody awards being made by courts. At this time, California is considering new legislation to extend the relocation rights of custodial parents: "Normal incidences of moving, including, but not limited to, increased distance from the noncustodial parent, change of schools or neighborhoods, or alteration of the custody or visitation schedule, are insufficient in and of themselves to establish detriment or prejudice, and shall not be the basis for an evidentiary hearing regarding the relocation."

*Wisconsin:* AB 400, which recently passed the Wisconsin Assembly, will help safeguard children by preventing relocations. Under this bill, the moving parent will have the burden of proving that prohibiting the move would be harmful to the children's best interests. AB 400 creates a rebuttable presumption that it is in children's best interests to remain in the community in which they have become adjusted.

*North Dakota:* a ballot initiative on shared parenting was approved recently by the Secretary of State to ensure that parents are not denied joint physical custody of their children unless they are termed unfit to raise children. The proposed new law would provide for a presumption of shared parenting in the case of separation or divorce.

*Massachusetts:* in the Massachusetts state ballot in the 2004 U.S. federal election, 85 per cent of voters favoured a non-binding shared parenting statute. Specifically,

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the question was whether voters would ask their state representative to “vote for legislation to create a strong presumption in child custody cases in favour of joint physical and legal custody, so that the court will order that children have equal access to both parents as much as possible, except where there is clear and convincing evidence that one parent is unfit, or that joint custody is not possible due to the fault of one of the parents.”

### United Kingdom

The Children’s Act (1989), which came into effect in 1991, replaced the terms “custody” and “access” with the terms “parental responsibility,” “residence” and “contact.” The central feature of the United Kingdom model of post-separation parenting is the notion of “parental responsibility.” The act replaces the old custody and access order with four types of orders: residence orders, contact orders, specific issues orders, and prohibited steps orders. Essentially, the Children’s Act changes the legal language of divorce.

The act declares that “the welfare of the child is paramount” in family law and the child’s welfare is “best served by maintaining as good a relationship with both parents as possible.” Toward this end, “shared residence should be the common form of order.” Yet there is no presumption of shared parenting or joint physical custody made in the act, and court-determined outcomes, despite the act’s encouragement of the child’s maintaining a relationship with both parents, reflect in practice a maternal preference presumption. Although the act has provided for the *option* of shared parenting, this is not being applied consistently and judicial discretion still leans toward the “tender years” doctrine and sole custody as being in children’s best interests.

As a critical tool in reducing conflict between parents and thereby ensuring better outcomes for children, the Children’s Act stresses the importance of services geared toward parent education in the divorce process; this is referred to by some as “divorce gospel style” (Freeman, 1997). Research indicates that the act has not succeeded in reducing litigation concerning custody and access. Clearly, parent education and language changes in themselves will have limited positive effects.

## France

With respect to children, the principle of gender equality is enshrined in virtually all statutes in France, a country with a civil law tradition. In recent years, France has undertaken a significant reform of its family law. While seeking to consider more effectively the diversity of family situations, the notions of “parental responsibility” and “parental authority” are central in its recent family law reforms which seek to “humanize and pacify divorce proceedings, in order to provide parents with better support and to create conditions for an organization responsible for the consequences of the parents’ separation for the children.”

*Law No. 2002-305* concerning parental authority, introduced in 2002, has been adopted by the French National Assembly. The new legislation clearly seeks to promote the active participation of fathers in the lives of their children, especially after parental separation. The law states, “Parents have more than just responsibilities; they also have a ‘duty of requirement’ in regard to their children, to enable the children to become socialized. Devaluing this duty would be to weaken the meaning of the parental relationship.” In other words, parents’ rights are needed to enable them to carry out their responsibilities successfully. The French Civil Code encourages parents to agree on an “alternating residence” solution and grants the power for the court to impose such a solution. French law does not contain any legal presumption, yet the new law formally recognizes shared parenting as “alternating residence for the child after separation or divorce.” The new law favours this mode of post-separation family organization. Parental authority is exercised jointly and the child resides with both parents on an alternating basis. In the words of the Dekeuwer-Défossez Commission, which concludes that the new legislation avoids one parent’s rights being opposed to the other’s, “Taking the child rather than the parents as the starting point, the text establishes the child’s right to be raised by both parents and to preserve personal relations with each of them.” The new law also applies the principle of joint parenthood in cases of parental relocation of residence. In sum, parental authority and the responsibility of state institutions to respect that authority are key ingredients of this unique and reportedly successful shared parental responsibility approach to child custody after separation and divorce.

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France was also the site of the Langeac Declaration of family rights and equal parenting, signed in July 1999 by parents' group representatives from around the world. The declaration emphasizes that equal parenting laws should not be lengthy, intricate or inaccessible to parents and children.

### Sweden

A distinctive feature of Sweden's *Children and Parents Code* is its emphasis on parents having joint responsibility for their children, and one of the aims of recent amendments to the legislation has been to pave the way for more frequent application of joint custody. The court has the power to order joint custody against the wishes of the parents; the court can decide on joint custody or refuse to dissolve joint custody even though one of the parents may be opposed. Joint custody against the will of one of the parents is precluded if the other parent is subjecting a member of the family to violence, harassment or other abusive treatment. Above all else, the court must take particular account of the child's need for "close and good contact with both parents."

### Australia

In Australia, discussions about joint custody and shared parental responsibility have been at the forefront of proposed family law changes for the past decade. Despite new family law legislation in 1995, modeled largely on the U.K. *Children Act 1989*, it has been recognized that merely cosmetic changes, such as "primary residence" and "parental responsibility" taking the place of "custody," and "contact" replacing "access," are insufficient. The act did not meet its objective of decreasing litigation and conflict in family matters.

Despite reports that cite Australia as a failed example of a shared parenting or joint physical custody presumption, Australia has only recently opted to move toward a true shared parental responsibility approach. The report of the House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story*, was tabled in 2003, and contained the following recommendations: amendment of the Family Law Act to (1) create a clear (rebuttable) presumption of equal shared parental responsibility (except where there is "entrenched" conflict,



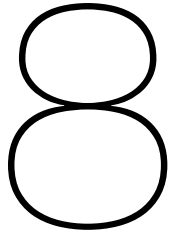
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family violence, substance abuse, or established child abuse); (2) require mediators, counsellors and legal advisers to assist parents to develop a parenting plan; (3) require courts and tribunals first to consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary caregiver; (4) replace the language of “residence” and “contact” with “parenting time;” (5) create a network of Family Relationship Centres across the country to provide alternative dispute resolution services. In response to the report’s recommendations, the Family Law Amendment (Shared Parental Responsibility) Bill 2005 was introduced and underwent final revisions before implementation.

The Family Law Amendment (Shared Parental Responsibility) Bill 2005 was enacted in March, 2006. The law provides a presumption of equal shared parental responsibility for parents, and requires courts to consider equal time in the first instance in parenting disputes after separation and divorce. The bill was designed, along with a proposed national network of Family Relationships Centres, to avoid litigation as the means of arriving at arrangements for the parenting of children after separation. Its principal revision to the former Family Law Act is not only the establishment of shared parental responsibility as a rebuttable presumption, but also a stated recognition that this is in the best interests of children after parental separation and divorce. The main provisions of the new act are: (1) in implementing shared parental responsibility, the court will first consider “equal parenting time” and, if that is not feasible, then “substantial and significant parenting time with both parents” (considerations in this regard include geographical proximity of the parents, parenting capacity for equal time, parental communication capacity, and impact in the child); (2) the “best interests of the child” are comprised of “primary” and “additional considerations”; primary: the child having a meaningful relationship with both parents, and the need to protect the child from physical and psychological harm, abuse or family violence; additional: the child’s expressed views, and the relationship of the child with other persons, including grandparents and other relatives; (3) the obligation to attend family dispute resolution before a parenting order is applied for; (4) exempt are cases where there are reasonable grounds to believe that there has been abuse of the child or family violence.

The new law also requires monitoring of Australian family courts in making shared parenting orders.



## I Child Custody Policy Debates

As reflected in government reports prepared by legal scholars, the Canadian legal community rarely supports shared parenting (Cohen and Gershbnain, 2000), although this lack of support is largely based on outdated assumptions about mothers as primary caregivers, children's well-being after separation being served by sole custody, and joint custody being inappropriate in "high-" litigated cases. Much of the social scientific research, however, has supported socio-legal reform in the direction of joint physical custody, and developments in foreign jurisdictions have favoured shared parental responsibility.

### Problems with the Sole Custody Model

Because of conflicting allegations of abuse in "high-conflict" cases, it is difficult for family court judges to determine, beyond a reasonable doubt, the actual presence of abuse, as is done in criminal court. A major problem is that "family courts" routinely award sole custody on the basis of unproven allegations (Millar and Goldenberg, 2004).

The sole custody model has, surprisingly, come under relatively little scrutiny in Canadian government reports: "It is ironic," writes Joan Kelly (1991), "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). Developmental and relationship theory should have alerted the mental health field to the potential immediate and long-range consequences for the child of only seeing a parent four days each month. And yet until recently, there was no particular challenge to this traditional post-divorce parenting arrangement, despite growing evidence that such post-divorce relationships were not sufficiently nurturing or stabilizing for many children and parents. . . There is evidence that in our well-meaning efforts to save children in the immediate post-separation period from anxiety, confusion, and the normative divorce-engendered conflict, we have

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set the stage in the longer run for the more ominous symptoms of anger, depression, and a deep sense of loss by depriving the child of the opportunity to maintain a full relationship with each parent.”

Herein lies the crux of current child custody and access policy debates. It has somehow come to be regarded as developmentally “correct” to award sole custody to one parent, usually the mother, with twice-monthly weekend access “visits” with the other parent, usually the father. Yet there is overwhelming evidence that such an arrangement disregards children’s physical, psychological and social needs for both parents in their lives.

The focus of current child custody debates is on the contested cases where courts impose a sole custody criterion. The rights-based claims of mothers’ and fathers’ rights groups in this realm have led to an impasse and a state of confusion as to what exactly is “the best interests of children” in divorce (Mason, 1994). Judges have consistently awarded sole custody in contested cases, but their reasons for judgment – their interpretations of “the best interests of the child” standard – vary tremendously (*ibid.*). The high potential of judicial bias in child custody disputes results from the fact that judges are not trained in the finer points of child development and family dynamics (Woodhouse, 1999).

In Canada, as in most U.S. jurisdictions (Mason, 1994), judges have asserted that shared parenting is unworkable in situations where parents cannot cooperate (Department of Justice Canada, 1990). To the degree that a “winner-take-all” sole custody approach is established, the adversarial system polarizes and disconnects the parties in dispute, and the problem of judicial bias in the direction of sole custody or “primary residence” determinations remains unaddressed.

Much of the current child custody debate focuses on whether to leave the present sole custody and adversary system essentially intact and institute a range of reforms within that structure, or to restructure completely the way child custody and access is determined and examine alternatives to sole custody and adversarial resolution. With respect to the former, three approaches have been tried both domestically and internationally: introduce (mandatory) parent education programs; change the legal language to make it appear less adversarial; and add more programs and professional services, such as family law judges and family courts, mediation, and collaborative law.

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The purpose of parent education, or “divorce gospel-style” (Freeman, 1997), is to encourage or mandate parents into divorce education programs, to emphasize the importance of children’s well-being during the divorce transition, and to explain the divorce process. The weakness of such programs, however, is that they have relatively little impact on couples in conflict over the post-separation parenting of their children (Braver *et al.*, 1996); the U.K. experience bears this out. Changing the legal language to make it appear less adversarial has similarly had little effect in jurisdictions such as Australia and the U.K., as well as in Washington State (with its “parenting plan” approach to child custody), where it has been shown that changing language alone does not change people’s behaviour. And more programs and professional services are also not the answer; despite the burgeoning “divorce industry,” the provision of more programs has not reduced inter-parental conflict in divorce (*ibid.*). None of these reforms have lessened the adversarial climate surrounding child custody, nor have they addressed the problem of judicial discretion in an area where judges lack the necessary knowledge of child development and family systems theory to begin to address complex child and family matters.

It is clear that an alternative approach is needed that goes beyond “cosmetic” family law reforms toward fundamental changes in divorce law, policy and practice. Clear rules and guidelines are needed to limit judicial discretion and to lessen the adversarial climate that exacerbates parental conflict in divorce. Four options have been advanced in this regard. First is the primary caregiver presumption, which would give *a priori* preference to the parent who is designated as primary in the child’s life, usually defined as the parent who is providing more of the daily care of the children. This position is based on the traditional role of mother as the sole or primary caretaker of children. Although touted as a gender-neutral standard, the primary caregiver presumption is essentially a sole custody presumption as it assumes the presence of one “primary” parent, which does not reflect the reality of most North American families with children (Warshak, 1992). Although some argue that, in cases of shared care in the two-parent family, two primary caregivers may be recognized by the court, the pattern of sole custody awards in litigated cases remains intact in Canada, despite the emergent trend of shared care in two-parent families. Further, child development research has demonstrated that children form strong and “primary” attachment bonds with both parents, even when

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caregiving is not equally shared; both mothers and fathers are salient individuals in their children's lives, and have a unique role to play in their development. Upon divorce, this is reflected in children's persistent yearning for their absent fathers; a critical factor in children's positive post-divorce adjustment is the maintenance of ongoing and meaningful relationships with both parents. The biggest problem with the primary caretaker presumption, however, is how one determines who is the "primary" parent? What is the basis for distinguishing "primary" versus "secondary" parenting? We cannot simply equate the amount of time a parent spends with the child with that parent's importance in the child's life. As Warshak (1992) asks, is the primary parent the parent who does the most to foster the child's sense of security, the person the child turns to in times of stress, the role that we most often associate with mothers? Or is it the parent who does the most to promote the child's ability to meet demands in the world outside the family, to make independent judgments, the role that we most often associate with fathers? The emergent view among child development theorists is that in the majority of Canadian families, we have no basis for preferring one contribution over the other; both parents have a unique and "primary" contribution to make.

A second child custody law reform option is the "approximation standard," whereby the caregiving status quo prior to separation would prevail in contested cases. This approach sets out a legal expectation that post-separation parenting arrangements reflect pre-separation parenting patterns, an arrangement endorsed by the American Legal Institute. Critics have pointed to the difficulty of establishing the degree of child-care involvement by parents prior to separation, as judges would tend to focus on childcare arrangements in the immediate past, which may result from one parent withholding the child from the other parent to establish a new "status quo." Critics also note that litigation rates would likely not decrease with such a formula. However, to the degree that the approximation standard seeks to maintain stability in children's relationships with their parents, it does have merit, and could serve as a useful guideline for parents seeking to minimize disruption in their children's routines following separation and divorce.

Third, a joint legal custody presumption has been advanced whereby parents would share decision-making responsibility for, but not necessarily physical care of, their children after separation. Feminist scholars (Polikoff, 1982) have pointed to the

inequity and power imbalance that may result in giving one parent decision-making authority over their child (and former spouse) without any corresponding obligation for child care. In fact, this approach is routinely applied as Canadian courts grant sole physical custody with joint decision-making authority in contested cases. Some non-custodial parents have characterized this approach as “joint custody in name only,” as their primary interest is their children’s need for both parents being involved as caregivers in their lives (Kruk, 1993).

The fourth option, shared parental responsibility (rebuttable presumption of joint physical custody), however, would grant both parents equal or shared decision-making authority *and* child-care responsibility. This option appears to be the most viable alternative to the sole custody model, which overcomes the main limitations of the three approaches discussed above.

### Shared Parental Responsibility as a Viable Alternative

It is generally agreed that any reform of child custody law must ensure that children’s basic needs and “best interests” are addressed effectively. This requires an understanding of children’s fundamental needs in the divorce transition, and the development of a corresponding set of parental and societal responsibilities to meet those needs. A new standard of “the best interests of the child” *from the perspective of the child* is needed, particularly with respect to what children have identified as their core needs; they are most affected by parental divorce and thus the real “experts” on the matter. By their own account, three essential elements stand out for children of divorce, as identified by Fabricius (2003) and others: autonomy, to identify their own “best interests” in the divorce transition; being shielded from conflict and violence between their parents; and substantially equal time in their relationships with each of their parents.

Listening to the voices of children themselves (as young adults), we now have clear evidence of a perception of divorce fundamentally different from what most policymakers and legislators have assumed. Most children want to be in the shared physical care of their parents after divorce (Fabricius, 2003; Fabricius and Hall, 2000), and research studies support their stated preferences: children in shared parenting arrangements adjust significantly better than those in sole custody arrangements on

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all general and divorce-specific adjustment measures (Bauserman, 2002). At the same time, western societies are moving toward a more egalitarian distribution of child-care tasks between the genders (Marshall, 2006; Higgins and Duxbury, 2002; Bianchi, 2000).

In addition, fundamental to divorce and child custody law reform is the need to address the problem of family violence and high conflict between parents in the divorce transition. Any new framework for child custody determination should be examined carefully in regard to the degree to which conflict and violence are reduced between parents.

Finally, there is the question of promoting responsible fatherhood involvement. Fathers face significant barriers in maintaining their relationships with their children after separation; from their perspective, their children are removed from their care in the absence of any protection concerns, and many face arrest for even trying to see their own children as non-custodial parents (Kruk, 1993). Many have been forcibly removed from their own homes, which are then confiscated and sold. They face a panoply of other expropriations, including their earnings being tied for years to come with child support burdens that reduce some to penury (*ibid.*; Baskerville, 2007).

The current child custody policy debate in Canada has been framed in a way that has overlooked some key questions, especially from the perspective of parents who are removed from their children's lives via sole custody judgments. Why are parents with no civil or criminal wrongdoing forced to surrender their rights and responsibilities to raise their children? Why do courts discriminate against children and families of separated parents by using the indeterminate "best interests of the child" standard to remove parents from children's lives, as opposed to the clearer "child in need of protection" standard for non-separated parents? On what basis do courts justify treating parents unequally, as "custodial" and "non-custodial" or "residential" and "non-residential" parents? Why are children forced to surrender their need for both parents? Why are social institutions such as the courts undermining, rather than supporting, parents in the fulfillment of their parental responsibilities?

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In debates and discussions about child custody and access, the following points have been largely overlooked in policy discussions:

1. When divorces occur, a father's role often becomes extremely marginalized. Because of the bias and prejudices inherent in the sole custody system, resulting in sole maternal custody in the great majority of litigated cases, children's need for a paternal influence has been overlooked. Fathers are no less "primary" than mothers in their children's lives, and an access-based "visiting" relationship in no way resembles "parenting," which requires routine involvement in the daily tasks of caregiving (Kruk, 1993; Arditti and Prouty, 1999; Kelly, 2000; Kelly and Lamb, 2000).
2. The sole custody system exacerbates conflict, in which the more aggressive and privileged party in a custody litigation holds a distinct advantage. Further, the language used in custody law has created expectations about ownership and rights, and who "wins" and "loses." Most important, the "winner take all" approach, in heightening conflict between former spouses, sometimes leads to tragic outcomes. It is critical that post-divorce living arrangements reduce conflict between parents, and that support services are available at the time of separation to shield children from any destructive parental conflict.
3. Divorces involving severe marital violence are made worse if shared custody is ordered. It is thus important that a legal presumption of joint physical custody be rebuttable. In cases where there has been a criminal conviction or an investigated finding that a child is in need of protection from a parent (although such cases constitute a minority of child custody disputes), a judge clearly should have the authority to make a child custody determination, including sole custody. High-conflict cases not involving such violence, however, may lead to first-time violence subsequent to a sole custody order. Within the adversarial sole custody system, fully half of severe violence episodes occur after separation. For the majority of "high-conflict" cases, shared parenting is preventive of violence, particularly when ongoing post-divorce therapeutic support is available to parents.



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4. It is now increasingly recognized that withholding a fit and loving parent from the life of a child is itself a form of child abuse. Such parental alienation is common in sole custody arrangements, but it is not clear whether shared parenting would reduce such incidents. Therefore it is important that there be some form of enforcement mechanism available to deal with breaches to shared parenting orders, in the absence of established family violence or a finding that a child is in need of protection.

These points may be added to the guidelines for child custody law reform proposed by the Special Joint Committee on Child Custody and Access, the Federal/Provincial/Territorial Family Law Committee, and the Child-centred Family Justice Strategy discussed earlier. Any effective law reform effort will have to incorporate these guidelines as the foundation for a just and equitable approach to child custody in Canada.

# 9

## I A “Four Pillar” Approach to Child Custody and Access Determination in Canada

This section will review the guidelines outlined in the Special Joint Committee on Child Custody and Access report, the Federal/Provincial/Territorial Family Law Committee report, and the Child-centred Family Justice Strategy. It will also examine the implications of current research into child and family outcomes and preferences, parenting patterns, and family violence and child abuse on post-separation child custody and access. A new approach to child custody and access determination, based on established principles and current research findings and beyond the limitations of existing options, will be proposed.

In essence, the stated objectives of proposed Canadian legislative reform to child custody and access are to promote meaningful relationships between children and their parents following separation and divorce, encourage parental cooperation, and reduce parental conflict and litigation. Further, legislative reform should encourage parents to restructure their relationships in a way that promotes the best interests of children; that is, to focus their attention on the needs of their children during the separation and divorce transition. At the same time, reform must ensure that children are protected from family violence and abuse. Although a “one size fits all” model of child custody determination is ill-advised, clarity and predictability of outcome are important, as judicial discretion regarding determination of the “best interests of the child” has proven to be highly problematic. Legislation must provide clear guidelines for custody determination.

In our view, an additional key question regarding the present approach to child custody in Canada should be posed in any law reform effort, and that is, “Is the removal of a fit and loving parent from the life of a child, in the absence of an investigated child protection order, a form of systemic abuse, if indeed children need both their mothers and fathers as active parents in their lives following parental separation?”

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Finally, in light of the diversity of parenting structures and patterns in Canada, a “one size fits all” approach, whether it be sole custody or shared parenting, will not meet the needs of all children and families, and has the potential to do harm. The law must allow for flexibility to address the different circumstances of children and families. Cases of established child abuse, which include children witnessing the abuse of a parent, it is generally agreed, require a court determination of custody as well as criminal proceedings. Cases where family violence and child abuse are not legally established, where there is no finding that a child is in need of protection from a parent, do lend themselves to a shared parenting arrangement, either parallel or shared parenting (Jaffe, Crooks, and Bala, 2006), as children are best supported when parents assume shared responsibility and when social institutions such as the courts support parents in the fulfillment of their parental obligations.

The following “four pillar” framework is offered as a socio-legal policy solution to the problems resulting from adversary-based sole custody determination, father absence in children’s lives, and parental alienation.

■ TABLE 1

<b>A FOUR-PILLAR APPROACH TO CHILD CUSTODY AND ACCESS</b>	
1.	<b>HARM REDUCTION:</b> Legal Presumption of Shared Parental Responsibility (Rebuttable Presumption of Joint Physical Custody in Family Law)
2.	<b>TREATMENT:</b> Parenting Plans, Mediation, and Support/Intervention in High Conflict Cases
3.	<b>PREVENTION:</b> Shared Parenting Public Education
4.	<b>ENFORCEMENT:</b> Judicial Determination in Cases of Established Abuse; Enforcement of Shared Parental Responsibility Orders

## PILLAR 1: HARM REDUCTION

### LEGAL PRESUMPTION OF SHARED PARENTAL RESPONSIBILITY (REBUTTABLE PRESUMPTION OF JOINT PHYSICAL CUSTODY IN FAMILY LAW)

The first pillar establishes a legal expectation that existing parent-child relationships will continue after separation; that is, in the interest of stability in children's relationships with their parents, the post-divorce parenting arrangements will reflect pre-divorce parenting arrangements in regard to the relative amount of time each parent spends with the children. In cases of dispute, however, shared parenting, defined as children spending equal time with each of their parents, would be the legal presumption in the absence of established family violence or child abuse. This will provide judges with a clear guideline and will avoid the dilemma of judges adjudicating children's "best interests" in the absence of expertise in this area.

This pillar is intended to maximize the involvement of both parents in their children's lives after separation. Shared parental responsibility results in a more equal division of parenting time and effort, and gives each parent a respite from full-time child rearing, which is particularly important when, as is the case with most Canadian families, both parents work full-time. It is also intended to maximize parental cooperation and reduce conflict and to prevent serious family violence and child abuse after parental separation. Finally, it is intended to reduce child poverty after divorce (Moyer, 2004).

A legal presumption of shared parental responsibility establishes an expectation that the former partners are of equal status before the law in regard to their parental rights and responsibilities, and conveys to children the message that their parents are of equal value as parents. At the same time, in the interests of stability and continuity in children's relationships with their parents, preexisting parent-child relationships would be expected to continue after separation, at least in the transition period. This would ensure that there is no sharp discontinuity of parent-child relationships, as exists at present in most sole custody awards. To the extent that "history of care" and "cultural, linguistic, religious and spiritual upbringing and heritage" are cited as important vis-à-vis children's needs for roots and security in maintaining existing relationships, the idea of the immutability of parent-child relationships is important to convey to divorcing parents. The adjudicative role of the courts would be reduced

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with the legal expectation that post-separation parenting arrangements reflect (in proportionate time) pre-separation parenting patterns. If the courts were to become involved, they would apply the shared parental responsibility presumption and not get drawn into investigations regarding the proportionate amount of time each parent spent with the children prior to separation.

Although it is a blunt instrument, and “children spending equal time with each of their parents” may not reflect *de facto* the existing arrangements in the pre-separation household, a rebuttable joint physical custody presumption would divert parents from a destructive court battle over their children’s care. Shared parental responsibility is also in keeping with current caregiving patterns, as the majority of mothers and fathers are now sharing responsibility for child care in two-parent families.

A legal presumption of shared parental responsibility is a much more individualized approach than the “one size fits all” formula of sole custody, a blunt instrument which removes a parent from the life of a child in contested cases. Within a rebuttable joint custody presumption, established cases of family violence are seen to necessitate a different approach, one in which a judicial determination of sole custody is the likely outcome. Second, parents are free to make whatever arrangements they wish on their own and, if they cannot decide, an individualized approach in which post-separation parenting approximating as closely as possible the existing arrangements in the two-parent family is recommended, in the interest of stability for children. Third, it is only in those cases where both parents present as primary caregivers and cannot agree on a suitable shared parenting plan where equal shared parenting would apply, in the interests of decreasing conflict and ensuring that each parent remains involved.

A legal presumption of shared parental responsibility would exclude cases of family violence established in criminal court, and cases of child abuse established via an investigated finding that a child is in need of protection. Family court judges, not trained in the finer points of child development and family dynamics, relying at times on imperfect third party assessments, are susceptible to making mistakes in determining the presence of violence and abuse, given the lax rules applied to fact-finding and perjury in family disputes (Bala, 2000). Determining whether or not violence, a criminal matter, has been perpetrated, and by whom, is a criminal

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matter and not an appropriate role for the family court. An allegation of abuse is not equivalent to a criminal conviction of abuse, or the result of an investigation by trained child protection authorities. In the absence of a criminal conviction or child protection finding, an equal parenting presumption ensures that children will have equal time with each parent, as opposed to being in the exclusive care and control of an abusive parent who has mounted the stronger case in a contested custody proceeding. In the family realm, where many parties see themselves (and their children) to have been “abused” by the other, “victim politics” are commonplace, and given no criminal conviction or a finding of “child in need of protection,” this may be the most protective option for children. Detection of abuse is a difficult matter, as at one extreme a significant proportion of family violence situations are hidden to state authorities, while at the other extreme false allegations are made. Where violence and abuse are alleged, criminal court proceedings as well as a comprehensive child welfare assessment must precede any family court judgment on matters related to child custody (see Pillar 4).

## PILLAR 2: TREATMENT

### PARENTING PLANS, MEDIATION, AND SUPPORT/INTERVENTION IN HIGH-CONFLICT CASES

Non-violent high-conflict couples can be helped, with therapeutic intervention and the passage of time, to achieve more amicable parenting arrangements (Jaffe *et al.*, 2006).

The second pillar of our model would set up a legal expectation that parents jointly develop a parenting plan before any court hearing is held on matters related to post-separation parenting. The court’s role would then be to ratify the negotiated plan. Through direct negotiation, parent education programs, court-based or independent mediation, or lawyer negotiation, a parenting plan that outlines the parental responsibilities that will meet the needs of their children would be developed before any court hearing is held. This does not require parents to negotiate face to face, but it is aimed at helping them negotiate in the future, as any post-separation living arrangement, whether shared equally or unequally, requires some form of ongoing communication. In the interest of parental autonomy, parents are deemed to have

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the capacity to resolve their own dispute, rather than surrendering decision-making regarding parenting arrangements to the court system.

Children's needs for protection from parental conflict are addressed by this legal expectation, as children's needs become a means of connecting the parents in a positive direction at a time when conflict has divided them. Parents in conflict would be steered toward an "introduction to mediation" session.

Mediation, as an alternative method of dispute resolution, has considerable (and as yet largely untapped) potential in establishing shared parenting as the norm, rather than the exception, for divorced families. In the majority of non-violent "high-conflict" cases, both parents are capable and loving caregivers and have at least the potential to minimize their conflict and cooperate with respect to their parenting responsibilities within a shared parenting framework.

With a legal presumption of shared parental responsibility as the cornerstone, mediation could become the instrument whereby parents could be assisted in the development of a child-focused parenting plan. Given the lack of information available to divorcing families about what to do, what to expect, and the services which might be available to them (Walker, 1993), mediators could make such information available prior to instituting any dispute resolution process. Parents who are oriented to the divorce process and the impact of divorce on family members are better prepared for mediation, and better able to keep the needs of their children at the forefront of their negotiations. Divorce education programs also offer a means to expose divorcing populations to mediation as an alternative mechanism of dispute resolution (Braver *et al.*, 1996). Further, an educative approach should be an integral part of the mediation process, with a primary focus on children's needs during and after the divorce process. Family mediators with expertise in the expected effects of divorce on children and parents can be instrumental in helping parents to recognize the potential psychological, social and economic consequences of divorce and, on that foundation, promote parenting plans conducive to children maintaining meaningful, positive post-divorce relationships.

Parent education regarding children's needs and interests during and after the divorce transition, followed by a therapeutic approach to divorce mediation, offers a highly effective and efficient means of facilitating the development of cooperative

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shared parenting plans. Within such an approach, parent education may be used to introduce the option of shared parenting as a viable alternative, and to reduce parents' anxiety about this new living arrangement. Mediation would then help parents work through the development of the parenting plan, and implementing the plan in as cooperative a manner as possible. The process consists of four essential elements of a parent education program, and four phases of mediation.



■ TABLE 2

**A SHARED PARENTAL RESPONSIBILITY FRAMEWORK FOR  
PARENT EDUCATION AND THERAPEUTIC FAMILY MEDIATION**

***Premediation: Parent Education***

1. *Orientation to the divorce process and available services: stages of divorce/grieving; alternate dispute resolution processes (including mediation); post-divorce counselling services and other community resources;*
2. *Children's needs and "best interests" in divorce;*
3. *Post-divorce shared parenting alternatives;*
4. *Communication, negotiation and problem-solving skills.*

***Therapeutic Family Mediation***

1. *Assessment to determine whether the parents are both ready to enter into therapeutic mediation, and whether shared parenting is indicated;*
2. *Exploration of shared parenting options and actively promoting a parenting plan that meets the children's needs;*
3. *Facilitation of negotiations toward the development of an individualized cooperative parenting plan, which outlines specific living arrangements, schedules, roles and responsibilities;*
4. *Continuing support/troubleshooting during the implementation of the parenting plan.*

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Once a parenting plan is developed, parents may need the services of a mediator to assist in their ongoing parenting negotiations; they should be urged to return for mediation beyond a trial period, as future issues develop or past difficulties re-emerge.

Social institutional support for parents in the implementation of a shared parenting plan is critical, particularly for “high-conflict” cases where children may be caught in the middle of disputes between parents. There are a number of existing models of therapeutic post-divorce support for such high-conflict families, including Ramsey’s Wingspread Conference Report (2001), Garber’s Direct Co-parenting Intervention Model (2004), and Lebow’s Integrative Family Therapy Model (2003).

Of all the strategies that can be used by divorcing parents to reduce the harmful effects of divorce on their children, most important is the development and maintenance of a cooperative co-parenting relationship (Kruk, 1993; Garber, 2004; Lebow, 2003; Ramsey, 2001). Children’s adjustment post-divorce in a long-term shared parenting arrangement is facilitated by a meaningful routine relationship with each parent; an absence of hostile comments about the other parent; consistent, safe, structured, and predictable caregiving environments without parenting disruptions; healthy, caring, low-conflict relationships with each parent; and parents’ emotional health and well being (*ibid.*). Any model of long-term support for high-conflict divorced families should focus on these factors to produce positive outcomes for children and their parents.

It is particularly important that hostility between parents be minimized following divorce. Currently, in cases where there is ongoing litigation between parents, children are at greater risk of emotional damage than in less contentious circumstances; in many cases, divorce does not end marital conflict, but exacerbates it. It is important that children see the good qualities in both of their parents, and that parents work toward the development of positive relationships with each other. An effective support system is instrumental in providing parents with the necessary skills to deal with co-parenting challenges: “the central tenets of this system should be to reduce conflict, assure physical security, provide adequate support services to reduce harm to children and to enable the family to manage its own affairs” (Lebow, 2003). In order for such a system to be successful, allied professionals need to be

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supportive of a model that helps resolve family disputes and focuses on the welfare of the children (*ibid.*).

Six key components of a longer-term support model for high-conflict parents have been identified:

1. Whereas education on the impact of divorce on children both in the short- and long-term should be provided to parents prior to the development of a parenting plan (Kruk, 1993; Lebow, 2003), reinforcement and enhancement of pre-divorce education should take place in a structured format post-divorce (Kruk, 1993).
2. In addition to negotiating a workable parenting plan that meets the needs of children and delineates the responsibilities of parents, monitoring the consistency of the caregiving environments to the parenting plan post-divorce is critical (Garber, 2004).
3. Although Garber (2004) argues that direct contact between highly conflicted parents may be unnecessary in shared parenting, as parents can share parenting responsibilities within a “parallel parenting” arrangement, it seems clear that some form of intervention to mend the relationship between parents would contribute to the long-term success of the shared parenting arrangement (Lebow, 2003). This intervention would focus on the development of positive interactions between family members, enhancing communication skills, developing a range of problem-solving skills, and enhancing non-aggressive negotiation skills.
4. Long-term counselling should be made available to children alone and to each parent and each child together during and after separation (Lebow, 2003).
5. Long-term success of shared parenting is achieved through emotional healing post-divorce (Lebow, 2003). Measures should be taken to allow each member of the family to gain an increased understanding and acceptance of the separation as time goes by.

6. Finally, regular reviews of the parenting plan at pre-specified periods are useful during the implementation of the plan (Kruk, 1993). This review should take into consideration developmental changes in the children as well as structural changes in the family such as the introduction of a new partner and step-parent, relocation, and children's changing developmental needs. The review should be conducted by a family mediator who can re-open the parenting plan for revision or modification as needed.

## PILLAR 3: PREVENTION

### SHARED PARENTING EDUCATION

Shared parenting education within the high school system, in marriage preparation courses, and upon divorce is essential to a much-needed program of parent education and support. Public education about various models of shared parenting is especially important, including models for "high-conflict" couples. Such programs are being established, with an emphasis on including fathers who have not traditionally been engaged by parenting support programs and services.

Shared parenting education should also involve the judiciary, as the effects of changes in family law legislation on the actual practices of judges are uncertain, although there is evidence that the incidence of shared custody increases and sole maternal custody decreases after statutory changes that permit or encourage joint physical custody (Moyer, 2004). The extent to which legislative reform can bring about the desired result will depend largely on the attitudes of the judiciary as well as legal practitioners. Assumptions about shared parenting being unworkable in cases of disputed custody, and sole custody being in children's best interests in these cases, should be challenged, and stereotypes about disputing parents addressed.

## PILLAR 4: ENFORCEMENT

JUDICIAL DETERMINATION IN CASES OF ESTABLISHED ABUSE;  
ENFORCEMENT OF SHARED PARENTAL RESPONSIBILITY ORDERS

The final pillar addresses directly the question of violence and abuse in family relationships, and enables sanctions to be imposed where there is non-compliance or repeated breaches of orders.

When it comes to questions of family violence, children's safety and well-being are of greatest concern. At the same time, it is important that innocence is presumed unless allegations are proved beyond a reasonable doubt. Children's safety is best assured by addressing family violence as a criminal matter and child abuse as a child protection issue. This is not, however, the general practice of family courts in Canada, which often proceed as if alleged abuse has occurred even when not proved in criminal court, and in the absence of a child protection investigation (Jaffe *et al.*, 2006).

A rebuttable presumption of shared parental responsibility means that proven cases of family violence would be exempt, and those cases involving either a criminal conviction, such as assault, in a matter directly related to the parenting of the children, or a finding that a child is in need of protection from a parent by a statutory child welfare authority, would be followed by judicial determination of child custody. It may be appropriate in such cases, argue Jaffe *et al.* (2006), for one or both parents to have limited or no contact with the children because of potential harm.

In child custody situations in which assault is alleged, a thorough, informed and expeditious comprehensive child welfare assessment is required. The criminal prosecution of family members alleged to have been violent toward any other member of the family would hold accountable all perpetrators of violence, as well as those who are found to allege abuse falsely. The family court would then retain its traditional role in the determination of custody. As Jaffe *et al.* (2006) highlight, in the context of family violence the court may identify specific goals for the perpetrator of violence to achieve (with monitoring) before progressing with the establishment of a parenting plan. Cases that would benefit from diversion to counselling could be referred to that arena.

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The use of family courts as “quasi-criminal courts” that do not have the resources to apply due process when abuse allegations are made leaves judges susceptible to making wrong decisions, leading to potentially greater harm to children. Women’s advocates have long argued that the adversarial system does not protect abused women adequately, and men’s advocates are beginning to identify the ineffectiveness of the courts in dealing with the abuse of men. Detection of genuine abuse cases is a critical yet difficult matter, and strengthening current child protection and criminal prosecution responses to these cases will require refining our ability to discern abuse where it exists, as well as dealing effectively with unproven allegations.

To the degree that the adversarial sole custody system disregards children’s need for both parents in their lives, it exacerbates the negative consequences of divorce for children not exposed to family violence or abuse. Children value their connection with their parents, and if one biological parent is denigrated, so is the child. The loss of a loving parent through divorce has devastating consequences for children’s self-concept. Children, who are the innocent victims of the “custody wars” between parents, and of the social institutions and policies that exacerbate the conflict, are a highly vulnerable and overlooked population. In the words of writer Jonathan Kozol (1995), “there is nothing predatory in these children; they know that the world does not much like them and they try hard to be good . . .”

When shared parenting arrangements are legally ordered, in which children spend at least 40 per cent of their time with each parent, and a parent refuses to abide by the order, disrupting the other parent’s time with the children, enforcement measures may be required. Wherever possible, however, mediation should be encouraged in cases where shared parenting orders are breached. Models such as Manitoba’s access assistance program, piloted from 1989 to 1993 to facilitate the exercise of access, could be modified for use in dealing with shared parenting orders. It is expected, however, that breaches are less likely when both parents have an active role to play in children’s lives within a shared custody arrangement.

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When enforcement measures are necessary, solutions may involve reduction or loss of parenting time, or the following sanctions:

- a requirement that a parent comply with “make-up” contact if contact has been missed through a breach of an order;
- the power to award compensation for reasonable expenses incurred due to a breach of an order;
- legal costs against the party that has breached the order;
- discretion to impose a bond for all breaches of orders.

# 10 | Specific Challenges and Recommendations

## Post-traumatic Stress

Children and parents who have undergone abuse, including forced separation from each other in the absence of abuse, are subject to post-traumatic stress, and reunification efforts should be undertaken. Any reunification program subsequent to prolonged absence should be undertaken only with great sensitivity, especially when parental alienation is a factor. The importance of regarding both parents as equally valued in the child's eyes is of utmost importance.

## Child Support

Although child support is not the focus of this paper, it is an essential need of children and a responsibility of parents. Child custody and access are closely related to child support and family maintenance.

The economic independence of parents is a goal that proponents of equal pay for work of equal value, and those challenging occupational segregation and wage differentials, have advanced. Such a goal is highly compatible with a shared parental responsibility approach to child custody. Shared parental responsibility for both childcare and child support, in the context of both parents working outside the home while actively parenting, is an important principle to uphold. Both parenting and paid work should be recognized as "work" of equal value.

Current Federal Child Support Guidelines have been structured around the existing regime of sole custody or primary residence with one parent, in which the calculation of child support obligations is based on the income of the non-custodial parent. The guidelines allow for a deviation from the specified amounts in the event of shared custody; that is, when a child lives with each parent at least 40 per cent



of the time. A shared parenting responsibility framework would mean that this exception to the guidelines would become the norm for parenting arrangements, which would necessitate a modification of the guidelines. The guidelines would need to take both parents' incomes into account, and would have to be based on a formula different from that which currently exists.

Although the economic consequences of divorce for all family members are devastating, the recent finding that the standard of living of non-custodial fathers falls below that of custodial mothers (Braver and Stockberger, 2005) is largely unrecognized, and this is a cause for concern, as child support guidelines are based not only on a sole custody framework but also on the feminization of poverty thesis. New child support guidelines within a shared parenting approach should aim toward equalizing the standard of living of both households. In addition, greater attention should be drawn to the general lack of government financial support for parenting itself, and the problem of wage differentials between the genders.

## False or Exaggerated Allegations, and False Denials

It is not uncommon for spouses in high-conflict separations to make false or exaggerated allegations of abuse, and false denials are equally a problem. Allegations of parental abuse or neglect of children should be investigated in a timely manner, and allegations of family violence dealt with as a criminal matter in criminal court.

When an allegation of abuse is made and an acquittal results in criminal court, this should be binding on a judge in any subsequent family law proceeding. If an accused is convicted in a criminal trial, however, the judge in a family law trial must take the criminal conviction as conclusive evidence that the abuse in question occurred, and act accordingly.

The outright suspension of parental involvement in a child's life must only be done in the case of established child abuse and, even then, reestablishment of a positive parent-child relationship must remain a goal.

## Civil Restraining Orders and Access Supervision

Civil restraining orders to prohibit parents from contacting a spouse should not be used to prevent parental contact with a child in the absence of a criminal conviction or a finding that a child is in need of protection. Such orders made in the absence of established family violence or child abuse are likely to have serious effects on children's well-being. Access supervision, in the absence of established abuse, is equally problematic.

## Abduction and Parental Alienation

The abduction of a child from a parent's life is a particularly egregious form of abuse. Responsible parenting involves respecting the other parent's role in the child's life, and any form of denigration of a former partner and co-parent, the most extreme of which is abduction, is harmful to children, whose connection to each parent must be respected. However, the position that, "if there is a reasonable possibility of abduction, this may be grounds for supervising or denying access" (Jaffe, 2006) is contrary to the presumption of innocence, and undermines co-parenting, and is therefore unsupportable.

Parental alienation, which is more common than is often assumed, is the "programming" of a child by one parent to denigrate the other parent. It is a sign of an inability to separate from the couple conflict and focus on the needs of the child. Alienating parents are themselves emotionally fragile, often enmeshed with the child, with a "sense of entitlement, needing control, knowing only how to take" (Richardson, 2006). Similar sanctions to those in family violence cases should apply in these instances, as poisoned minds and instilled hatred toward a parent is a form of abuse of children.

When children grow up in an atmosphere of parental alienation, their primary role model is a maladaptive, dysfunctional parent. Shared parenting is clearly preferable to sole custody in these cases, as children have equal exposure to a healthier parental influence in their lives.

## Unrepresented Litigants

Many parents are caught between legal aid criteria and having lost financial resources to the adversarial system. They are thus unrepresented, and unable to get fair hearings in court. This affects a disproportionate number of fathers in Canada. Parents exposed to family violence are especially vulnerable without legal representation.

## Public Awareness and Support

A large hurdle for fathers and proponents of child custody law reform is garnering public and political attention and support to deal effectively with the social problems of fatherlessness, parental alienation and diminished father involvement after parental separation and divorce. These problems need to be made more visible, and constructive solutions advanced.

Engaging the legal system and professional service providers in dealing with these issues is another challenge. A constructive role for these professionals needs to be advanced if family law is to remove itself from the adversarial arena in cases without violence or abuse.

Finally, engaging fathers themselves remains a challenge, as clinical and research literature has described the lack of “fit” between fathers and therapeutic agents as emanating from two sources: the characteristics of men and fathers themselves (their resistance to counselling and therapy), and aspects of the therapeutic process (which have failed to engage fathers successfully) (Forster, 1987). Patterns of traditional gender-role socialization directing men toward self-sufficiency and control, independent problem-solving and emotional restraint have largely worked against fathers being able to acknowledge personal difficulties and request help. A fear of self-disclosure and a feeling of disloyalty to one’s family in exposing family problems are not uncommon; a fear of losing control over one’s life and the need to present an image of control or a “facade of coping” in the form of exterior calm, strength, and rationality, despite considerable inner turmoil, characterize many fathers. Professional service providers do not always consider such psychological obstacles to therapy and thus do not address fathers’ unique needs. The research on separated and divorced fathers is clear about their most pressing need: their

continued meaningful involvement with their children, as active parents. The lack of recognition of this primary need is the main reason for therapists' lack of success in engaging divorced fathers (*ibid.*).

## Six Key Policy Recommendations

Errors of theory lead to potentially life-threatening errors of intervention strategy and social policy. Given the current harms attendant on divorce for children and families, including depression and suicide rates, and especially the heightened probability of family violence in adversarial sole custody proceedings, a more equitable and safe alternative to sole custody is needed. Shared parental responsibility is a viable option for both cooperative and "high-conflict" parents, with sole custody reserved for actual, established cases of family violence and child abuse.

The four-pillar approach to child custody and access determination is offered as a means to achieve the goal of shared parental responsibility in contested custody cases. The following are specific recommendations for Canadian child custody law reform that flow from this new proposed framework:

- 1. As Canada lags behind other countries in parental involvement levels, policy recognition of the fact that children need both parents and that parents require social supports to address this need of children is urgently needed. Shared parental responsibility before and after parental separation is a core element of a broader campaign to promote active and responsible father involvement, via direct incentives for parents to spend more time with their children before and after separation and divorce.**
- 2. Policy should recognize the fact that equal rights, privileges and responsibilities for mothers and fathers as parents are needed in divorce legislation to promote children's adjustment to the consequences of divorce and overall well-being.**

3. **As post-divorce shared parenting is becoming established as the norm in Canada in non-litigated cases, a presumption of equal shared parenting responsibility should be established as a legal foundation for litigated cases, rebuttable only in cases of established violence. Only in the case of established family violence or substantiated abuse, with a finding that a child is in need of protection from a parent or parents, is a judicial determination of sole custody warranted.**
4. **When abuse allegations are made, an immediate and thorough investigation of the allegations must be undertaken by a competent child welfare authority. Child exposure to spousal violence should be a legal basis for finding a child in need of protection. Allegations of family violence should be part of a criminal and child protection process, not left to be settled in family court. The family court should not have to resolve conflicting criminal allegations, as litigants are entitled to more than “proof on the balance of probabilities” when their relationship with their children is at stake.**
5. **Parent education and therapeutic family mediation services should focus on the development of parenting plans and provide post-separation support for co-parenting, but these should be voluntary. A mandatory introduction to mediation session should be considered only in cases where violence and abuse are not a factor.**
6. **Enforcement measures may need to be used to ensure compliance with shared parenting orders, only after mediation efforts have been unsuccessful or support services refused. In the presence of a finding that the child is in need of protection from a parent or parents, enforcement measures should be used to ensure compliance with child protection orders.**

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