EQUAL PARENTING INTERNATIONAL INNOVATIONS: EVALUATING MYTHS AND STEREOTYPES

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Equal Shared Parenting (ESP) initiatives are gaining traction around the world. In the USA, several states have adopted some form of shared parenting with Kentucky in 2018 being the first to adopt a rebuttable presumption of equal shared parenting. In Canada and in other countries, variants of shared parenting are becoming increasingly accepted in practice. However, opposition from lawyers and others persists. The authors present the arguments both against and for a rebuttable presumption for ESP. They examine the social science consensus. Is ESP simply a "fathers' rights" issue or should the ESP model merit consideration along broader social and legislative parameters? Should there be a statutory rebuttable presumption of ESP?

***Keywords**: shared parenting, rebuttable presumption, arguments, prevalence*

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1.0 INTRODUCTION

Various permutations of Shared Parenting (also referred to in some quarters as "Equal Parenting" or even "Equal Shared Parenting") have been passionately debated for over 30 years in various forms - scientifically, legislatively, politically, in courts, editorially, rhetorically, polemically, ideologically… and sometimes rudely.[1] A web search under "shared parenting" illustrates the interest in this topic: 488,000 Google hits (523,000 in Bing); 9,740 in Google Scholar, and 4,050 in Google News[2]. A narrower search for the arguments and counter arguments for shared parenting resulted in 154,000 hits[3]. We endeavor to present a summary of the state of Shared Parenting (and its various iterations, such as ESP) addressing critical analysis of arguments and issues pro and con, current scientific consensus, international trends, and public reaction to the concept.

We place reliance on existing summaries, meta-analyses, and aggregated data sources supplemented by general and academic web searches.

2.0 SHARED PARENTING -TERMINOLOGY

"Shared parenting" can have multiple meanings and can encompass multiple names with different nuances - e.g.: joint legal and physical custody, joint physical custody, shared residence, shared care, co-parenting, alternating residency, equal shared parenting and equal parenting. Using traditional custody terminology, shared parenting generally refers to significant shared legal

[1] See discussion below re ethics.

[2] Search performed 2019-01-22. Google News search performed with "Any Time" duration span which is limited to the prior 10 years approximately and excludes blogs.

[3] Search performed 2019-01-22 using the search term: "shared parenting" (myths|facts|stereotypes|pro|con|argument|"counter-argument")

(parenting responsibility and decision-making) and physical custody (parenting time). 35% seems to be the current minimum threshold to meet the various definitions.

We extend polite deference to those who may believe that the inclusion of the word "shared" might tend to mislead. Some might argue that using the term "ESP" itself engenders confusion, given the wide-ranging literature that often uses the term "shared parenting" without implying a rebuttable presumption in favour of the concept or even equal parenting time. Those who advocate for "Shared Parenting" arrangements may be offended by the phrase, "Equal Shared Parenting", and the authors' perceived conflating of the two related but not identical concepts. "Equal Shared Parenting" tends to go hand in hand with the "rebuttable presumption" argument; those who oppose a rebuttable presumption for ESP may very well be in favour of voluntary "Shared Parenting" arrangements.

No less a personage than Prof. Rollie Thompson[4] bemoaned the lack of clarity in the terminology. At the outset of his important 2013 paper (Thompson, 2013, p. 1), he bemoaned that "even our language of shared parenting is confused and confusing". Prof. Thompson's first heading also says it all: "Language: The Confused and Confusing Lingo of Shared Parenting". He writes:

> One of the major barriers to intelligent discussion about shared parenting has been the very "language" we use. We all think we know what we mean by our use of various terms, but there is much confusion across countries, jurisdictions, social scientists, law professors, lawyers and even judges operating within the same building. (2013, p. 1)

He then proceeds to endeavour to define the following terms: Custody, Joint Custody, Sole Custody, Access, Visitation, Joint Legal Custody, Joint Physical Custody, Shared Custody, Equal Shared Parenting (Hey! That was our term!), Shared Parenting, Parallel Parenting, and Nesting Orders (which he equates with "equal shared parenting").

He argues that Joint Custody should equate to Joint Legal Custody, ie. joint decision-making. He then explains that:

> "Joint physical custody" implies substantially shared care of a child by both parents, as distinct from "joint legal custody". (2013, p. 3)

"Equal Shared Parenting" he seems to applaud as:

> "a term which has concrete meaning, unlike some other custody terms. It means "equal time" shared parenting, however scheduled. … Implicit in the term "equal shared parenting" would be an order of joint legal custody, under which time is shared equally. Implicit, because a commitment to equal care will almost always involve a commitment to joint and equal decision-making too. (2013, p. 3)

[4] Prof. Thompson is one of the architects of Canada's *Child Support Guidelines*, editor of the *Canadian Family Law Quarterly* and editor of the *Reports of Family Law*, and a frequent presenter to judicial training courses.

Prof. Thompson clarifies that his use of "joint custody" means "joint legal custody". "Shared custody" will mean residential time of at least 40%, while "shared parenting" will refer to "a wider range of shared time arrangements, with no need to define a minimum threshold." I postulate that Prof. Thompson would likely agree that his definitions are somewhat arbitrary. The authors of this paper accept Prof. Thompson's definitional approach. He would presumably acknowledge that there are other ways of defining the terminology.[5] How one defines the terms will naturally have some influence on how the discussion is framed.

Another group of authors that includes Prof. Nick Bala examine the Ontario case law and the social science research (Birnbaum et al, 2016). They sensibly write as follows under their part 2 – "The Complex Language of Shared Parenting":

> Defining shared parenting is challenging from both a legal and social perspective, and even more so, when attempting to differentiate the real from the perceived differences and benefits that accrue to children from a joint legal custody or shared residential care arrangement. Professionals, courts and researchers have not been consistent in their use of terminology related to "shared parenting:" the term shared parenting can cover a range of different arrangements from equal time with joint decision-making on all issues, to an arrangement with primary residence with one parent limited time with the other and a complete division of decision-making in a parallel parenting arrangement necessitated by high conflict. Adding to the complexity, is that sometimes different terminology is used for similar arrangements (Bauserman, 2002; Buchanan & Jahromi, 2008; Fehlberg et al., 2011). [Authors' emphasis added] (2016, p. 2)
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> …
>
> We use the term "shared custody" (or "joint physical custody") as defined by Canada's *Child Support Guidelines*, as at least 40% of the time with each parent. We use the term "shared parenting" as including both shared custody and cases where there is joint legal custody or joint decision-making responsibility, as distinguished from cases of sole custody. Admittedly, this makes shared parenting a somewhat fuzzy concept, with no clear minimum time requirement, and the possibility that sole custody arrangements with generous access may be very similar to some joint custody arrangements. It does, however, allow for analysis of cases in a way that recognizes the importance of legal terminology and the psychological and social significance of use of terms like "joint legal custody." [Authors' emphasis added]

In Canada the use of the prejudicial and value laden terms of "custody" and "access" are almost a phenomenon of the past. Many lawyers for years now have avoided these terms, preferring such

[5] In a 2018 article (apparently written in 2014), one author quotes approvingly from Prof. Thompson's definitions and then extends his definitions somewhat by defining the situation that she examines as "equal time-sharing or equal parenting time". She equates this with "substantially equal splitting of time between two parents": (See Arje-Goldenthal, 2018, p. 189)

terms as "parenting time" and "parenting responsibilities" – where decision-making in various areas is defined. Indeed, Canada's laws may change for the better assuming passage of Bill C-78[6] (which passed 3rd reading on 6 February 2019) where the operative terms are now:

- Parenting order: This order allocates both parenting time and decision-making responsibility. The *Divorce Act* no longer sounds like a winner take all proposition as it did with the former terms of "custody" and "access".
- Decision-making responsibility
- Parenting time
- Contact order: This order allows the court to provide for contact between a person who is not a spouse and the child.

Other jurisdictions where law reform has taken place have adopted various terms. Foremost in one's mind must be the state of Kentucky, where amendments came into effect on 26 April 2018, so that Kentucky was the first American state to legislate a truly rebuttable presumption in favour of ESP. However, let us examine what the Kentucky statute says:[7]

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. Subject to Section 5 of this Act, there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and ***equally shared parenting time*** is in the best interest of the child. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent with ensuring the child's welfare. The court shall consider all relevant factors including:
> [authors' emphasis]

The Kentucky language sounds close to the language that the authors of this paper prefer. As part of a joint submission by six organizations, the authors presented an advocacy Brief to the House of Commons Standing Committee on Justice and Human Rights when it was holding hearings on Bill C-78. Our Brief outlined various family rights movement organizations' position on the Bill. We recommended that Bill C-78 be amended to provide for "Equal Shared Parenting" (Colman & Piskor, 2018). We defined there equal shared parenting along the following parameters:

Equal Shared Parenting is:

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[6] Detailed Bill explanation at:
https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C78E
Bill C-78 as passed at 3rd Reading in the House of Commons and is now before the Senate:
http://www.parl.ca/DocumentViewer/en/42-1/bill/C-78/third-reading

[7] 2018 HB 528 (https://apps.legislature.ky.gov/lrcsearch#tabs-6)

a) joint legal custody (parental responsibility) and

b) joint physical custody (parenting time)

c) with maximum practicable child time with each parent (approximately 50%)

d) as the highest embodiment of the best interests of the child standard

e) subject to evidence-based consideration of child safety.

We prefer the term "Equal Shared Parenting" as it encompasses approximately equal parenting time and some form of shared responsibility for significant decisions that affect the child. Equality connotes equity, fairness and most importantly - a focus upon children's best interests.

3.0 ESP ARGUMENTS – OPPOSITION AND PROPOSITION

We juxtapose here arguments opposed to an ESP rebuttable presumption versus the arguments in favour. We loosely replicate the 'three waves' analytical approach of Prof. Edward Kruk (2018) who dissects the arguments against ESP from three perspectives or "waves". Wave #1 was based upon what some would argue was an outdated form of attachment theory and the "primary parent" presumption. Wave #2 arguments focused on children's exposure to inter-parental conflict and violence. Wave #3 acknowledged the efficacy of "shared parenting" but decried the use of any presumptions in family law while nonetheless acknowledging that for some families shared parenting might be beneficial (Kruk, 2018a). While the construct is useful, one should note that the three waves are not necessarily as sequential as Kruk might have us believe. The "older" arguments, such as the primary attachment theory, persist in the literature in recent years as well.

3.1 FIRST WAVE – ATTACHMENT THEORY AND THE "PRIMARY PARENT" PRESUMPTION

3.1.1 Single Attachment Theory (one parent is enough!) vs Multiple Attachment Theory and Not Appropriate for Young Children (Toddlers/Infants and Overnights)

a) Against Shared Parenting

Bowlby's (1972) attachment theory is predicated on the concept that children form strongly rank-ordered attachments as the basis for their psychological and emotional development[8]. His original single attachment (monotropy) theory emphasized the hypothesized dominant primary attachment (mother) role, even at the expense of relationships with the other parent (father) and warned "prolonged" maternal deprivation may have grave developmental consequences. Some attachment

[8] For comprehensive overview of attachment theory, see: (Elrod & Dale, 2008; Lamb, 2012; Ludolph & Dale, 2012; Warshak, 2018)

theorists expanded the maternal deprivation hypothesis to include even relatively brief or routine separation such as day care (e.g. Sroufe, 1988). Drawing on Bowlby's work, Goldstein, Solnit & Freud's (1973) influential work postulated that children's developmental needs post dissolution are served best by one gatekeeping "psychological parent" with sole custody providing stability and continuity. The authors later recognized the value of joint custody between co-operating parents as consistent with the continuity of relationship principle, any conflictual relationships were excluded in their view (Goldstein, 1991, pp. 17–18). This nuanced interpretation was largely overlooked by the legal community who adopted the original position as the cornerstone of primary caregiver / sole custody doctrine that continues to be influential today.

Staring in the 1970's, single attachment theory gave way to multiple attachment hypothesis reflecting the view that children form equally strong bonds with multiple family members - generally mother and father - in a looser non-hierarchical attachment framework. Multiple attachment theory is generally accepted as uncontroversial and mainstream in the social sciences today but traditional single attachment theory continues to have adherents both in the research and legal community (e.g. Ludolph & Dale, 2012, note 5; Jennifer McIntosh, (ed) (2011)).

Viewed from the perspective of a policy maker or advocate, the scientific debate on blanket restrictions on toddlers/infants can be viewed as another round in the scientific debate between the traditional single attachment vs. multiple attachment camps.

Statistics on the prevalence of overnights remain preliminary. Pruett, McIntosh, & Kelly (2014, p. 246) state: "Current general population statistics in the United States and Australia indicate that in separated families, between 93–97% of children aged 0–3 years spend less than 35% of their nights with the non-resident parent."

Proponents of blanket or controlled restrictions generally draw on several studies (Ludolph & Dale, 2012, pp. 24-33,; Pruett et al., 2014; Fabricius & Suh, 2017; Warshak, 2018). The earliest study by Solomon and George (1999a and 1999b) was conducted on 145 infants in an atypical divorce context with a follow-up a year later. Overall, overnights were found to not constitute a significant factor in outcomes with attachment problems in overnighting children stemming more from poor communications, conflict, and low maternal psychological protection of the child. Using follow-up data, the authors tentatively concluded regular overnight visits could negatively affect attachment to the mother, although they conceded these findings could be due to non-overnight factors (Ludolph & Dale, 2012, p. 144; Warshak, 2018, pp. 22–23). A study of 132 families with children six and under by Pruett, Ebling & Isabella (2004) found the quality of parent-child relationship best predicted child adjustment, followed by conflict as a lesser predictor, with overnights as an apparent tertiary factor. The largest overnight study was undertaken by Tornello et al (2013) using the Fragile Families data base. Although not nationally representative, its findings were in line with other studies examining the frequency of overnights, namely that attachment insecurity was highest with frequent or rare overnights and lower for moderate overnights. The study also found " no significant relationships between frequent overnights and multiple measures of children's adjustment" at ages 3 and 5 and a positive effect among toddlers. In the aggregate, these studies are suggestive but not determinative on overnight care and broadly suggest that overnight care may turn out to be an ancillary consideration in post dissolution custody arrangements.

No other researcher has roiled the overnight debate as much as McIntosh, no doubt in part due media notoriety of her views. While other researchers have adopted a more tentative or nuanced stance pending further research about the developmental impacts of overnights, McIntosh , in the eyes of some, has advocated for turning the clock back by calling outright for blanket restrictions based on her Australian research: "In early infancy, overnight stays are contra-indicated, undertaken when necessary or helpful to the primary caregiver, and when the second parent is already an established source of comfort and security." (McIntosh, 2011a).

b) Pro Shared Parenting

Considering the overwhelming findings in favour of multiple attachments, single attachment adherents have downplayed maternal deprivation theory as justification for sole custody with the current debate focused on shared care and overnights for infants/toddlers.

Can infants and older children have more than one primary attachment (the "primary parent" or "primary caregiver" label)? Research has demonstrated that infants form significant attachments to multiple caregivers. It is not a matter of gender but more a matter of time and caring.

The rise and strong acceptance of multiple attachment theory from the 1970's onward was reflected in the 1994 consensus by 18 experts sponsored by the U.S, National Institute of Child Health and Human Development concluding "distribution of custodial time should ensure the involvement of both parents in important aspects of their children's lives and routines-including bedtime and waking rituals, transitions to and from school, extracurricular and recreational activities" (Lamb, Sternberg, & Thompson, 1997, p. 400).

Several studies have demonstrated the importance of early father involvement (Fabricius & Suh, 2017).

With the debate on maternal deprivation and primary caretaker theory increasingly made moot by the on-the-ground reality of approaching parity in labour force participation by women, it seems inevitable in hindsight that blanket restrictions would become the next flashpoint in the debate of ESP vs sole (maternal) custody.

Warshak argues that those who advocate for blanket restrictions on overnight father contact with infants and toddlers use invalid methodologies and distort their own data (Warshak, 2014, 2017, pp. 187–189) severely criticizes and deconstructs the work of McIntosh and Tornello. Warshak demonstrates through his extensive review of the literature just why one cannot rely upon those who to this day, in one form or another, promote blanket all-encompassing restrictions on overnight time between fathers and their infants and toddlers.

Prof. Linda Nielsen also attacks McIntosh - whether the focus was on infant and toddler contact with fathers or whether the focus was generally on McIntosh's research at large (Nielsen L, 2018, pp. 10–11). With respect to McIntosh's toddler research this is what Nielsen had to say [authors' emphasis]:

> In an Australian study commissioned by the government, toddlers (ages 2-3) had worse outcomes in JPC on two of the six measures of well-being (McIntosh et al., 2011).

> Because this one study has so often been misrepresented in the media and in academic circles (Nielsen, 2014b; Warshak, 2014), it merits more careful attention than the other 59 studies.
>
> The 19 JPC toddlers scored lower on a 3 question test of "persistence at tasks" and lower on 3 questions asking how often they tried to get their mother's attention and how often they looked at her. Neither of these two measures had any established validity or reliability, in contrast to the instruments used to measure children's outcomes in the other 59 studies.
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> Nevertheless, on the basis of these two invalid measures, these researchers concluded that JPC toddlers were less securely attached to their mothers and less persistent at tasks than SPC toddlers. The 22 JPC toddlers also scored more poorly than 191 SPC toddlers on a validated "problem behavior" scale (refusing to eat, clinging to the mother when she tried to leave, hitting the mother).
>
> Again, these researchers interpreted this finding as a negative outcome of JPC.
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> In fact, however, JPC toddlers' scores were well within the normal range and were not significantly different from the scores of 50% of the toddlers with married and with separated parents in the general population. On the other four validated measures of well-being, JPC and SPC children were not significantly different.

One commentator has gone so far as to suggest that, “Any argument that relies on McIntosh to oppose equal shared parenting fails. It should be considered malpractice for any practitioner who directly or indirectly uses the research, conclusions, or recommendations of McIntosh to restrict a child’s access at any age to a fit, loving, responsible father.”(Olson, 2019).

Shared parenting, including overnights, has been scientifically proven to be beneficial to infants and toddlers (even under one year), even when parents disagree (Warshak, 2014, p. 47; Nielsen, 2014, pp. 315–333; Warshak, 2017; Fabricius & Suh, 2017, pp. 68–84) .

Does more contact with father detract from the child’s bond with the mother? Warshak (2017, pp. 204–205) answers:

> After the Warshak Consensus Report was published, three new studies lent additional weight to the report's conclusions. Reanalyzing the data set used by Tornello et al., Karina Sokol examined the correlation between the absolute number of overnights with father and the incidence of insecure attachments to mother. In her preliminary findings, Sokol found no correlation and concluded that overnights with father do not harm the mother-child relationship.

The more residential time that infants and toddlers enjoyed with their fathers, the more well-adjusted in later years were the children:

> The third recent study is a peer-reviewed study of 116 college students, which found better outcomes for those who, in the first three years of life, spent overnights with their fathers after

> their parents separated. The more overnights that infants and toddlers spent with their fathers, up to half of all overnights, the higher the quality and the more secure were their long-term relationships with fathers and mothers.
>
> Instead of discouraging frequent overnights for litigating parents, this study supports encouraging more overnights to overcome the potential harmful impact of parent conflict on father-child relationships.

The single attachment theory lives on in the work of McIntosh and allied academics. Their work has been seriously questioned if not discredited by many including Warshak, Nielsen, and Fabricius. The overwhelming social science research indicates that infants and toddlers hugely benefit from overnight time with both parents. Such time is a building block to establish and encourage parenting regimes that truly maximize meaningful contact between children and parents.

3.1.2 It's only a Fathers' Rights Issue

a) Against Shared Parenting

A frequent tactic against shared parenting is to associate it with the Fathers' Rights Movement (FRM) as a supposedly ill-conceived issue by "angry white men" holding fringe views not worthy of consideration. Written largely from a gender feminist perspective, existing literature has been both mostly critical and often polemical of FRM views(eg. Dragiewicz, 2008; Amyot, 2010; Boyd, 2004; Collier & Sheldon, 2006; Crowley, 2009; Harris-Short, 2010; Kaye & Tolmie, 1998; Kimmel, 2017). In their synoptic analysis of FRM, Alschech and Saini (2018, p. 6) summarize FRM discourse and activism as, "Researchers interpret fathers' rights activism and discourse as part of the backlash … against feminist achievements in the past several decades…. [and] a regressive attempt to reinstate patriarchal privileges, derail ongoing efforts to fight violence against women, and delegitimize policies aimed at countering structural gender inequalities in society". The FRM is portrayed largely as a political foil in a zero-sum game against hard won feminist gains. In this politically framed narrative, to support any issue such as shared parenting is to automatically be against women.

Women's advocates and bar associations who are opposed to shared parenting have with considerable success exploited this guilt-by-association political framing.

b) Pro Shared Parenting

The United Nations has recognized the rights of all parents to raise their children[9].. United Nations conventions, when adopted by a state actor, serve to encompass the full force and effect of domestic law. Yet somehow and for unfathomable reasons, in western societies when fathers assert a demand, neigh a legal "right", to participate meaningfully in the raising of their children, they

[9] See section 4.1

are invariably demonized. The rationality for this destructive attitude is puzzling. Yet prevalent across government and legal circles it surely is.

One may speculate that the negative animus towards men and fathers is a product of the myths and stereotypes that are so prevalent within our society[10]. Even such a highly credible and respected academic as Prof. Nick Bala has yielded to the temptation of ever so gently tarnishing one of the authors of this paper as simply a "fathers' rights" advocate – thus implying that the movement for ESP is somehow tainted. In his Brief to Canada's House of Commons Committee that recently examined Bill C-78, an Act that would amend portions of the *Divorce Act*, Prof. Bala (2018, p. 5) wrote: "The absence of a presumption in favour of equal parenting rights is the subject of adverse commentary by Equal Parenting advocates (a.k.a. "Fathers' Rights" advocates)." Note how Bala inaccurately equates the equal parenting movement in general with the "fathers' rights" movement specifically. The equal parenting movement is much wider than what one would call the "fathers' rights movement". Bala's footnote to his statement was:

> See e.g Toronto lawyer Gene Colman (June 13, 2018), who advertises as a "dedicated advocate of protecting fathers' rights" proposes a "presumption of equal parenting time: www.complexfamilylaw.com. (2018, p. 4 and note 12)

It would appear Bala identifies the "fathers' rights" movement in a narrow fashion. Thus, Bala seems to imply that the source of the criticism of Bill C-78, is not worthy of serious consideration.

Certain elements of the legal establishment and allied professionals tend to write off ESP as a "fathers' rights" issue as if that pejorative label alone should be sufficient to summarily end all debate. Yet they ignore or distort the extant research which establishes that ESP is actually a very mainstream concept whose time has come and that a rebuttable presumption in favour of ESP actually makes eminent policy sense, irrespective of whether or not there is a legal "right" of fathers to participate meaningfully in the parenting of their children.

3.1.3 "Yo-Yo" Argument

a) Against Shared Parenting

Rooted in Single Attachment theory, the "Yo-Yo" argument posits that constant transfers of children between homes in a shared parenting situation is inherently unstable - causing feelings of stress, instability, insecurity and parental alienation that can be avoided through a single psychological parent (Goldstein et al., 1973). In many ways, the Yo-Yo premise is a restatement of the toddler/infants argument that advances the psychologically and socially disruptive effects of inter-household transfers regardless of age. Proponents of this argument point to weakened shared parenting arrangements among adolescents as indicative of the failure of shared parenting.

b) Pro Shared Parenting

[10] See Braver and O'Connell (1998) for a well-reasoned and documented exposition of the myths and stereotypes that typically characterize society's views of men and dads.

There is considerable evidence that kids adapt well to two homes. A Sweden study of 3,656 children between the ages of 3 and 5 years of age (Bergström et al., 2018) found that preschool children living in joint physical custody arrangements show less psychological symptoms than those living mostly or only with one parent. Similarly, the latest research update by Fabricius (2019, pp. 3,8-16) found that children's emotional security was strengthened when time was shared approximately equally.

Especially with children from approximately ages 8 or 9 and up, they tend to adapt well to a week about schedule. So, you then have two exchanges every 14 days. Where a parent has "access" on two occasions every 14 days, you have the same two changes. Even with younger children where we tend not to overly extend residential time so that the children are not absent from one parent for too long, we endeavour to minimize transitions. There seems to be no empirical evidence that such changes harm children. The bulk of the social science evidence that we have tends to support good results for such children.

3.1.4 It's only a ruse by Fathers to reduce Child Support

a) Against Shared Parenting

Critics of shared parenting have contended as far back as 37 years that fathers were using shared parenting as a strategy to reduce child support obligations (Polikoff, 1983; Reece, 1982; Schulman & Pitt, 1982, p. 549). These claims have continued to the present day: "the interest of secondary parents in shared custody is primarily in reduced child support, not in time with their children" (Melli & Brown, 1994, p. 546); "Many lawyers, and a minority of family relationship professionals, felt that clients were seeking to manipulate the levels of contact to influence their child support responsibilities" (Lamb, 2012, p. 68). "Laws that require joint physical custody could also lead to the elimination of child support in some states, women's advocates say" (Chandler, 2017). Of course, the debate is not entirely one-sided as many fathers have argued the reverse: "Mom just wants my money – that's why she won't agree to shared parenting".

b) Pro Shared Parenting

The above anti ESP positions are expressed as assertions or opinions. No empirical research has been provided.

The argument that fathers utilize shared parenting as a negotiating strategy to reduce child support payment rests on two premises: (1) motivation to reduce obligations; (2) actual savings in child costs.

(Kruk, 2018a, pp. 2–3) has rejected the notion of cynical motivation by fathers:

> Another concern about the granting of joint custody to fathers was the assumption that the primary motivation of divorced fathers seeking joint custody and shared parenting arrangements was to avoid child support obligations (Polikoff, 1983). Fatherhood researchers (Ambrose, Harper, & Pemberton, 1983; Greif, 1979; Hetherington, Cox, & Cox, 1976; Jacobs, 1986; Kruk, 1992; Lamb, 1981; Lund, 1987) thus examined this question. This research

> concluded that although fathers envisioned the concept of shared parenting as encompassing a sharing of both parental rights and responsibilities, their primary motivation was to maintain meaningful day-to-day relationships with their children.

Surprisingly, the alleged financial incentives of shared parenting have not been explored by researchers. To fill this void, we offer what may be the first mathematical examination of this issue in Annex "A" together with the narrative interpretation that follows:

We note that shared parenting involves the additional cost of maintaining two residences for the child. Economists and courts have generally agreed that the additional fixed cost of the second residence increases total child cost by about 50%[11]. As most child support models[12] are predicated on the basis of parents covering total child costs proportionate to their earnings, it follows that out-of-pocket expenses - direct child costs plus child support quantum paid or received - increase correspondingly for both parents - i.e. there are no savings to be had under shared parenting.

While the quantum paid decreases with increasing parenting time for the secondary parent as noted by various authors, the resulting decrease is more than offset by the increase in direct child costs living in the second residence leading to increased total out-of-pocket (OOP) expenses for the parent; conversely, any reduction in direct child expenses due to decreased child residency in the primary household is offset by steeper reduction in quantum. Thus, the OOP expenses increase for both parents under shared parenting assuming both parents maintain the child at the Guideline standard of living (SOL). Additionally, there is no financial incentive to negotiate an adjustment to parenting time in the shared parenting economic zone in which the full fixed cost of both households is incurred as the total child costs remain the same - any change is quantum would be equally offset by change in direct child costs.

The exception to the above is in those jurisdictions that do not factor in the cost of the second residence in their Guideline models, in which case the total child costs remain the same with no strict financial incentive to pursue shared parenting over sole custody. Simply stated, assuming both parents maintain the Guideline SOL in terms of direct child expenditures, shared parenting

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[11] See Melli & Brown, 1994 for a considered treatment of dual residency.

[12] There are three main variants of child support models in common use. The dominant Income Shares model calculates quantum by apportioning total surveyed child cost in a dual residence situation based on combined parental incomes assuming the child continues the standard of living (SOL) of the intact home; the Percentage-of-Income (POI) approach as the oldest and simplest methodology calculates quantum as a percentage of non-resident parent (NRP) income assuming single residency with percentage determined by the number of children; the Melson model may be thought of as a two stage POI calculation that augments basic child cost with a standard of living allowance while explicitly providing a self-support reserve for the NRP. The POI model may be viewed as an Income Shares model with 0 % parenting time for the NRP; courts follow various rules of thumb to adjust the POI model to shared parenting situations, often via an offset approach where quantum is based on the difference of POI calculations for each parental income. Child support models used in common law countries are: USA - 40 Income Shares states, 7- POI, 3-Melson; Canada - 9 provinces use a revised POI approach, Quebec-Income Shares; UK - Melson variant, Australia - Income Shares, New Zealand - Income Shares.

arrangements are more, and never less, expensive for both parents than sole custody arrangements due to the additional economic costs of maintaining a second home for the child.

This conclusion does not hold if either parent feels the imposed Guideline child SOL is too high. For example, parents living in jurisdictions with the dominant Income Shares model predicated on the "Continuity of Expenditures" assumption may feel maintenance of the child at pre-separation SOL is unnecessarily inflated and represents a discriminatory practice not imposed on intact families. In this scenario, parents will be motivated to seek maximum parenting time to allow child expenditures at a lower (but still adequate) level. For the non-resident parent, the motivation will be to curtail unnecessarily inflated child costs; for the resident parent, the motivation will be to retain the windfall in inflated quantums. From an economics game theory perspective, Guidelines with perceived inflated standard of living for the child act as a perverse incentive for both parents to pursue sole custody as the maximum economic payoff, a scenario familiar to lawyers and the courts. The underlying public policy issue is finding the right balance between adequate child welfare and unwarranted state intrusion in family affairs motivated by fiscal savings.

On balance, the proposition that fathers pursue shared parenting as a ruse to reduce child support is unfounded both motivationally and economically as shared parenting represents the more expensive option for both parents. However, Guidelines with perceived inflated standard of living for the child serve as a perverse incentive for both parents to pursue sole custody as the maximum economic payoff. Mathematical analysis indicates that both sides have mischaracterized the issue. As Amyot (2010, p. 29) observes:" It would appear logical that one of the main motives behind … a presumption of shared custody … is a desire to reduce child support payments; however, there is little direct evidence that this is a major explicit aim".

3.2 SECOND WAVE – "YES, BUT NOT SAFE OR PRACTICAL"

3.2.1 ESP not safe due to Family Violence and Conflict

a) Against Shared Parenting

Both sides of the shared parenting debate agree that Family Violence and Conflict is the major unresolved issue. The debate is clouded by differences in definition, typology identification, data sources, and prevalence statistics ("Family violence statistics - Global Reports," n.d.; P. G. Jaffe & Crooks, 2006). Statistics during separation are notably scarcer. In Canada, family violence was cited as an issue in 8 - 25% of divorce cases depending on the data source (Government of Canada, 2017); Nielsen (2017, p. 217) suggests that, excluding conflict cases, 10% - 12% of cases constitute "ongoing violence and severe emotional and physical abuse that has traditionally been referred to as "domestic violence" or "battering". These difficult cases typically end up in litigation. Elrod and Dale (2008, p. 395) report "some studies indicate that sixty percent of litigating parents report domestic violence of some kind".

Both sides of the debate agree that shared parenting is contraindicated at the higher spectrum of family violence typology. The current debate is focused on the lower end to identify the appropriate threshold of inter-parent conflict for consideration of shared parenting.

Courts have adopted the view that parenting time, and perhaps joint legal custody, is inappropriate for high-conflict or uncooperative parents with a high preference shown for voluntary agreements between friendly parents (Nielsen, 2017, p. 215). This view reportedly has strong backing among social science researchers as voiced by McIntosh et al (2012, p. 174) of over two decades of research "demonstrating a poor fit between…shared time parenting arrangements and ongoing high levels of conflict between parents". A majority of the 32 social scientists and family law professionals at the 2013 AFCC Think Tank concurred (Pruett & DiFonzo, 2014).

b) Pro Shared Parenting

A distinguished panel of experts attended the May 2017 International Conference on Shared Parenting. They recognized the importance of allowing for a domestic violence exception to any regime that contained a rebuttable presumption of Shared Parenting. Braver and Lamb (2018, p. 10) wrote:

> All panelists were, however, appropriately wary of a one-size-fits-all standard, cautioning that exceptions to an SP presumption need to be recognized as appropriate bases for rebuttal. Among the factors that should lead to such exceptions are credible risk to the child of abuse or neglect…
>
> An additional potential rebuttal factor was the topic of more extended discussion: the mere existence of intimate partner violence (IPV). It was noted that there is increasingly sophisticated understanding of IPV, due primarily to the writing of Johnson (2010). He distinguished among four distinct patterns of IPV, only one of which, coercive controlling violence (the stereotypical male battering pattern), should preclude SP (Kelly & Johnson, 2008). Researchers, custody evaluators, and courts must explore not simply whether there is evidence of IPV, but also its nature, when considering implications for parenting plans.

3.2.2 ESP not practical - has been rolled back in some jurisdictions

a) Against Shared Parenting

Opponents of a rebuttable presumption have claimed that presumptive equal shared parenting provisions were tried elsewhere (particularly in the United States), did not work, and were therefore cancelled (e.g. Bala, 2018, 5-6).

Pruett and DiFonzo (2014, p. 153) write with respect to alleged changes in other jurisdictions:

> …time must be determined on a case-by-case basis, preferably by the parents themselves. These various perspectives have been highlighted by recent legislative activity across the globe. Shared parenting legislation has been passed in the United Kingdom, reversed in Denmark, and revisited in both Australia and Israel. In the United States, a statute lengthening the minimum amount of parenting time was recently passed by the Minnesota legislature, but vetoed by its governor, while a comprehensive parenting law was enacted in Arizona. Bills on this subject are being studied in numerous jurisdictions and the pace of legislative proposals has been increasing over the past several years.

As recently as 6 February 2019, Canada's Justice Minister, The Hon. David Lametti, adopted this position at the House of Commons 3rd Reading debate on Bill C-78:

> Madam Speaker, indeed the bill places the best interests of the child first, and one of the criteria is maximal contact time with each parent. This was felt to be a better criterion than an equal parenting presumption, which has been tried and has failed in a number of other jurisdictions. The best evidence from experts was that we have chosen the better way to go forward. (Lametti, 2019 at 1645)

b) Pro Shared Parenting

We have read claims that shared parenting has been reversed, revoked or rolled back in some jurisdictions such as California, Australia, Denmark and Israel. Examined in detail, these claims are mischaracterizations or misapprehensions.

California: In 1980, California became the first state to adopt a policy favouring joint custody whose goal was " to assure minor children of frequent and continuing contact with both parents" (Post, 1988, p. 320) but adopted implementation wording that was misconstrued by some as a preference for joint custody[13] as subsequently recognized in 1987 by the Task Force in Family Equity which noted that the statute was misinterpreted "to create a joint custody preference or presumption"(1988, p. 321) The statute was amended in 1988 to remove any perceptions of rank ordering[14] with the original public policy goal of continuity of relationship for the child remaining intact. The statute includes a presumption favouring joint custody when parties agree[15].

Australia: Australia has actually (contrary to popular views) never enacted a rebuttable presumption for any kind of equal time sharing. The law did, however, create a presumption of equal parental responsibility. There was a long battle to reform Australia's custody and access laws between 1995 and 2011. The result is a law which strongly encourages courts to consider the option of shared physical custody, while also emphasizing the need to protect children from harm, not least from being exposed to family violence. The trench warfare over the text of the legislation between advocacy groups has now largely ceased. Good empirical research on the outcomes of reforms to the family law system assisted in clarifying the issues. However, the role of law in shaping parenting arrangements after separation should not be exaggerated. We can believe too much in law; and therefore, believe too much in law reform.

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[13] "To both parents jointly…or to either parent" (Cal. Fam. Code § 3040 (a)). The "or" could be read as either an inclusive or exclusive "or".

[14] "This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child."(Cal. Fam. Code § 3040(c))

[15] "There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child…where the parents have agreed to joint custody" or so agree in open court at a hearing for the purpose of determining the custody of the minor child" (Cal. Fam. Code § 3080).

Australia implemented major reforms towards shared parenting in 2006 based on two primary factors: (1) "benefit to the child of having a meaningful relationship with both of the child's parents"; (2) "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence"(Family Law Act 1975 (Cth) s 61DA). The law provided for a presumption of equal shared parenting responsibility in cases that did not involve abuse or violence. The legislation does not specify parenting time but does direct courts to consider whether "equal" or "substantial and significant" time would be practicable and in the best interests of the child (Parkinson, 2018, p. 5).

Responding to concerns that family violence provisions were perhaps underemphasized; legislation was amended in 2011 to place "greater weight" on child protection over parental involvement without changing shared parenting provisions. Empirical evaluation of the 2011 reforms indicates it has had modest or minor impact on shared parenting or family violence statistics (Parkinson, 2018, p. 8; Smyth & Chisholm, 2017, p. 589; Fehlberg, Smyth, Maclean, & Roberts, 2011b). Parkinson notes that the empirical evidence does not indicate any substantial change in outcomes across the population as a result of the 2011 reforms (2018b, p. 8)

The prevalence of shared-time arrangements almost doubled from an already growing base of 9% in 2003 to 16% following the 2006 reforms and has reached a plateau of 17% in 2015 (Keogh, Smyth, & Masardo, 2018).

For an exposition of what actually happened in Australia where the warring forces engaged in bitter political battles over legislative reform, see Patrick Robinson, 2018. The 2006 amendments encouraged "a meaningful relationship with both of the child's parents" and cautioned courts about "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence." The courts were also directed to consider whether shared parenting time would be practicable and in the best interests of the child. The law also contained a somewhat standard type of "friendly parent" provision. Some argued that these reforms exposed women to a greater risk of violence.

Australia is perhaps unique in that the government commissioned extensive follow-up analysis of the reforms along with ongoing research into a broad range of family issues. Evaluation of Australian reforms has found that they have worked well, although there were some difficulties and challenges. Parents reported they were generally satisfied with parenting arrangements, dispute resolution was deemed successful, and litigation filings decreased sharply by 22% (Kaspiew et al., 2009) Evaluations also showed that 'there was no reliable evidence, beyond some professional opinion, that the 2006 amendments were linked to an increase in violence or abuse" and that a "history of family violence did not necessarily impede friendly or cooperative relationships between parents following separation" (Parkinson, 2018, p. 7). This is not to say that issues of family violence are not significant, but rather that a nuanced approach by the courts is practicable. The evaluation highlighted the need to identify "the minority of highly vulnerable cases in which concerns about child or parental safety must take priority in decisions about care-time arrangements" (Kaspiew et al., 2009, p. E3). The evaluation studies also served to identify that many family issues transcend a purely legal approach and require a shift to a public health perspective to address substantial issues of family violence, mental health and addiction.

Parkinson (2018, p. 11) concludes that:

> It is reasonable to suggest, from all the available evidence in Australia, that the legislation contributed to an increased awareness and acceptance of shared care arrangements as a viable and "normal" option for parenting after separation. …The legislation seems to have encouraged parents who live near one another to be more equally involved in looking after their children during the school week.

Here is what Brian Ludmer (2018) had to say with respect to the myth that, "It didn't work in Australia":

> This is entirely untrue. The Australian experience was actually well received by the public with a noted decrease in litigation and increased satisfaction with post-separation arrangements. Any further legislative changes thereafter were simply a result of political lobbying. After the passage of the 2006 shared parenting amendments in Australia, the Australian Government commissioned a study by the Australian Institute of Family Studies. Amongst the findings were that an increased number of parents were able to sort out their post separation arrangements with minimal engagement of the formal family law system and that the majority of parents in shared care time arrangements reported that the arrangements worked well for them and their children The 2012 changes (primarily focused on domestic abuse cases) were the result of a politically-driven process and were not based on the actual experience of the public with family law dispute resolution during the period of time between 2006 and 2012 Prior to the implementation of the 2006 Australian reforms, 77% of Australians supported shared parenting. Five years after implementation, the figure had risen to 81%.[16]

Again, we must emphasize here that the Australian legislation did not create a rebuttable presumption for equal shared parenting. It merely allowed "shared parenting" as an option. There has been no retrenchment from this position. Amendments have simply paid particular attention to domestic violence, sensibly making it a counter indication to implementing a shared parenting regime.

Denmark: Changes in Danish Family law legislation have been described by some as a reversal of Denmark's evolution to shared parenting. This is not consistent with the views of the Danish Ministry of Justice and Safety which states that the right of the child to "two parents" has been central to several legislative reviews during the past decades (Ministry of Justice and Security, 2019). The report explains that misinterpretation of the 2007 legislation for 7/7 parenting arrangements as an option was misconstrued as a "right" resulting in a clarifying amendment in 2012 which still recognizes equal time as an option. The law was also amended in 2015 to counter gatekeeping in shared parenting situations by requiring parents to submit to administrative review.

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[16] Cf. 10 Common Misconceptions about Australia's Shared Parenting Laws – online 17 April 2019: http://www.familylawexpress.com.au/family-law-brief/children/childcustody/sharedparenting/10-common-misconceptions-about-australias-shared-parenting-laws/3111/

As part of its most recent changes coming into force 2019-04-01, legislation has been changed to impose a mandatory three-month reflection period replacing the previous one-day separation process in situations with children, during which time dual residency is the default.

Israel: One of the authors corresponded with and spoke with two eminent family law lawyers in Israel: Ms Esther Sha'anan and Mr. Amir Shai. The following is a synthesis of the information that we gleaned from them.

Israel was probably ahead of the curve on the issue of joint decision making. The Law of Legal Capacity and Guardianship, 1963, established both parents as guardians which meant they both had equal say regarding issues of health, place of residence, travel, education and religious matters. This joint legal custody was, according to Mr. Shai, more illusional than practical for many years as once a custody order was granted to the mother, the father practically speaking had no say with respect to important issues. By the year 2000, this state of affairs had largely changed such that the courts began to follow the 1963 law. Ms Sha'anan noted that this necessitated many motions for mothers who needed to simply travel with children or secure necessary medical treatment. Mr. Shai responded that this was relatively rare as most fathers did in fact cooperate with such issues.

Custody has never been defined in the law; though courts did and continue (all be it less and less) to award custody to one parent - often the mother. There was and is no distinction between the guardianship rights and responsibilities of a custodial and non-custodial parent. There is no legislation in Israel which relates to time-sharing, and where the parties cannot agree on a time-sharing schedule, the courts appoint a specially trained State social worker or an expert in the field.

There is proposed legislation which has not been passed which would give the courts the ability to modify a shared parenting regime – particularly with respect to joint decision making (an issue, according to Ms Sha'anan that tends to provoke confrontations where one parent behaves in a destructive manner).

The trend over the past few years both in court and in negotiations has trended towards a 50/50- or 60/40-time sharing allocation, Ms Sha'anan informed us. Mr. Shai agreed. He noted that this state of affairs came into effect in about 2006 when a Special Parliamentary Committee that included members of the Knesset (parliament) and interested stake holders. The representative of the Welfare Ministry, after hearing the concerns of fathers, directed the social workers (who played key roles in custody assessments and determinations) to henceforward change their defined roles (previously expressed as helping women and children in divorce) to help families build shared parenting solutions as children need both parents. This resulted in an almost overnight revolution in the family courts as social workers who investigated divorcing families started to more and more recommend some form of shared parenting arrangement with 60/40 times splits and less frequently 50/50. The standard recommendation and effective default position came to be six nights out of fourteen: Two overnights during each week (that's four) and every second weekend – Friday to Sunday (that's another 2). Sunday is a regular school day in Israel. This schedule is normally continued into July school vacation when most kids go to camp. Generally, pickups and drop offs are at school and camp, thus avoiding parental conflict. In August, time is split equally. Religious holidays are generally divided equally. For the court to grant such an order, the parents must generally speaking live within 35 to 40 minutes' drive of the school.

Mr. Shai added that fathers generally have to wait for approximately 18 months until they "prove" through this process that they are good enough for shared physical custody. Once they prove it, then they receive substantial time as well as the "joint custody" designation. By no means is any type of joint custody and automatic right upon parental separation.

A current hot issue is the extent to which this regime can apply to infants and toddlers. Since the beginning of 2019, judges have become very sensitive to Parental Alienation and are taking a very strong stand against it – whether the perpetrator is the mother or the father.

Ms Sha'anan reports that one could say that courts have tended for decades to award fathers residential time; in recent years that tendency has grown to include sleepovers for children from a young age, though the rulings on sleepovers for babies and toddlers very much differs on a judge by judge basis. Historically in Israel, she claims that fathers tend to achieve more residential time than most other jurisdictions. Mr. Shai agrees – but only since 2006.

In more recent years the Education Ministry has issued guidelines to ensure that both parents receive notices of parent teacher meetings etc. though that is not always 100% effective. Schools will not register a child of divorce unless both parents agree, and therapists will not agree to treat a child without the agreement of both parents. So joint parental authority is fairly entrenched even where there is not a court order for joint custody.

There had been legislation pending about whether to make the maternal custody preference that was up to age 6 be reduced to age 2. Both feminist and fathers' groups took issue. The Knesset has passed no such law to this point in time.

In short, fathers tend to achieve significant parenting time in Israel (all be it with a substantial waiting time) and this shows no serious sign of being changed. The suggestion that there is any backtracking in Israel with respect to shared parenting is patently false – at least according to the two eminent family law lawyers who informed this part of our paper. In fact, just the opposite is the case as Israel has progressed without statutory amendment to a jurisdiction that is now quite father friendly; this is even more so with the recent judicial attitude to really do something about parental alienation.

3.2.3 ESP only works when parents get along (Friendly Parent)

a) Against Shared Parenting

Stahl (1999, p. 99) opined that "high conflict parents cannot share parenting argued that "joint physical custody is the worst arrangement for children when [it] leaves [them] in the middle of a war zone". Jaffe (2014)agrees.

b) Pro Shared Parenting

Braver and Lamb (2018, pp. 10–11) disputed the position of Stahl and Emery. Braver and Lamb point out that "Nielsen (2017) had reviewed 27 distinct studies showing that children benefited significantly from SP even when the parents had high levels of conflict." [authors' emphasis added]. They sensibly recommended that steps should be taken to minimize conflict such as

arranging for exchanges at school instead of at parents' homes. They also noted that retreating from shared parenting in cases of high conflict "unwisely gives veto power to the less cooperative parent."

3.2.4 Effect Size – Benefits of Shared parenting are Overblown

a) **Against Shared Parenting**

Some researchers have suggested that JPC is not especially beneficial due to the small to moderate measured differences[17] in well-being between JPC and SPC arrangements. The argument centers on the subjective interpretation of effect size as a statistical measure of the standardized difference of means between JPC and SPC outcomes.

b) Pro Shared Parenting

While the observation is valid, the inference is not. Small effect sizes are prevalent in social and medical sciences- often due to small sample sizes- and must be interpreted practically within context. The issue is often not the effect size, but rather the outcome/impact of the different treatment – e.g. in medical science, a small dosage may have a large impact; in sports, a 5 % skill difference may differentiate a star from an average player. In other words, effects size and the impact/outcome are different issues that should not be conflated. For example, a small value of Cohen's d=.25 as a measure of effect size for a different surgical technique may translate to a 10% improvement in survival. One would not select the inferior surgical procedure in this instance.

Similarly, if "best interests" is the legal standard, the courts should be oriented to selecting the superior life outcome, especially if the difference has outsized life achievement probabilities and the converse is associated with substandard social outcomes. For example, children raised in SPC homes have a much higher correlation with suicide, educational attainment, substance abuse, behavioural disorders and incarceration according to analysis by Center for Disease Control, US Department of Justice and the US Census Bureau[18]

[17] e.g. "Mountains are being made out of molehills" as cited in (Nielsen L, 2018, p. 28)

[18] As cited in (National Parents Organization, 2018)

3.3 THIRD WAVE – YES, SCIENCE CORRECT BUT CLASHES WITH INDIVIDUALIZED LEGAL NORMS

3.3.1 "One Size Fits All" is too narrow; ESP incompatible with Individualization

a) Against Shared Parenting

Opponents to ESP argue that it will reduce judicial discretion, perhaps dangerously so in situations involving domestic violence. Some go further to claim that shared parenting imposes the specter of pure 50:50 without consideration of any other parenting time arrangements. The basic assertion underlying the "one size fits all" premise is that shared parenting precludes individualized consideration of each child's particular situation on a case-by-case basis under the best interest's standard. Jaffe (2014)examines the AFCC Think Tank Report Consensus through the domestic violence concern lens, eloquently emphasizing how the consensus points may not take sufficient cognizance of D.V. situations that will require individualized consideration.

b) Pro Shared Parenting

To date, no research has been provided to support the myth that ESP is incompatible with individualization. We agree that one size certainly does not fit all. Yet that same argument can be advanced with respect to the unwritten customary standard of 'every second weekend and once during the week'.[19] Our challenge is to determine what sort of a parenting regime actually works for most people. Once that is determined, then that regime should constitute the system's default standard, absent factors that would militate against that standard.

We have learned that the closer to 50% of the time that the children enjoy with each parent, the better the outcomes (Fabricius, 2019). Those outcomes have been measured along various axes:

- greater father-child relationship security (Fabricius, 2019, p. 8,16; Fabricius, Braver, Diaz, & Velez, 2010, pp. 225–227; Fabricius, Sokol, Diaz, & Braver, 2012, p. Table 7.2, 2016, p. Table 4.1) ;
- better behavioral adjustment (Fabricius, 2019, p. 11);
- better social adjustment (Fabricius, 2019, p. 11);

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

- protects the child against insecurity about parent conflict (Fabricius, 2019, p. 11) (Fabricius, 2019, pp.16 - 17);

Nielsen (2018) argues that contrary to assertions made by opponents over the years that shared parenting is only warranted under limited, special or even ideal conditions - joint physical custody (JPC) produces superior outcomes to sole physical custody (SPC) independent of:[20]

- the quality of the parent-child relationship (i.e. even marginal fit parents are beneficial),
- Parental incomes (i.e. JPC benefits are not tied to standard of living),
- Level of conflict (low to high but not extreme conflict situations warrant JPC) (Nielsen, 2018)

Most cases are resolved outside of the courtroom. Parties negotiate in the shadow of the law. There is precious little opportunity in most cases for judges to fine tune the parenting regime. Parents (sometimes with the help of their lawyers and other professionals) do the fine tuning themselves. This fine-tuning process will take place outside of the courtroom even if the standard default position is changed. There is still plenty of room to avoid a one size fits all trap.

"One Size Fits All" is too narrow. This argument suggests that any presumption will over-constrain judicial discretion or individualized decision-making. It overlooks that a presumption is a legal starting point within a generally applicable framework that may be countered by case-specific evidence. Certainly, the presumption of innocence as the basis of law has not interfered with findings of guilt. Rebuttable presumptions are already commonly used in family law in property, child support guidelines, and *de facto* in the *Canadian Spousal Support Advisory Guidelines* (2013). In Canadian child support, for example, more than 40% of awards differ from the presumptive *Federal Child Support Guidelines* (Bertrand, LD, Hornick, JP, & Paetsch, JJ, 2002, p. vi).

3.3.2 Not in the Best Interests of the Child (current system already advances BIOC)

a) Against Shared Parenting

Many statutes have a list of factors that expound on "best interests of the child". In addition, opponents argue there is extensive jurisprudence on just what is in children's best interests. This enables courts to meet the needs of each individual child without constraint of presumptions that would fetter judicial discretion. Others argue for a standard of proof not applied in other areas of

[20] Meta-analysis of 60 studies. "...in 34 of the 60 studies JPC children had better outcomes on all measures of wellbeing than SPC children. In 14 studies JPC children had better outcomes on some measures and equal outcomes on others. In six studies JPC and SPC children were not significantly different on any measure in the study. In six other studies, JPC children had worse outcomes on one of the measures, but equal or better outcomes on all other measures. In none of the 60 studies were the outcomes worse for JPC children on all measures of well-being.".

family law or social science- e.g. " If it is accepted that there is no unequivocal evidence that shared parenting is in the best interests of children generally, it is hard to see how a presumption would be reconcilable with the notion of paramountcy" (Kaganas & Piper, 2002, p. 377)

b) Pro Shared Parenting

"Not in the best interests of the child" - this common unsubstantiated allegation represents an emotional argument devoid of logical substance. Since BIOC is undefined, it is equally valid to posit the opposite making this an empty argument. The flat assertion that shared parenting is not in the best interests of the child (BIOC) is one of the oldest and most consistent rhetorical arrows in the anti-shared-parenting quiver. It attempts to emotionally appropriate the open-ended best interest standard without any effort to provide substantiation. Nonetheless, this cynically empty argument has been successful in intimidating many legislators unaware that BIOC is undefined in law.

How we define "best interests of the child" serves to drive our perceptions with respect to the potential deficits of ESP versus the potential benefits. If we define best interests as children remaining with one parent for various reasons including purposes of stability, then the result is that one parent will enjoy the majority of the parenting time and all-important decision making. Any proposed paradigm that challenges the 'common knowledge' about best interests will *per force* be rejected. Any argument that says that we ought to measure best interests in some other fashion (ie. in a scientific fashion) will be rejected as it challenges a status quo that has been, more or less, fairly kind to judges, lawyers and allied professionals. If we define "best interests" more widely, then we should turn to scientific observation, discussion and literature. Such an approach leads us to an examination of children's well-being across a variety of axes. Which makes more sense – relying upon myths and stereotypes or relying upon scientific studies?

Above, we noted how Fabricius classified an examination of BIOC. Here we shall bring forth other sources in order to better appreciate what is truly in the best interests of the child.

Overall: A distinguished panel of experts attended the May 2017 International Conference on Shared Parenting. Sanford Braver and Michael Lamb (2018, p. 4) reported on the proceedings:

> The beneficial effects are evident across a wide range of measures of children's well-being, including (a) lower levels of depression, anxiety, and dissatisfaction; (b) lower aggression, and reduced alcohol and substance abuse; (c) better school performance and cognitive development; (d) better physical health; (e) lower smoking rates; and (f) better relationships with fathers, mothers, stepparents, and grandparents. Of course, some studies have failed to show such benefits, but almost none show that SP harms children. At worst, there are no significant differences between children with different custody arrangements. The 12 experts agreed that a tipping point had been reached in the r research, and that the benefits of SP for most children could no longer be doubted.

Prof. Linda Nielsen (2018) examined some 60 studies and aggregated their data. She found that when one compared children in regimes of Joint Physical Custody" (JPC) against those who were in "Sole Physical Custody" (SPC) regimes, 34 studies found that children had better outcomes

across multiple axes, that in 14 studies some had equal outcomes in some areas and better outcomes in other areas and that in six studies there was no difference. From all the 60 studies' data she concluded that independent of family income or parental conflict, JPC was generally linked to better outcomes for children.

Better behavioral and health adjustment:

Sweden enjoys a high proportion of approximately equal shared parenting. Fransonn et al (2018, pp. 3–4) have extensively studied the phenomenon there. They stated:

> In the recently published study, we investigated psychological symptoms for 136 children in JPC, 3,369 children in intact families, 79 children living "mostly" with one parent, and 72 children living only with one parent (Bergström et al., 2018). The pre-school teachers and the parents reported that children living mostly or only with one parent had more emotional and behavioral problems than those living in JPC or in intact families. According to the parents' reports, there were no significant differences between children in intact families and JPC children. The preschool teachers, however, reported fewer problems for children in intact than in JPC families.
>
> In the second…study, …As with the first study, the children in SPC had more psychological and behavioral problems than those in JPC and those in intact families had the fewest problems.
>
> As is true in the studies with preschoolers, the Swedish studies on school-age children and adolescents also show that children in JPC have better mental health and fewer behavioral problems than children in SPC families, who most often live in sole mother care, as well as children who live mostly with one parent (Bergström, 2012; Bergström et al., 2015; Bergström et al., 2013; Brolin Låftman, Bergström, Modin, & Östberg, 2014; Brolin Låftman, Fransson, Modin, & Östberg, 2017; Fransson, Brolin Låftman, Östberg, Hjern, & Bergström, 2017; Fransson, Turunen, Hjern, Östberg, & Bergström, 2015; Turunen, Fransson, & Bergström, 2017).

Fabricius (2019, p. 11) writes:

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

Better social adjustment:

As Kruk (2018a, pp. 4–5) notes: "It is now well established that children's level of stress is reduced and adaptation to parental separation is enhanced in shared parenting, as opposed to sole custody, arrangements. In regard to both divorce-specific and general adjustment measures of physical, psychological, emotional, and social well-being, children in shared care homes fare significantly better than children in other arrangements".

Protects the child against insecurity about parent conflict:

For many years the position that shared parenting in situations of high conflict was harmful to children was popular. There is now strong empirical evidence, however, that children can benefit from shared parenting even when their parents do not have low-conflict, cooperative relationships (Fabricius et al., 2012; Nielsen, 2017). Shared parenting might create an incentive for parental cooperation.

More recent research has also found that shared parenting can ameliorate the harmful effects of high conflict: A warm relationship with both parents is a protective factor for children (Nielsen, 2017; Warshak, 2014). The benefits of shared parenting exist independent of parental conflict. Shared parenting is beneficial for children in both low- and high-conflict situations. Except in situations where children are at risk of physical harm or negligent parenting, parenting time should not be limited in cases of high conflict, and high conflict should not be used to justify restrictions on children's contact with either of their parents.

Bauserman (2002, p. 99) states: "The research reviewed here does not support claims by critics of joint custody that joint custody children are likely to be exposed to more conflict or to be at greater risk of adjustment problems due to having to adjust to two households or feeling torn between parents."

Fabricius (2019, pp. 16–17) writes:

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

Greater father-child relationship security and with extended family:

JPC was linked to children having better relationships with their parents, stepparents, and grandparents in 24 of the 25 studies that assessed family relationships.

Moreover, all 30 studies (Nielsen 2018) that assessed children's relationships with their parents and other relatives found better outcomes for the JPC children. Given this, it is highly likely that family income and parental conflict are less closely linked to children's well-being than the quality of their relationships with their parents, stepparents, and grandparents. As researchers continue to explore the factors that might explain children's better outcomes in JPC families, it is clear that shared parenting families are on the rise and that children are benefitting from this new family form.

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

Fabricius (2019, pp. 15–16) writes:

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

> In contrast, at equal parenting time, while the change in circumstance would be greater than at 35% time, there is less room for insecurity about the father's commitment to continued presence because it is concretized in his provision of an equal home for the child. Thus, equal parenting time, in and of itself, likely carries meaning to protect the child against insecurity about parent conflict.
>
> Several lines of research suggest that reduced parenting time with fathers threatens emotional security by preventing children from having sufficient daily interactions to reassure them that they matter to their fathers**.** The correlational findings of many studies show that more parenting time with fathers up to and including equal parenting time is associated with improved emotional security in the father-child relationship. None of these studies found that mother-child relationship security decreased with increasing parenting time with fathers. This means that the children of divorce with the best long-term relationships with both parents are those who had equal parenting time. [Authors' emphasis added.]

The Conclusion Report from the 2018 International Council on Shared Parenting Conference states:

> UN CRC provides useful guidelines and regulation to overcome the current challenges we encounter in improving children's well-being and growth after parental break-up. Nevertheless, the concept of Best Interest of the Child needs to be interpreted according to societal challenges and actual scientific knowledge on parental break-up aftermaths. In most cases, this leads to establish equal shared parenting as a legal presumption when children face parental break-up.(2018, p. 4)

3.3.3 ESP is about Parental Rights at the expense of Children's Rights

a) Against Shared Parenting

Opponents maintain that shared parenting - and even more so under a presumption of ESP[21] - runs counter to the paramountcy principle by prioritizing parental rights over those of children under the best interest standard[22].

b) Pro Shared Parenting

The anti ESP position assumes that parental rights and children's rights are mutually exclusive in a postulated zero-sum game. Moreover, the argument is limited to shared parenting situations as sole custody arrangements are expected to be naturally exempted from any consideration whether this arrangement may privilege the single parent over the child's rights.

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[21] For example, in 2018 testimony before Committee, then Canadian Justice Minister Wilson-Raybould stated: "Fundamentally, a presumption would detract from the focus on the best interests of each individual child, which the bill aims to promote"(Wilson-Raybould, 2018 at 1530)

[22] For a historical perspective on *parens patriae* through Canadian lens, see (McGillivray, 2011).

3.3.4 ESP Risks Increased Litigation

a) Against Shared Parenting

A frequent allegation made by opponents of shared parenting is that it will increase litigation at divorce or relitigation post-dissolution. For example, the UK Law Commission expressed concern in 1986 that "imposed joint custody could increase the likelihood of litigation (Kaganas & Piper, 2002, p. 369); more recently, as part of current divorce reform proposals, the Canadian Department of Justice noted: "Several stakeholders, including the Canadian Bar Association, have argued that a presumption [of shared parenting] could increase litigation by forcing parents to lead evidence that the other parent is less fit, thus fueling conflict" (Government of Canada, 2018).

b) Pro Shared Parenting

Little empirical research has been done in this area with much of it relating to joint legal custody rather than shared parenting. This older research suggests this is a moot argument: "No significant difference in the overall frequency with which the two groups returned to the court (JOINT: 17%; SOLE: 20%)"(Phear, Beck, Hauser, Clark, & Whitney, 1983, p. 436); "When joint custody is imposed over the objection of the parties, the rate of relitigation is roughly the same as when a parent has sole custody" (Elrod & Dale, 2008, p. 399); "The rate of relitigation with joint custody was not significantly different from that with exclusive" (Berger, Madakasira, & Roebuck, 1988, p. 606)

Other data indicates shared parenting significantly lowers litigation and relitigation. As far back as the 1980's authors noted lower litigation rates for joint [legal] custody: "the proportion of relitigation for joint custody families was half that of exclusive custody families, suggesting that joint custody is a more beneficial arrangement in terms of reduced parental conflict" (Ilfeld, Ilfeld, & Alexander, 1982). Charlow (1987) noted: "Preliminary results of one joint custody study indicate that parents relitigate joint custody decisions less frequently than sole custody decisions". Australia provides the largest study of the litigation impacts of shared parenting and found "matters involving children...reflect a decrease of some 25%...filings for all categories...decreased by 14%" (Kaspiew, Moloney, Dunstan, De Maio, & Australian Institute of Family Studies, 2015, p. 22).

Fabricius et al (2018, p. 12) note that Arizona's legislation "is functioning as a rebuttable presumption of equal parenting time" … and "has neutral impact on parental conflict and legal conflict".

4.0 SHARED PARENTING – AN INTERNATIONAL PERSPECTIVE

The shared parenting debate and its adoption spans about 35 years encompassing the social sciences, the legal community, politics and public sentiment in Europe, North America, Australia and is spreading to South America, Asia and Israel. This section provides a snapshot of shared parenting from various international perspectives.

4.1 International Law

The tenets of shared parenting are embedded in international law as the right of the child to a continuing relationship with both parents unless it is specifically shown not to be in the best interests of the child.

The United Convention on the Rights of the Child (1989) outlines these rights as follows:

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

Taken together, international law can be said to have a preference, or even an implied presumption, for shared parenting as a child's right.

4.2 International Adoption & Experience

In the past half-century, industrialized countries have abandoned the maternal preference principle in favour of Joint Legal Custody (JLC) as a minimum with an increasing number adopting some form of residential shared parenting. A few jurisdictions have gone on to refine shared parenting legislation - typically with improved family violence provisions or clarifications of legislative intent.

Europe

As noted by Tromp (2013a), "The present dominant European family legislation and family court practice regarding court ordered parenting arrangements after parental separation, is still a combination of joint legal custody legislation combined with sole physical custody". Nonetheless,

there is a distinctive trend towards an implicit presumption of shared parenting with parents and families actively involved in children's lives. In broad terms, Northern and Western Europe have been setting the pace with evolution beyond Joint Legal Custody by embracing the EU paradigm of continuity of parental authority and relationship with the child post-dissolution as the default social norm without use of explicit presumptions. The legislative trend in these countries has been to encourage parents to make their own arrangements with minimal reliance on the courts. Countries in Eastern and Southern Europe continue to strongly favour the maternal preference model but find themselves under pressure from EU legislation and resolutions and rulings from the European Court of Human Rights (ECHR) to harmonize their legislation and practice.

The European Union Charter of Fundamental Rights ("Article 24 - The rights of the child," 2015) states: "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.".

In 2015, the Council of Europe (COE) passed a resolution encouraging European countries to adopt shared parenting legislation. Article 5.5. calls upon member states to "introduce into their laws the principle of shared residence following a separation, but under no circumstances in cases of sexual or gender-based violence, with the amount of time for which the child lives with each parent being adjusted according to the child's needs and interests*"*(Hetto-Gaasch, 2015; Holstein, 2015).

Shared Parenting is most prevalent in Nordic countries, Belgium, France, Netherlands and Spain (Catalonia, Aragon, Valencia regions) with reported rates of 20%-37%. Consistent with other international polls, citizens strongly favour shared parenting: Portugal (69%), Germany (77%), Belgium (70%), Holland (71%), (LW4SP, 2018).

Country-by-country European analysis is included as Annex B. Common Law jurisdictions are covered in the following sections.

UK

In legislation enacted in 2014, the UK adopted what has been described as a "loose endorsement" of shared parenting (Haux, McKay, & Cain, 2017, p. 574). The courts are now required to presume, unless the contrary is shown, that involvement of both parents is in the best interests of the child, and that this "involvement" means "of some kind, either direct or indirect, but not any particular division of a child's time" (Children Act 1989, s 1 (2A) and (2B)). Despite the strong initial endorsement of shared parenting, the government walked back its position under effective political pressure, including what has been argued to be a misapprehension or misrepresentation of shared parenting experience in Australia in the influential Norgrove Report of Family Law Reform (Parkinson, 2012).

Nonetheless, this rather amorphous formulation of presumptive joint legal custody (JLC) represents an evolutionary step in the general direction of shared parenting being increasingly embraced in Europe.

Public polling is 84 % in favour of shared parenting (LW4SP, 2018). The prevalence of shared parenting is difficult to ascertain due to lack of public data but is thought to be 3% for 50:50 care arrangements and up to 17% for shared parenting in general (Fehlberg, Smyth, Maclean, & Roberts, 2011a). It remains to be seen what effect the legislative changes may have. Unfortunately, the government has not instituted any formal evaluation process.

US

The US has seen an evolution away from maternal preference to options/preference/presumption of shared parenting. Starting in 1957, North Carolina became the first state to introduce an option of joint legal custody (Ferreiro, 1990, p. 420); today only one jurisdiction remains with maternal preference[23] (American Bar Association, 2012).

Based on an analysis of the 2014 Shared Parenting Report Card[24] and a review of legislation tracking data bases since 2014, the authors have concluded there are currently 37 US states/jurisdictions with various forms of shared parenting orientation categorized[25] as follows in increasingly stronger gradations:

- Rebuttable Presumption (JLC & JPC)- Kentucky
- Rebuttable Presumption (JLC) – 8 states (DC, FL, ID, IO, LA, NM, WV, WI)
- Maximum Time Provisions – 3 states (AZ, MO, UT)
- Preference (JPC) – 1 states (NM)
- Preference (JLC) – (24 states)

[23] For a review of joint custody legislation in the US, see Di Fonzo (2014)

[24] (National Parents Organization, 2014). Analysis based on raw data from individual state analysis to survey questions.

[25] Categorization based on author analysis with each state being placed in only one category. As there is a degree of assessment subjectivity involved, other reviewers may categorize differently.

Excluding JLC states, the number of moderate to strong shared parenting jurisdictions drops to 13.

In 2013, Arizona adopted what is recognized as a *de facto* presumption of shared parenting, while Kentucky became the first state to officially adopt a rebuttable presumption of equal shared parenting in 2018. Presumptive shared parenting was passed by both legislatures in Minnesota (2012) and Florida (2016) but vetoed by the Governors. There have been 152 shared parenting legislative initiatives during the past five years, of which 12 were enacted and 36 remain pending. The majority of the bills proposed a presumptive shared parenting (72%) followed by preferential shared parenting (14%) and an option for shared parenting (6%). Forty states have introduced shared parenting bills since 2014 with 12 states having more than 5 initiatives during this period - Missouri, New York and Iowa have been the most legislatively active with 12/9/9 initiatives respectively[26].

Statistics on the prevalence of shared parenting in the US are spotty and subject to estimation error but reflect among the strongest adoption rates internationally: Wisconsin (45%), Washington (34%), Arizona (44%), California (27%) (CEPC & CAFE, 2018, p. 4).

In the first study of its kind, the firm Custody X (2017) compiled a state-by-state comparison of custody time given to fathers following separation or divorce based on select interviews and online published standards. They found that nationally a father is likely to receive 35% parenting time ranging from 22% to 50% by state. Quite surprisingly, the data shows "that 20 states have some version of a 50/50 visitation schedule as the most common schedule awarded" (2017 Annex A). The results reflect most commonly awarded schedules for the non-custodial parent for cases of consensual custody without logistical impairments or extenuating circumstances.

Polling results for eight states show an average 74% support for shared parenting: Ohio (87%), Kentucky (83%), Missouri (80%), Michigan (76%), USA Pew (70%), Maryland (63%), Massachusetts (86%), North Dakota[27] (48%) (LW4SP, 2018). North Dakota has the lowest international support rate for shared parenting, but even here the most recent 2014 poll showed: 44% in favour, 30 % opposed, 26% undecided.

Canada

The Canadian family law scene is based on split jurisdictional responsibilities with federal legislation covering divorces and provincial legislation addressing other family law matters including common-law relationships. In theory, Canada has been a shared parenting jurisdiction since the passage of the *Divorce Act*,1985 which includes the Friendly Parent rule under

[26] Based on author analysis using: US Legislative tracking web site www.legiscan.com, NCSL(National Conference of State Legislatures) database at ww.ncsl.org/research/telecommunications-and-information-technology/ncsl-50-state-searchable-bill-tracking-databases.aspx, National Parents Organization 2014 Report Card (https://www.nationalparentsorganization.org/component/content/article/16-latest-news/22043-state-by-state-analysis-highlights-parental-inequality-across-the-nation), and Leading Women for Shared Parenting (www.lw4sp.org).

[27] Based on average of 4 polls spanning 2004-2014

"maximum contact" provisions. In practice, Canada followed the North American trajectory from strong maternal preference with joint legal custody only becoming the dominant custody arrangement at the turn of the millennium with the exception of Ontario whose sole custody rate of 65% is four times the national average (Bala, N et al., 2017,Table 2). Shared Parenting (operationalized at 40% parenting time) has almost doubled this century to 22 % with large disparity among provinces: British Columbia (30%), Quebec (22%), Ontario (14%), Alberta (9%) ((CEPC & CAFE, 2018; Bala, N et al., 2017).

The federal government introduced legislation in May 2018 to modernize the *Divorce Act*. Although the legislation is silent on shared parenting, it does introduce conditional "maximum time" provisions to reportedly "encourage" shared parenting, as recently reported to the authors by a constituent of the current Justice Minister (which admittedly is not an ideal source). The government is opposed to any presumption of equal shared parenting, arguing it would shift the focus away from best interests of the child to parental rights.

Canadian polls since 2000 consistently indicate Canadians not only support shared parenting, but presumptive equal shared parenting. In three polls taken 2007, 2009, 2017 that specifically asked for support or opposition to "federal and provincial legislation to create a presumption of equal shared parenting in child custody cases", Canadians responded with 74% support – a six-fold ratio against opposing respondents. The level of support was generally consistent across gender, age, geographical region and political party affiliation (Colman & Piskor, 2018, p. 14)

Australia

We discussed Australia in s. 3.2.2b of this paper.

New Zealand

New Zealand adheres to the paramountcy principle but encourages continuity of family relationships following dissolution under the *Care of Children Act 2004*[28] (ss 4-5). On the day the Act came into force, the then Minister for Courts explained that one of the key objectives of the law was to encourage parents to make their own shared care arrangements (Newman, 2017). More recently, New Zealand streamlined its family justice delivery system, introduced dispute resolution to encourage out-of-court settlement, updated its child support system to the prevailing Income Shares approach and is currently completing another round of service delivery review (Latkin, Caldwell, Henaghan, & Tapp, 2013; Gollop, Taylor, & Henaghan, 2015; "Family Court Rewrite," 2019). There is no indication that any changes to custody provisions are under consideration.

[28] ss 4(1) " The welfare and best interests of the child must be the first and paramount consideration"; ss 5(a) (a): the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing, (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents).

New Zealand does not currently have a mechanism to track shared parenting adoption (Callister, 2006).

5.0 SHOULD THERE BE A REBUTTABLE PRESUMPTION OF ESP?

With an increasing number of jurisdictions trending towards forms of shared parenting, including proposals for presumptive ESP, opponents have resorted to several strategies to counter proponents of a presumption. The simplest strategy has been to rehash earlier first and second wave arguments, namely that shared parenting:

- causes loyalty conflicts,
- creates unnecessary confusion and child instability with yo-yo house switching,
- requires co-operative parents,
- reduces child support for needy children and parents,
- requires greater economic resources,
- exacerbates unresolved conflicts,
- promotes litigation,
- it has not been scientifically proven.

This line of argumentation does not distinguish between shared parenting and presumptive shared parenting. A more focused argument raises concerns that a presumption will trump domestic violence concerns (Morrill, Dai, Dunn, Sung, & Smith, 2005) or that "a legal presumption of shared parenting will allow abusive parents to continue to reign terror in families" (Kruk, 2018b).

The central theme underlying anti-presumption arguments[29] is that presumptions would restrict freedom of legal action and judicial discretion thereby:

- increasing risk in family violence situations;
- coercing settlement due to inadequate financial resources;
- pre-empting solutions by parents who might otherwise have made their own amicable agreements,
- unilaterally impose a one-size-fits-all 50:50 allocation of parenting time precluded by logistical considerations or considerations of conflict;[30] or, most importantly,
- disallowing individualized consideration under the best interest standard[31].

[29] The arguments expressed on both sides in the Canadian "For the Sake of the Children" Report (1998, p. ch 4 A. 1.(i)) resonate universally over time. See also (Donnelly & Finkelhor, 1992; P. Jaffe, 2014)

[30] E.g., see Arje-Goldenthal (2018), Bala (2017, pp. 32–33), Covy (2018)

[31] For example, "the Canadian Bar Association was also opposed to Bill C-560, but recognized the need for legislative reform; the CBA favours recognition of "shared parenting," while expressing concerns about the "one size fits all" strong presumption of "equal parenting" in Bill C-560" (Bala, N et al., 2017, p. 2).

As Kruk (2018a, p. 9) notes:

> The third wave of arguments against shared parenting acknowledged that shared parenting may be beneficial for most children and families of divorce, including those in high conflict, but cautioned against the use of presumptions in family law, arguing that the best interests of children are different in each individual case, and that judges should retain their decision-making authority when it comes to post-divorce living arrangements for children".

The Maryland Commission on Child Custody Decision Making (Callahan, 2014, p. G-32) took a novel view:" As a practical matter, adopting a presumption is unnecessary because, in recent years, an increasing percentage of custody cases result in joint legal and/or physical custody decrees".

Social Sciences – From Outlier to Mainstream

In comparison to what appears in hindsight like scientific acclimation of sole custody as the preferred post-dissolution parenting norm, shared parenting has been subject to intense research and level of proof that arguably constitutes a double standard in social science research[32].

From a historical perspective, studies comparing results of sole physical custody (SPC) to joint physical custody (JPC) have followed a trajectory from mixed early results to strong support for the overall superiority of JPC. Studies undertaken in the 1980 - 1995 timeframe were limited by the low incidence of JPC and largely restricted to voluntary JPC arrangements. Overall, but not without dissenting views, qualitative summaries of that era concluded:

- children were generally resilient to divorce with the majority able to adjust psychologically, but generally with lower outcomes than children in intact homes;
- maternal care or paternal care produced generally similar outcomes;
- children preferred continuity of relationships with both parents, even in situations of parental conflict;
- parental conflict generally decreases over time;
- the quality of parental relationship often overcomes issues of low to moderate conflict, but can lead to lower child adjustment under high or prolonged conflict; and,
- quality of parental time is stronger than quantity (Charlow, 1987; Kelly, 1993; Lamb et al., 1997).

While shared parenting was not specifically addressed, an expert panel convened in 1994 concluded: "postdivorce arrangements should also aim to promote the maintenance of relationships between nonresidential parents and their children. The manner in which this occurs can take many forms."(Lamb et al., 1997, p. 400).

[32] See note 19.

Early summaries of research were limited by the inherent shortcomings of all qualitative assessments: study selection criteria, reviewer perspective, interpretation of statistical analysis or mixed results. The adoption of the quantitative tools of meta-analysis provided a systematic and consistent means to synopsize research within a common statistical framework to examine magnitude and difference effects.

When we examine the more recent conglomerative studies[33], the arguments for some form of shared parenting come to the fore. Whether or not we can extrapolate those results to a convincing argument that a rebuttable presumption ought to be the law (as the authors of this article maintain) is indeed the crux of the current debate.

To date, two meta-analyses have been conducted specifically focused on SPC and JPC outcomes[34]. We have referred to these studies earlier in this paper. To focus the arguments, we review the two studies now in one place.

Meta-Analysis #1: The first study by Bauserman (2002) was based on 33 studies spanning studies from 1982 to 1999 with a combined size of 1,846 sole custody and 814 joint custody children. He found children in joint custody scored significantly higher on all measures than children in sole custody, d=.23, and concluded "current results appear favorable to advocates of joint custody who favor a presumption of joint custody in divorce cases' (p. 99). While recognizing the need for more research and that joint custody was not universally applicable, he found the results sufficiently robust to state:

> the research reviewed here does not support claims by critics of joint custody that joint-custody children are likely to be exposed to more conflict or to be at greater risk of adjustment problems due to having to adjust to two households or feeling "torn" between parents. Joint-custody arrangements (whether legal or physical) do not appear, on average, to be harmful to any aspect of children's well-being, and may in fact be beneficial. This suggests that courts should not discourage parents from attempting joint custody. (p.99)

As noted by Fehlberg, Smyth, Maclean & Roberts (2011a, p. 6), Bauserman's (2002) study did not distinguish between consensual and court-imposed shared parenting arrangements and is subject to self-selection effects.

Meta-Analysis #2: The second meta-analysis conducted by Baude, Pearson & Drapeau (2016) reviewed 19 studies published between 1986 and 2013 involving a total of 32,285 sole custody and 4,214 joint custody subjects. The authors corroborated Bauserman's earlier results that children in joint custody generally fare better than those in sole custody but with notably smaller effect size (d=.109) leading them to state the advantages of joint custody over sole custody should

[33] Only larger summarization studies have been considered. Smaller studies like Birnbaum and Saini (2015) have not been reviewed.

[34] Other meta-analyses have been done during the last decade but focus on other research questions such as parental well-being (e.g. Bauserman, 2012). See also Steinbach (2018, p. 2) for a summary listing of recent meta-analyses and summarization studies.

be considered "prudently". In examining the effects of parental time, the authors found that increased time with both parents improved children's adjustment with a weak effect size (d=.018) below 40% with a parent but was significant above concluding "the amount of time spent with the two parents after their separation has beneficial development effects" (p. 356).

In addition, a number of research summaries have been published recently, the best known being Nielsen ((2018) and the most recent being Steinbach (2018).

Nielsen Research Summary: Expanding the number of studies in her earlier reviews, Nielsen (2018) reviewed 60 studies from 8 countries with 69,422/170,563 SPC/JPC arrangements similarly organized by the broad categories of well-being used by Bauserman (2002) and Baude et al (2016): academic outcomes, emotional/psychological outcomes, overall physical health, and quality of parent-child relationship. Consistent with the earlier meta-analyses, Nielsen's analysis went significantly further by examining several long-standing debates of the impacts of parenting quality, income and conflict in JPC/SPC outcomes:

> JPC is generally linked to better outcomes than SPC for children, independent of parenting factors, family income, or the level of conflict between parents…. Those who minimize the contribution of JPC argue that it is factors such as parents' income, education, parenting skills, and low conflict that better account for the positive outcomes seen in JPC children. This view finds very little support in the data from the 60 studies. This is not to say that children do not benefit from high-quality relationships with their parents, or living in higher income families, or having parents with low-conflict relationships. As explained in this article, these factors do matter. Nor is this to say that JPC is the most beneficial arrangement for all children. As documented in this article, that is not the case. What these studies do mean is that the vast majority of children benefit more from JPC than from SPC—and that there is no compelling evidence that PIC [parenting, income, and conflict] trumps JPC. Even if the parent–child relationship, income, and conflict were equal, children are still more likely to benefit in JPC families. (p.30)

While Nielsen is careful to note that JPC may not be warranted in all cases, a summary of her results shown below indicates that opponents of JPC are now decidedly on the defensive with the three main historical issues of parental quality, income differences and parental conflict being shown not to be determinative factors.

JPC vs SPC: Meta-Analysis (Nielsen,2018)			
Control Factor	JPC:SPC		
	JPC Favourable	No difference	SPC Favourable
None - aggregate result	90%	10%	0%
Parental quality -P	100%	0%	0%
Income-I	96%	4%	0%
Parental conflict- C	84%	11%	5%

Note:
a) JPC Favourable reflects all five assessed categories better or equal with at most only 1 worse, b) 2. No difference based on equal assessed outcomes, c) SPC Favourable is worse outcome than JPC

(The authors created the above chart from Nielsen's data.)

Nielsen is careful to acknowledge that effect sizes between JPC and SPC are generally small to moderate but cautions about misinterpreting this subjective statistical metric. She notes that smaller effect sizes are common in social and medical sciences and can have large contextual implications (i.e. small effect sizes can have outsized impacts). At this point, Nielsen's meta-analysis provides the most current scientific reference point for the state of social sciences on the issue of SPC vs JPC.

Steinbach Literature Review: Intentionally focusing on 40 more recent studies during 2007-2018 timeframe examining the effects of JPC on both child and parental well-being, Steinbach (2018) similarly concludes that JPC arrangements can have positive effects on the well-being of children and parents. However, because the reviewed studies are dominated by self-selected highly educated parents with high socioeconomic status, a low conflict level and children in the 6-15-year age range, she concludes the risks and benefits of JPC are not clear yet. She provides overall positive conclusions for JPC together with suggestions for future research. As Steinbach does not reference Nielsen's 2018 paper, she presumably was not aware of Nielsen's strong findings that income and parental conflict are not generally determinative factors in JPC outcomes compared to SPC.

Consensus Reports: The AFCC Community appears to generally have a decidedly more conservative view of shared parenting while cautiously adopting some aspects of shared parenting – judging from the general thrust of the 2013 AFCC think tank of 32 family law experts and researchers. Their task was to examine the issues surrounding shared parenting to "begin identifying when and how to offer guidance to policy makers and practitioners" (Pruett & DiFonzo, 2014). The resulting 12 Consensus Points are often vague and general and reflect a lowest common denominator consensus at odds with meta-analytic findings. Still, the Think Tank Report must be viewed as a salient moment for the AFCC community on several counts:

- it represents the first public recognition of meritorious aspects of shared parenting in stark contrast to the anti-shared parenting stances adopted by bar associations;

- it takes a historically conceptual leap by recognizing "promotion of shared parenting constitutes a public health issue that extends beyond a mere legal concern" (2014, p. 160 ,Consensus Point 1);
- it signals a major turn away from rigid adherence to individualization as "a majority of the think tank professionals supported a presumption of joint decision making, while the rest supported a case-by-case approach" (2014, p. 167,Consensus Point 8); and,

it lays out an aspirational roadmap to provide practical guidance to family law practitioners. The Think Tank panel agreed: "There is enough research to conclude that children in families where parents have moderate to low conflict and can make cooperative, developmentally informed decisions about the children would clearly benefit from JPC arrangements (Pruett & DiFonzo, 2014, p. 162)".

In contrast to the conservative stance of the AFCC Think Tank, the Warshak Consensus Report (Warshak, 2014) endorsed by 110 experts constituted a major step in providing practical guidance in its seven recommendations based on the central conclusion that "shared parenting should be the norm for parenting plans for children of all ages, including young children [recognizing] that some parents and situations are unsuitable for shared parenting"(2014, p. 59). In a subsequent paper, Warshak (2018, p. 29) notes "with one exception, studies have yet to address whether parental conflict has a different impact on very young children versus older children in shared parenting arrangements". That single study by Fabricius and Suh (2017) supports the Warshak Consensus Report that parental conflict should not trump JPC arrangements.

The most recent recommendations were made by a panel of 12 experts at the 2017 ICSP (International Council on Shared Parenting) Conference. These experts "largely agreed that:

- SP should now be a legal presumption,
- a minimum of 35% of the child's time should be allocated to each parent for the child to reap the benefits of SP, and
- the existence of interparental conflict or opposition to SP by one parent should no longer be grounds to preclude or rebut SP" (Braver & Lamb, 2018).

While these views are ahead of current practice and the AFCC Think Tank, they reflect the views of overwhelming majorities of the public as demonstrated through polling and, as the experts point out, are consistent with recommendations that have been made by other panels over two decades (2018, p. 12).

Pruett and DiFonzo's 2014 paper title -"Closing the Gap" – aptly summarizes the state of affairs between the conservative wing of the AFCC and the progressive wing of the Warshak Consensus. The conservative wing would seem to be increasingly out of step with social science, public opinion, and legislative initiatives.

Bringing together ESP advantages: A rebuttable presumption is a rule of law which allows a court to assume a conclusion or set of facts is true until proven otherwise by the preponderance of evidence. Presumptions are used both as legal starting-point shortcuts to minimize court time and litigant expenses for fact scenarios applicable in most situations as well as a signal of desirable

societal norms. Presumptions are commonplace in law and there is no evidence in any common law jurisdictions to indicate they impose "one-size-fits-all" certainty or remove individualized consideration as a bedrock principle of law. Presumptions are commonly used in family law in Child Support Guidelines, less so in property division, and have been adopted in Canada as *de facto* presumptions for spousal support (Government of Canada, 2013) with pending legislation to establish presumptive relocation law (Parliament of Canada, 2018).

The argument in favour of a rebuttable presumption of equal shared parenting rests on five points:

(1) social science research supports this proposition;

(2) strong public support;

(3) elimination of existing ambiguity and inconsistency in best interests standard;

(4) conformance to international children's rights;

(5) recognition that dissolution is a social issue rather than merely a legal one.

The social science consensus has crystallized in recent years through the Nielsen 60-study aggregation and the Warshak Consensus to conclude that barring issues of safety, abuse or parental incompetence, shared parenting results in superior outcomes to sole custody for children of all ages and even in situations of high conflict or when one parent opposes it. The Warshak Consensus is so strong that the author notes in a follow-up paper: "in the nearly four years since its publication, no article…has explicitly identified any errors in the report or disputed any of its conclusions and recommendations" (Warshak, 2017, p. 207).

More recently, a panel of 12 experts concluded that a qualified rebuttable presumption of shared parenting was warranted (Braver & Lamb, 2018, p. 9):

> The evidence is now sufficiently deep and consistent to permit social scientists to provisionally recommend presumptive SP to policy-makers … these statements are explicitly made guardedly … We might aptly characterize the current state of the evidence as "the preponderance of the evidence" (i.e., substantially more evidence for the presumption than against it). A great many studies, with various inferential strengths, suggest that SP will bestow benefits on children on average, and few if any studies show that it harms them.
>
> All panelists were, however, appropriately wary of a one-size-fits-all standard, cautioning that exceptions to an SP presumption need to be recognized as appropriate bases for rebuttal. Among the factors that should lead to such exceptions are credible risks to the child of abuse or neglect, too great a distance between the parents' homes, threat of abduction by a parent, and unreasonable or excessive gate-keeping. Furthermore, some children with special needs might require the care of a single parent.
>
> An additional potential rebuttal factor was the topic of more extended discussion: the mere existence of intimate partner violence (IPV). It was noted that there is increasingly sophisticated understanding of IPV, due primarily to the writing of Johnson ... He

> distinguished among four distinct patterns of IPV, only one of which, coercive controlling violence (the stereotypical male battering pattern), should preclude SP ...Researchers, custody evaluators, and courts must explore not simply whether there is evidence of IPV, but also its nature, when considering implications for parenting plans.

The argument for presumptive ESP is perhaps best encapsulated by Braver (2014, p. 175):

> Much as it may be desirable, we may really not know how to properly individualize, tailor, or custom-fit parenting plans to achieve the best possible outcomes in each case. So, the effort and expense and time and trouble taken in the futile pursuit of case-specific decisions come with little corresponding benefits. Better to have a starting place that covers the majority of cases and families, with, of course, the ability to deviate when the fit is obviously bad. The general public strongly believes that shared parenting is that starting place and that any other position is biased. The second cost is that vagueness and ambivalence will ultimately be iatrogenic for families by leading to greater conflict. Various proposals under consideration differently incentivize parents to engage in that conflict. Presumptions, of any flavor, generally minimize such incentives. A shared parenting presumption would minimize that incentive most of all.

The Conclusion Report of the 2018 International Council of Shared Parenting Conference states:

> As noted earlier, shared parenting, including presumptive ESP is popular with the public in many countries. Scientific research bears out the continuity of parental relationships adopted in the UNCRC and pointedly ignored in jurisdictions continuing to support traditional sole custody arrangement. The social science research now allows the heretofore indeterminate and ambivalent best interest standard to be defined in terms of maximum practicable continuity of family and parental relationships for the child as the foundational criteria for best interest determination with a concomitant reduction in parental litigation conflict based on articulated societal expectations. (2018, p. 4)

6.0 ETHICS, PROFESSIONALISM, DIVERSITY, INCLUSION

Our system is truly dysfunctional. It makes no logical sense whether from a policy perspective or from a practical humane perspective on the part of professionals who ostensibly advocate for children's best interests. But our current system surely does benefit vested interests who profit from the conflict. Whether benefiting from family law conflict is a motivation is a question that must be asked but we will leave the answer to that query to our thoughtful readers.

The vehemence of the debate on both sides is puzzling. Why is it that proponents and opponents engage in such vituperation? Even the authors of this article descend at times to such depths. Feelings run incredibly high. One would expect from learned lawyers, psychologists, social workers, judges and others that the discussion should center around an inquisitive and sober examination of the evidence, a respectful debate about the pros and cons of an ESP rebuttable presumption, and all the while the participants should focus only on what is best for most children. Sadly, this is not the case.

The debate around the issue approaches one of hysteria, particularly within the anti ESP camp. An example: The Canadian government introduced Bill C-78 to amend the federal *Divorce Act*. In the Canadian system, once a bill passes 2nd reading in the House of Commons the bill is referred to a committee for more detailed examination and debate. Both written and oral submissions are welcomed from stakeholders and the public. This bill contained not a word about ESP. One would have therefore assumed that other than the authors of this article and a few others who are disgruntled with Canadian family law, that the thrust of the submissions to the committee would have focused on aspects of the bill that merited amendment or improvement. There was no pressing need to embroil the committee in a discussion about ESP as the government bill said nothing about ESP; the concept was not even on the table.

Nonetheless, virtually every submission (oral and written) outside of the authors' submissions and a few others, spent an inordinate amount of time attacking an ESP rebuttable presumption. They were attacking a concept that the government was not even including in the bill!

One may speculate upon the reasons for this out of proportion response to the government bill. Why do so many feel such a pressing need to attack a concept that the government does not even support?

May we your authors tentatively respond? Perhaps there is an ethical gap amongst the bar and others. The vehemence of their responses is out of all proportion to the perceived threat in Canada that an ESP rebuttable presumption presents. They feel threatened by a scientifically proven concept that is being more readily accepted around the world and overwhelmingly supported by the general public in poll after poll. They perhaps fear that the present system might ultimately be truly reformed and their way of doing things will be significantly challenged.

Or maybe not.

Turning to diversity and inclusion, the authors are not aware of any studies that differentiate between the experience of racialized minorities versus the majority white culture. Are there differences in the experiences post separation/divorce amongst groups? Do various ethnic, religious and cultural groups parent their children differently during marriage or cohabitation and if so, will those differences affect post relationship parenting standards? Is there any difference in how native born Canadian and American parents divide parenting responsibilities versus those who are more recently residents of our countries? If so, how might these differences impact the ideal parenting regime when the relationship sours? These are questions that merit study and consideration.

7.0 CONCLUSIONS

We have learned here that ESP appears to garner impressive positive reaction in polling worldwide. Yet the concept evokes visceral opposition amongst many lawyers and other family law professionals, with the debate becoming unusually heated at times for academics and practitioners who presumably focus on only one factor: best interests of the children. How one defines "best interests" drives the conversation. ESP proponents define best interests in terms of

maximum time and a role in decision making – with the benefits having been proven by the social science literature. ESP opponents tend to define best interests as simply opposed to an equal time presumption that would disrupt tailor made solutions for each family, and they deride the proponents as simply trying to pay less child support and/or being fathers' rights activists (as if that alone should be enough to end the discussion).

Legislative proposals have been initiated within many jurisdictions, with Kentucky most recently adopting the clearest preference for a rebuttable presumption for an equal parenting regime. However, opposition from lawyers and others is very strong. We have presented the arguments both against and for an ESP rebuttable presumption. We have discussed the international aspects of ESP. We have examined the literature.

We maintain that ESP is not simply a "fathers' rights" issue. While under International Law and consensus, both parents do indeed have rights to be active parents, we prefer not to approach the ESP option as of one of "rights". Rather, in this paper we have tried to present a constructive pro-child approach that affords to most parents the opportunity to fulfill their parental responsibilities. To that end, we define "best interests" in light of the overwhelming social science consensus that has documented the benefits for most children. Seen in that light, it follows that a broader based scrutiny of what is best for most kids needs to be implemented within both social and legislative parameters. We argue that the best way to achieve what is best for most kids is to enact a statutory rebuttable presumption of ESP.

If we reject the social science, then we continue to encourage divisive family law contests that seek to minimize the role of one parent while aggrandizing the "primary parent" role of the other parent. To achieve that result the "primary parent" proves how he/she is a superior parent to the other and that the other is not an adequate parent. Our system encourages conflict; ironically lawyers and others call that determining the children's "best interests" on a case by case individualized basis.

To achieve a legislated solution, the authors argue that ESP rebuttable presumption advocates must embrace the legitimate concerns of the ESP opponents and provide sensible and workable solutions. For example, no person should be subjected to violence of any kind – from extreme controlling behaviour to outright physical assault. Yet, the presumption should be recognized as "rebuttable" and clear guidelines need to be outlined to characterize when ESP should not be imposed. Courts must be given (or perhaps "reminded of") the tools available to minimize if not eliminate conflict such as pickup and delivery at school or camp, at supervised access centres, or other means to eliminate conflict. Such tools as "Our Family Wizard" should be employed with an admonition that one's communications can be reviewed at any time. Parental Alienation and excessive gate keeping will not be tolerated. Where ESP is imposed and proves to be detrimental to a child, then there must be expeditious means to have the regime reviewed.

Jurisdictions that implement an ESP rebuttable presumption should study the results carefully - from parent satisfaction/dissatisfaction to child adjustment on multiple axes. Conflict under the new regime (both interpersonal and legal) needs to be measured.

The current family law system in most of Canada and the U.S.A. (and other jurisdictions) is not working. At least in Canada we do not need any further studies to tell us that. Bold reform

measures as advocated here would be a sea change improvement for the lives of parents and children.

ANNEX "A": CHILD SUPPORT CALCULATION FOR SHARED PARENTING CASES

1.0 Prototypical Income Shares Child Support Model

Under the principle of proportionality underlying the dominant Income Shares model (and other approaches), parents contribute to the total child cost proportional to their respective incomes. Jurisdictions typically utilize gross income but some utilize after-tax income.

Total child costs for each parent, i, are composed of out-of-pocket expenditures (OOP_i) consisting of two cost components: direct household child costs (C_i) and child support transfer (Q_i).Child support paid is a positive value while child support received is the corresponding negative value since net transfers must be zero, by definition:

$$Q_1 + Q_2 = 0 \qquad \text{--- (1)}$$

It follows that total out-of-pocket expenses for both parents (OOP) equal total child costs:

$$OOP = OOP_1 + OOP_2 = (C_1 + Q_1) + (C_2 + Q_2) = (C_1 + C_2) + (Q_1 + Q_2) = C \qquad \text{--- (2)}$$

The proportionality principle of proportionate contributions allows the child support quantum to be readily calculated as the prototypical equation:

$$OOP_1/E1 = OOP_2/E_2 \qquad \text{--- (3a)}$$

$$(C_1 + Q_1)/E_1 = (C_2 + Q_2)/E_2 \qquad \text{--- (3b)}$$

which simplifies to the child support quantum

$$Q_1 = -Q_2 = (E_1/E)\, C_2 - (E_2/E)C_1 \qquad \text{--- (3c)}$$

This may be written in an alternative format as follows:

$$Q_1 = (E_1/E)C_2 + \{(E_1/E)C_1 - (E_1/E)C_1\} - (E_2/E)C_1$$

$$= (E_1/E)C - C_1 \qquad \text{--- (3d)}$$

Equation 3c states that child support quantum consists of the net difference between proportionate contributions by each parent to child costs borne in the other parents household; equation 3d provides an alternate conceptual understanding that child costs consists of proportionate contribution towards total child costs less direct expenses incurred in the household- i.e. each

parent contributes proportionately to the total child cost cookie jar and then withdraws direct expenses incurred.

The prototypical child support model accommodates the dual residency of shared parenting by dividing the child standard of living (SOL) into standard economic fixed cost (w_i) and variable cost (v_i) components where, by definition,

$$w_i + v_i = 1 \qquad \text{--- (5)}$$

Economists and many courts agree that fixed costs are about 50% so that w=v=.5.

Child costs for each household, i, may be written as:

$$C_i = C_0\{w + vt\} + CX_i - CT_i \qquad \text{--- (6)}$$

where t = proportion of time spent by a child in household i
w = .5 assuming proportion of child time is sufficient to trigger full fixed cost
C_0 = Base child costs at combined income of both parents determined from survey data
CX_i = special or extraordinary child costs above base costs, C_0
CT_i = child related tax credits/benefits which reduce gross child costs

To determine child support quantum under shared parenting, substitute equation (6) in (3d) to yield:

$$\begin{aligned} Q_1 &= (E_1/E)\, C - C_1 \\ &= (E_1/E)\, (C_1 + C_2) - C_1 \\ &= (E_1/E)\, \{C_0(.5 + .5t) + C_0(.5 + .5(1-t)\} - C_0(.5 + .5t) \\ &= C_0\{1.5E1/E - (.5 + .5t)\} \qquad \text{--- (7)} \end{aligned}$$

Under the condition of 50/50 parenting time split (t=.5), child support payable becomes:

$$Q_1 = C_0\{1.5E_1/E - .75\} \qquad \text{--- (8)}$$

Child support remains payable in a 50/50 arrangement except in the specific instance where household incomes are equal (E_1/E=.5), as intuition would suggest.

Shared parenting opponents often assert that a parent is motivated to seek that arrangement to reduce child support obligations. This is a misleading argument as it only addresses child support quantum while ignoring direct household child expenses as the other component of out-of-pocket expenses.

The impact can be seen by comparing out-of-pocket expenses in a sole custody and shared parenting situations. Using equation (3d), out-of-pocket expenses for household 1 are proportional to total child cost in accordance with the proportionality principle:

$$OOP_1 = C_1 + Q_1 = C_1 + \{(E_1/E)C - C_1\} = (E_1/E)C \quad \text{--- (9)}$$

For sole custody where household 2 has the child full time with no parenting time for household 1,

$$OOP\text{-}SC_1 = (E_1/E)\, C = (E_1/E)\,(C_1 + C_2) = = (E_1/E)(0 + C_0) = = (E_1/E)C_0 \quad \text{--- (10)}$$

For shared parenting with parenting time, t, where full fixed costs of dual residences apply,

$$\begin{aligned} OOP\text{-}SP_1 &= (E_1/E)\,(C_1 + C_2) \\ &= (E_1/E)\,\{C_0(.5 + .5t) + C_0(.5 + .5(1-t)\} \\ &= (E_1/E)\,\{1.5C_0\} \end{aligned} \quad \text{--- (11a)}$$

Comparing equation (11a) with (10) shows that shared parenting is 50 % more expensive than sole custody due to the need to maintain two homes. The same applies to the other household.

$$OOP\text{-}SP_2 = (E_2/E)\,\{1.5C_0\} \quad \text{--- (11b)}$$

It follows that total out of pocket expenses in shared parenting (where parenting time triggers full fixed costs in each household) are 50 % more than for sole custody:

$$OOP\text{-}SP = OOP\text{-}SP_1 + OOP\text{-}SP_2 = 1.5C_0 \quad \text{--- (12)}$$

While quantum decreases for the non-resident parent (household 1) under increased parenting time, the decreases are more than offset by increases in assuming direct household child expenses for the dual-resident child. The converse applies to the resident parent (household 2). This is illustrated in the following example assuming the higher earner makes 60% of combined earnings and sole-custody child costs are C_0.

Custody	**Sole Custody**		**Shared Parenting**		**Difference**	
Household	**1**	**2**	**1**	**2**	**1**	**2**
Direct Cost (C_i)	0	C_0	.75 C_0	.75 C_0	.75 C_0	-.25 C_0
Quantum (Q_i)	.60 C_0	-.60 C_0	.15 C_0	-.15 C_0	-.45 C_0	+.45 C_0
Out-of-Pocket (OOP_i)	.60 C_0	.40 C_0	.90 C_0	.60 C_0	.3 C_0	.2 C_0
% OOP	60%	40%	60%	40%	60%	40%

As the example illustrates, shared parenting is a more expensive proposition for both parents. Specifically, the argument that non-residential parents seek shared parenting to reduce child costs is false, notwithstanding that quantum may decrease. This conclusion applies generally across all prevailing types of child support models (i.e. Income Shares, Percentage of Income, Melson) and their variants although results will differ somewhat from the prototypical formulation. Some jurisdictions do not factor in the fixed cost of the second residence. In these cases, the total out-of-pocket costs for sole custody and shared parenting are the same and parents will continue to contribute proportionally albeit with offsetting direct costs and quantum depending on parenting time splits.

2. Financial Incentives for Reduction in Child Support Quantum

Are there financial incentives exist to reduce child support quantum? The answer is yes and lies in understanding the financial impact of shared parenting time and parental perception of the appropriateness/fairness of the child standard of living (SOL) embedded in Child Support Guidelines.

The financial impact can be assessed by comparing the impact on out-of-pocket expenses. For parent 1, recall equation (9) which states that out-of-pocket expenses for child cost, C, are proportional to parental earnings. The equation may be expanded to express parental time allocation:

$$OOP_1 = (E_1/E)C = (E_1/E)C_0 \{ w(t) + vt + w(1-t) + v*(1-t)\} = (E_1/E)C_0 \{ w(t) + w(1-t) + .5\} \quad \text{--- (13)}$$

Next, consider the scenario where parent 1 negotiates a different parent time, t', and maintains the child at some lower fraction, f, of child SOL.

$$OOP_1' = Q_1' + C_1' = \{(E_1/E)C_0 \{ w(t') + w(1-t') + .5\} - C_1' \} + x\, C_1' \quad \text{--- (14)}$$

Subtracting the two yields:

$$\Delta OOP_1 = OOP_1' - OOP_1 = (E_1/E)C_0 \{ (w(t') + w(1-t')) - (w(t) + w(1-t))\} - (1-x)\, C_0\, (w(t') + v*t') \quad \text{--- (15)}$$

The first term states that OOP will be reduced to the extent total fixed costs between the household is reduced. This occurs when parenting time is reduced below the threshold where full fixed cost occurs for one household resulting in shared parenting reduction to some form of visitation with

occasional overnights with the optimal cost reduction occurring in a sole custody situation for either household. However, in those jurisdictions where Guidelines do not incorporate the fixed costs of the second household, this term will be zero.

The second term describes the reduction in direct child expenses due to a below-Guideline SOL in household 1. The maximum savings occurs for sole custody for parent 1.

The same financial incentive logic is applicable to the second household.

3. Summary

Based on a prototypical "Income Shares" child support model, the above mathematical analysis of the alleged financial incentives for parents to pursue shared parenting indicates the following:

i. Shared Parenting is more costly that sole custody to both parents in terms of direct out-of-pocket expenses due to the additional fixed cost component of the second residence;

ii. While child support quantums do indeed decrease with shared parenting, any savings for the non-residential parent are more than offset by the necessity for direct child expenditures to support the child leading to higher out-of-pocket expenses. The exception to this is in jurisdictions that do not factor in the fixed cost of the second residence, in which case the out-of-pocket expenses remain the same regardless of parenting time allocation, including sole custody;

iii. As long as both households are deemed by Guidelines to incur full fixed costs, there is no financial incentive to change parenting time allocation within this shared parenting zone;

iv. Guidelines with perceived inflated standard of living for the child act as perverse incentives for both parents to pursue sole custody as the maximum economic payoff.

The above conclusions remain generally valid under different variants of the dominant Income Shares model as well as other child support models (e.g. Percentage-of-Income, Melson) providing the jurisprudence recognizes increased fixed costs associated with the second residence.

ANNEX B: ANALYSIS OF SHARED PARENTING IN EUROPE

Country	Legislation	Practice	JLC Percentage of joint legal custody	JPC Percentage of Joint Physical Custody
Austria	Legislation based on primary residence with mutually agreed parenting time arrangements (15)	Notwithstanding any legislation, strong judicial preference for SPC continues. JPC severely restricted by the courts.	54%	
Belgium	In 1995 and 2006. JLC and JPC became the default recommendations. No specific JPC formula but "hébergement égalitaire" legislation states children should live an equal amount of time with both parents as preferential condition (3) JPC does not need agreement of both parents	One of the advanced shared parenting jurisdictions JPC is highly tailored by courts		50:50 10% (2004) 23% (2012) JPC: 35-45%
Czech Republic	JLC legislation in 1998	Serious lag with 85% maternal SLC High court ruling on presumption of alternating residency has yet to be felt	8% (2011) 2% (2001)	
Denmark	Continuity of parental authority post-dissolution established for decades 2007 allowed co-parenting, even against wishes of a parent	92% of cases resolved through administrative parental agreement Strong shared parenting cultural	64%	25% (8) 50:50 39% (age 7-11) 22% (age 15)

Country	Legislation	Practice	JLC Percentage of joint legal custody	JPC Percentage of Joint Physical Custody
	2015 legislation provided for anti-gatekeeping provisions 2019 streamlining legislation includes 3-month continuance window if one parent wishes to challenge custody. Accelerated processes and exceptions made for DV cases. (9). Stronger emphasis on equal parental rights (10)	norm dictated by logistical practicalities		
France	1993 continuation of parental authority post-dissolution (6) 2002 "Alternating Residence" co-parenting legislation provides JLC and encouragement of JPC Emphasizes continuation of joint parental authority and responsibility post-dissolution	Heavy use of Friendly Parent rule	95%	11.5% (2004) 20.0% (2010) (2)
Germany	Presumptive JLC Law recognizes continuity of relationships for both child and parents (7)	Parent B spends 20-30% parenting time with child. Cochem shared parenting model gaining traction	13%	
Greece	No explicit JLC provision, but not disallowed	90% maternal SLC		

Country	Legislation	Practice	JLC Percentage of joint legal custody	JPC Percentage of Joint Physical Custody
Italy	2006 JLC legislation for JPC as default residential model (3) Children's right to have significant and stable continuing relationship with both parents Presumptive equal shared parenting legislation ("perfect co-parenting") under consideration (1,16).	Seriously lags legislation with 89% of maternal parenting time despite high JLC	89%	2%
Luxembourg	JPC legislation adopted			
Netherlands	1998 law established continuation of joint parental responsibilities post-dissolution as default (17) Presumptive JLC in 2005 2009 law introduced principle of parental equality and presumptive JLC to promote shared parenting as policy	Friendly parent rule orientation	90% (12)	5% (1998) 16% (2008) (3) 20% (2013) (11)
Norway	State policy on gender equality and equal parenting rights 2010 presumptive JLC legislation allows JPC even against will of one of the parents (3)			7% (2002) (13) 30 % (~ 2017) (8) 50:50 is reportedly typical arrangement (13)
Portugal	No legal definition of custody	JLC is general tendency with severe restriction on parenting time		3%

Country	Legislation	Practice	JLC Percentage of joint legal custody	JPC Percentage of Joint Physical Custody
		reflecting strong maternal preference		
Romania	2011 JLC legislation	Serious legislative lag with 85% maternal residency and continuation of "standard visitation" model	48%	
Slovakia	Joint Custody option in 2010	Serious legislative lag with 89% maternal SLC with ~ 15 % paternal parenting time	5%	
Spain	2005 legislation for JPC as default residential model for agreeing parents (3,5) Regional laws vary in Aragon/Catalonia/ Valencia Shared parenting legislation has been discussed but not tabled	Historically strong maternal preference with >20% with Parent B except in 3 autonomous regions		12.3% (2011) 21% Catalonia 19% Aragon 14% Valencia
Sweden	1920 legislation established JLC JPC as preferred option introduced in 1998 In 2006, JPC amended to consider impacts of non-cooperating parents but not as determinative factor (4)		82 % (1992)	1% (~1985) (8) 4% (1992) 21% (2005) 37% (2018) (8)
Switzerland	Traditionally a maternal preference jurisdiction,	Serious legislative lag with continued strong maternal	46%	

Country	Legislation	Practice	JLC Percentage of joint legal custody	JPC Percentage of Joint Physical Custody
	shared parental authority became the rule in 2013	preference in the courts (93 % maternal residency)		

Sources:

- (Tromp, 2013a; Primary source: Vezzetti, 2013),
- (1) (Momigliano, 2018)
- (2) (Whiston, n.d.)
- (3) (Sodermans, Matthijs, & Swicegood, 2013)
- (4)(Singer, 2013)
- (5) (Whiston, 2011)
- (6) (Parkinson, n.d. Note 33)
- (7)(n.d. notes 35,36)
- (8) (Fransson et al., 2018, p. 350)
- (9)(Ministry of Justice and Security, 2019)
- (10) (Lohse, 2019)
- (11)(Poortman & van Gaalen, 2017)
- (12) (Spruijt & Duindam, 2008)
- (13) (Kitterød & Wiik, 2017)
- (14) (Tromp, 2013b)
- (15) (Pototschnig, 2013)
- (16) (Martin, 2018)
- (17) (Boele-Woelki, Schrama, & Vonk, n.d.)

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