

# MYTHS AND FACTS CONCERNING A REBUTTABLE PRESUMPTION OF EQUAL SHARED PARENTING

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# Myths and Facts

**Introducing a rebuttable presumption of equal shared parenting would reform the current dysfunctional and arbitrary litigation-based system, which, despite its stated goals:**

- ❖ Is founded on a series of demonstrably false Myths and Assumptions;
- ❖ in practice fails to advance the long-term best interests of the affected children; and
- ❖ in practice exposes them to conflict, uncertainty and parental pressure; and
- ❖ In fact exposes the family and the taxpayers to unjustified costs, trauma and uncertainty that impacts the family in all domains of their lives; and
- ❖ Opposing statements are empty rhetoric pandering to special interests and not evidence-based

# Myth:

- **The current system is actually working to advance the best interests of the children**

# Fact:

- ❖ The current system is built to foster litigation (and mud-slinging) for those couples unable to successfully restructure on their own.
- ❖ Even supplemented with a long list of criteria for Courts to consider, there is too broad a range of discretion for actual results in Court. – lack of predictability and guidance and no impetus to settlement
- ❖ Therefor actual results in Court are not predictable and dependant upon, and influenced by, many factors that do not advance the best interests of the children, such as judicial background and urban/rural; whether parties represented by counsel; budgets for legal fees; false allegations and status quo

# Myth:

- **The current system is actually working to advance the best interests of the children (Part 2)**

# Fact:

- ❖ The current system has no answer for the chaos that results on separation where it may take many months to properly start a case and have a first Case Conference before bringing a Motion for an initial interim Court Order
- ❖ During this time, self-help, power/control, unilateral withholding and self-help tactics dominate and determine parenting time.
- ❖ A starting point of a rebuttable presumption until there is a proper evidentiary base for a Judge in a proper forum
- ❖ The current system seeks to find the “better” parent – an impossible task as parents bring complementary skills, interests and values - Kopetski research from the 80’s and twp. “normal” parents are all that is required. Child protection vs best interests constructs

# Myth:

- It is necessary to make a custom inquiry into the best interests of a child without any guidance, other than a list of criteria; a rebuttable presumption detracts from this

# Fact:

- ❖ Judges themselves will indicate that they do the best they can with limited information (and they are particularly limited in their fact-finding ability at a Motion based solely on affidavit evidence).
- ❖ There are no retrospective studies of whether Judges are getting it right - Studies interviewing children of divorce show that children would have wanted ESP and avoiding the whole battle and loyalty-bind
- ❖ Most parents settle pre-Trial after Motions based solely on paper evidence and at an early stage
- ❖ Granular solutions instead of parenting schedule

# Myth:

- Equal shared parenting is not appropriate for all families.

- Fact:

- ❖ According to the science, and decades of polls of public opinion across North America, equal shared parenting is appropriate for most, if not the vast majority of, families.
- ❖ By preventing undue litigation concerning families contesting parenting plans within a narrow band of 70/30 to 50/50 (where both parents are typically of normal skill set and aptitude), the very expensive family law system can devote its resources to the families with significant or atypical issues.
- ❖ What is being proposed is a **rebuttable** presumption

# Myth:

- Equal parenting initiatives have been attempted and the results have not been favourable and there has been a move to undo the reforms.

# Fact:

- ❖ Australia did not enact ESP and then retract it. Five years after the 2006 reforms support for ESP had risen from 77% to 81%. The political pushback related to increased DV provisions and shared decision-making as opposed to ESP time. – see *“Shared Physical Custody: What Can We Learn From Australian Law Reform”*, Parkinson, P., 2018 Journal of Divorce & Remarriage
- ❖ There has never been a US enactment that was subsequently withdrawn
- ❖ Results in Kentucky and Arizona (a version of maximum contact) are very favourable

# KENTUCKY RESULTS ARE VERY FAVOURABLE

- Went from a D minus (with only two states being lower) in the previous NPO Scorecard (with very archaic jurisprudence) to an A in the 2019 Scorecard
- Last year, Kentucky passed the nation's first complete "shared parenting law," which was called the state's most popular law of the year. The law created a starting point that both parents have equal child custody time if the parents are fit caregivers. The Bluegrass State's citizens voiced their support by a whopping factor of 6 to 1. Now, the Administrative Office of the Courts has issued a report that the law is as effective as it is popular.



# KENTUCKY RESULTS ARE VERY FAVOURABLE

- **Kentucky's family court caseload and domestic violence cases had been rising, which is expected because the state's population is increasing.**
- **But, in early July 2017 when Kentucky implemented a partial version of the shared parenting law. that trend abruptly stopped and family court cases and domestic violence filings began declining.**
- **In July 2018 the rebuttable shared parenting law (with a "friendly parent" factor) took effect and the family court caseload and domestic violence filings dropped further.**

# Kentucky Results Are Favourable

- **The decline in domestic violence claims is meaningful as Kentucky expanded its domestic violence definition to include dating in 2016. Then, in 2018 the state began requiring a much broader form of domestic violence reporting.**
- **Despite the upward domestic violence trend, state population growth, broader definition of domestic violence and stronger reporting criteria there are fewer claims.**

# Myth:

- Equal parenting is not suitable in situations where the parents do not get along and cannot make decisions jointly.

# Fact:

- ❖ Overwhelming science exists supportive of the fact that equal parenting **reduces** conflict, obviously particularly where unbalanced parenting proposals are the primary source of the conflict, but generally, as well
- ❖ See for example, several articles in the 2018 Edition of the Journal of Divorce & Remarriage such as by Nielsen and Mahrer
- ❖ Jurisprudence also supports ESP as reducing conflict (fewer transitions, transition only at school/camp)
- ❖ Decision making – including using a PC – can be allocated differently even though parenting time is equal

# Myth:

- Equal parenting supports the rights of child or spousal abusers or parents with addictions or other parenting impairments.

# Fact:

- ❖ The rebuttable presumption of equal parenting does not overcome the other considerations in the legislation and where material abuse or material parenting impairments relevant to future childcare have been substantiated, the presumption will be rebutted.
- ❖ The rebuttable presumption of equal parenting supports the child's rights to know and experience their parents to the maximum amount consistent with their best interests
- ❖ Often any parenting concerns can be mediated with courses, supports, parenting covenants or be considered transitory issues and allocating parenting time is not the effective, granular way to deal with the issue

# Myth:

- A Rebuttable presumption of equal shared parenting does not reflect parents' and children's expectations based on prior child care arrangements before separation.

# Fact:

- ❖ The mental health literature and legal jurisprudence make it clear that families restructure after separation and parents make adjustments to their schedules and activities and prior child care arrangements are not necessarily determinative of an optimal post-separation arrangement.
- ❖ Children generally want two primary parental relationships post-separation according to surveys

# Myth:

- A rebuttable presumption of equal shared parenting is inconsistent with current and pending expanded concepts of domestic violence provisions in legislation.

# Fact:

- ❖ It is a “rebuttable” presumption and in cases of demonstrable domestic violence affecting the ability to parent the presumption will be rebutted..
- ❖ The maximum contact principle has lived harmoniously for over 30 years with other provisions making DV a factor in parenting plans; there is no reason to conclude that a rebuttable presumption of ESP cannot also live harmoniously in the legislation.
- ❖ Expanded definitions of family violence pick up coercive control/gatekeeping/parental alienation and tie in nicely with the ESP/friendly parent principles

# Myth:

- **A rebuttable presumption of equal shared parenting is not appropriate for infants and toddlers.**

# Fact:

- ❖ The science is overwhelmingly in favour of equal parenting arrangements for infants and toddlers and has recently been revalidated through an international consensus report (Warshak 2018 published in the 2018 Edition of the Journal of Divorce & Remarriage).

# Myth:

- **A rebuttable presumption of equal shared parenting would impact on child support for stay at home mothers.**

# ▪ Fact:

- ❖ Under the current child support paradigm shared parenting resulting in off-setting support would have a negligible impact on the net amount of child support paid to a stay-at-home parent.



# Myth:

- **Alternative Dispute Resolution proposals can solve the current litigation issues**

# Fact:

- ❖ The types of families who would benefit from ADR are doing so today, with broadly-based resources
- ❖ ADR is contra-indicated in PA and Gatekeeping cases due to the power imbalances and risks of delay

# Myth:

- The massive cost of the current system (Courts, administration, mediators, Judges, lawyers, therapists and disruption to parents during the litigation process) is justified in terms of the need for customized solutions for each family and no “principles or presumptions” to guide the process.

# Fact:

- ❖ There is no empirical evidence that the customized solutions improve outcomes better than ESP or that the costs of the delay, expenses, trauma and uncertainty are justified by materially superior outcomes.
- ❖ The only reliable (and overwhelming) research supports the view that children’s adjustment to separation is enhanced the closer you get to a 50/50 parenting plan.

# Myth:

- **There should not be any principles or presumptions in family court legislation**

# Fact:

- ❖ For decades jurisprudence has relied on the existing maximum contact and friendly parent principles in the Canadian federal Divorce Act.
- ❖ There is now a pending presumption concerning mobility cases.
- ❖ The maximum contact principle has gone some way, but only in an inconsistent fashion, to preserve children's relationships against the wishes of a parent seeking to marginalize the other parent.

# Public Opinion Polls

- **See full list of international polling on the website for Leading Women For Shared Parenting**
- **In Canada two decades of polling results:**
  - ❖ Across every demographic (age, gender, political affiliation, region)
  - ❖ Approx. 80% of decided participants are in favour or strongly in favour – exceeding climate change as man-made views by 12%
  - ❖ Less than 10% of decided participants opposed or strongly opposed
- **Similar international results**
- **Special interests vs the true experts – the public exposed to the current system**

# The Science - Collections

- **In 2014, the Council of Europe passed a resolution recommending adoption of ESP by member countries**
- **Lawyers for Shared Parenting**
- **Canadian Equal parenting Coalition**
- **International Council on Shared Parenting**
- **Leading Women for Shared Parenting**
- **National Parenting Organization**
- **Leading Experts in North America:**
  - ❖ **Dr. Richard Warshak (Texas)**
  - ❖ **Dr. William Fabricius (Arizona State University)**
  - ❖ **Prof. Linda Nielsen (Wake Forest University)**
  - ❖ **Pref. Edward Kruk (University of British Columbia)**

# NPO 2019 Scorecard

- **The 2019 Report Card provides an update on the inaugural 2014 Report Card Overall, 9 states enacted shared parenting legislation since 2014.**
- **Kentucky was a stand-out as the first jurisdiction in the US (and globally) to pass a rebuttable presumption of equal shared parenting.**
- **Along with Kentucky, Arizona also received an A grade as evidence since the 2013 enactments of maximum parenting time provisions indicates they have been interpreted as an implicit presumption of equal shared parenting.**

## 2019 NPO Scorecard – Part 2

- **The average shared parenting grade went from D+ in 2014 to C- in 2019 indicating there's still a long road ahead despite notable improvements during the past 5 years. The average grade for the nine states with legislative changes went from D+ in 2014 to B- in 2019.**
- **Shared Parenting has been a hotly contested legislative topic during the past 5 years. There have been 180 shared parenting bills introduced during that time in 46 states and DC with Missouri leading the pack with 12 bills followed closely by New York (current rating – F), Minnesota and Massachusetts. Florida was a near win with the House and Senate passing shared parenting legislation which was vetoed by then Governor Scott.**

# **The Canadian Experience 2018 - 2019**

- **December 2017 Canadian bar Association Family Law Section submission re modernizing the 1985 Divorce Act**
- **Bill C-78 introduced Spring 2018 – modernizing legislation (keeps maximum contact and friendly parent provisions but does not add ESP despite many supporting submissions**
- **House of Commons Standing Committee on Justice and Human Rights hearings November – December 2018**
- **Cdn Bar Association and DV lobby tried to even gut the 30-yr old maximum contact principle**
- **Senate Committee on Legal and Constitutional Affairs hearings June 2019 – jammed in and no changes to legislation proposed to ensure it could be given Royal Assent before Parliament prorogued. Changes take effect July 2020**



# The Canadian Experience 2018 – 2019 (pt 2)

## Dept of Justice Final Legislative Explanation of Max. Contact provision

It is well accepted that unless circumstances, such as safety concerns, indicate otherwise, children should have strong relationships with each parent. Sufficient time with each parent is necessary to maintain these relationships.

However, the optimal amount of time depends on an individual child's circumstances and must be based on what is in the child's best interests. Therefore, courts must take into account all factors relating to the best interests of the child in determining what division of time would be best.

As part of the best interests of the child analysis, the allocation of parenting time is subject to the overarching primary consideration of the child's safety, security and well-being.

**Query what meaning to then give to this specific principle? The extensive jurisprudence on the point is not mentioned by the D of J**

# The Canadian Experience 2018 – 2019 (pt 3)

## Sept. 2018 D of J Legislative Backgrounder

Over the years, several private member's bills<sup>12</sup> have proposed changes to the *Divorce Act* that would have created a legal presumption of equal shared parenting meaning equal time and joint decision-making responsibility. This presumption would apply unless a parent could prove that such an arrangement is not in the best interests of the child. While in most cases parents can and should share responsibilities for their children, a presumptive equal shared parenting arrangement does not work for all families. For example, if one parent travels frequently with work, or does shift work, it may be very difficult to share time with a child equally. If there has been family violence, sharing responsibilities may be dangerous to the child and other family members. An imbalance in power between spouses—as well as the high cost of legal representation—may make it difficult for a party to present evidence to convince a court not to apply the presumption.

**This commentary: (I) inconsistently reflects on the “rebuttable” part of the proposal; and (II) ignores the high cost involved today in proving that ESP is in the best interests of the children and that many merit worthy situations for ESP have to be abandoned as a result of costs of litigation**

# The Canadian Experience 2018 – 2019 (pt 4)

## DOJ Backgrounder

<sup>11</sup> Nicholas Bala et al, “Shared parenting in Canada: Increasing use but continued controversy” (2017) 55:4 Family Court Review 513.

<sup>12</sup> See for example Bill C-560, [An Act to amend the Divorce Act \(equal parenting\) and to make consequential amendments to other Acts](#), 2nd Sess, 41st Parl, 2013.

Several stakeholders, including the Canadian Bar Association,<sup>13</sup> have argued that a presumption could increase litigation by forcing parents to lead evidence showing that the other parent is less fit, thus fuelling conflict. The Special Joint Committee on Child Custody and Access noted that a parenting presumption would shift the focus of the inquiry in parenting matters away from the best interests of the child.<sup>14</sup> A presumption would be inconsistent with Bill C-78’s emphasis on children’s best interests.

<sup>13</sup> The Canadian Bar Association, [“Bill S-202 – Shared Parenting Act,”](#) Legislative Comment on Bill S-202, *An Act to amend the Divorce Act (shared parenting plans)*, 1st Sess, 42nd Parl, 2015 at 2.

<sup>14</sup> Parliament of Canada, Special Joint Committee on Child Custody and Access, [For the Sake of the Children](#) (December 1998) at 44.

**Illogical and unsupportable – there is too much harmful litigation and mudslinging already today because of the lack of a presumption, which would reduce the incentive for conflict. A rebuttable presumption advances best interests by reflecting social science and public understanding of how to best assist children’s outcomes.**

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