

**Submission to the House of Commons Standing Committee
on Justice and Human Rights
on Bill C-78 by the Canadian Association for Equality and Brian Ludmer, B.Comm, LLB.
Myths and Facts Concerning a Rebuttable Presumption of Equal Shared Parenting**

EXECUTIVE SUMMARY

Introducing a rebuttable presumption of equal shared parenting would reform the current dysfunctional and arbitrary litigation-based system which, despite its stated goals, in fact fails to advance the long-term best interests of the affected children and in fact exposes them to conflict, uncertainty and parental pressure.

A rebuttable presumption of equal shared parenting does not impose that solution for all families. It merely recognizes public opinion (i.e. the actual consumers and clients of the current dysfunctional system) and the applicable science to indicate that there must be persuasive evidence that the needs of the children must be “substantially enhanced” for a departure from an equal parenting solution. In other words, a rebuttable presumption of ESP is just the starting point for the analysis.

Support for this initiative is overwhelming across all Canadian demographics, according to decades of public opinion polling – the public’s actual experience is that the current litigation-based system is failing families. Overwhelming science supports a rebuttable presumption of equal shared parenting as a means to protect children from the conflict inherent in the current system. Opposition submissions on this issue are vague and based entirely on rhetoric and lacking in substance and are generally not evidence-based assertions. In the face of overwhelming public opinion and science, **the current system is founded on a set of material incorrect assumptions and myths, which are sequentially addressed and refuted below.**

REFUTING THE MYTHS WITH LOGIC AND FACTS

1. **Myth:** The current system is actually working to advance the best interest of the children.

Facts:

- I. The current system is built to foster litigation for those couples unable to successfully restructure on their own. The current system, even supplemented with a long list of criteria for Courts to consider, provides too broad a range of discretion for actual results in Court. As a result, the actual results in Court are dependant upon and influenced by, many factors that do not advance the best interest of the children. These include:
 - a) The personal background, assumptions, biases and life experience of the particular Judge;
 - b) Whether one or both parties are self-represented, in which case the proper data presented in a legally admissible and persuasive manner are not available to the Trial Judge. The importance of this factor is underscored by the fact that at least 50% of Family Law litigants are self-represented and self-represented litigants fare quite poorly in Court generally, but particularly when the other side of the case is represented;

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- c) Relatedly, a wealthy or well-funded (friends and family support) litigant will have an inherent advantage and the parent with less financial resources may have to fold and accept a marginalized role in the children's lives because of the prohibitive cost of Trials.
 - d) The thoroughness (and related cost) of presentation of the case, including whether the client in question is represented and whether they have the budget for multiple witnesses and a lengthy Trial and up-to-date research on Court decisions involving maximum contact and equal shared parenting – this produces inconsistent results in the jurisprudence itself;
 - e) Undue reliance in Court decisions on contested assertions of relative parenting time prior to separation and on artificial status quos created post-separation;
 - f) Whether the narrative before the Court has been influenced by false allegations and whether the defendant is represented or is otherwise able to demonstrate the falsity of the allegation;
 - g) Whether a particular litigant's extended family lives in another province or country and therefore is less able to provide supportive collateral information;
 - h) Whether a party wishing to introduce the latest social science research has the funds to afford this expert evidence or expert evidence to refute a parental alienation dynamic;
 - i) Most litigants do not have the financial capacity to endure a one-to-two-week (or longer) Trial. Their cases are decided at Motions based solely on affidavit evidence or on abbreviated proceedings of a couple of days. In all such cases, the full detailed family history and the full understanding of children's needs and the ability and willingness of the parents to meet those needs, with all of its nuances, cannot be determined with precision. The Court applies "models" and unstated presumptions in determining a parenting plan. There is no ability in such forums for robust fact-finding.
- II. As a result of these and other factors, there is a material arbitrariness in the actual outcomes of contested family law adjudications. Many worthy parents are unjustly marginalized and the children miss out on what they had and what they might benefit from in future. Despite robust jurisprudence supporting equal shared parenting, and despite the current "maximum contact principle" in Section 16(9) of the Divorce Act, there is no predictability, nor any consistency in where, when and how certain children benefit from two primary parents and others have a parent marginalized. The arbitrariness of the current system manifests itself because of the following factors, amongst others:

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- a. The personal background, assumptions, biases and life experience of the particular Judge;
 - b. Whether the case takes place in an urban centre or a rural centre (less diversity of Judges in the locale and less evolution of the jurisprudence);
 - c. Whether the case takes place in a Province with more developed “maximum contact” and equal parenting jurisprudence;
 - d. Whether the local Judge has been trained in the latest social science research on children’s outcomes, which overwhelmingly support equal shared parenting; and
 - e. Whether one or both parties are self-represented, in which case the proper data presented in a legally admissible and persuasive manner are not available to the Trial Judge.
- III. The current system (regardless of the length of listed criteria) provides no structure or guidance to parents at the time of separation. It can take up to six months after separation to get into Court for a contested Motion on an initial interim parenting plan. Chaos, self-help and power dynamics apply during the period from separation until the first contested Motion, with the more powerful parent dictating terms of access to the children to the less powerful parent. Only a starting point – such as a rebuttable presumption of equal parenting that can be addressed at the first Motion, can save families from the current chaos that exists at the time of separation, where perfectly normal parents are being marginalized by the dictates of the other parent, with the children used as possessions.
2. **Myth:** It is necessary to make a custom inquiry into the best interest of a child without any guidance, other than a list of criteria; a rebuttable presumption detracts from this necessary custom solution.

Facts:

- I. 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) but they will never actually get to know the people involved or actually know who is telling the truth about various matters and therefore they do not actually know whether they are making a decision in the best interest of the children. Judges are usually quite candid about their own understanding about the limitations of the current system.
- II. There are no retrospective studies of the jurisprudence and families who have gone through an adjudication under the current system which would substantiate that a “custom” solution produces better outcomes, as opposed to following the overwhelming science which suggests that the closer you get to two primary/equal parents the better the outcomes. The science is supported by Meta-Analyses by Professor Linda Nielsen

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of Wake Forest University, Professor William Fabricious of Arizona State University (a witness on November 26) and Canadian peer-review journal experts Professor Edward Kruk of UBC (a witness) and Professor Paul Millar of Nipissing University and an international body of research available through various organizations, including the International Council for Shared Parenting.

- III. With two normal parents it is unnecessary and indeed problematic to search for which parent is “better” when each has their own respective positive and negative attributes. A broad range of parenting styles and interests can produce healthy child-rearing. The types of parenting impairments that are relevant to a parenting plan are quite obvious, and relatively rare. A granular review of minutiae of the family history and prior parenting issues is not required to advance children’s future best interests. Accordingly, litigation and a departure from shared parenting should be reserved for only the most extreme cases of impaired parenting practices.
- IV. The current system encourages parents to try to introduce as much negative material about the other parent as possible and provides incentives for false allegations and exaggerated claims about the other parent. The current system provides incentives to pressure and influence children against the other parent. In midst of all of this “smoke”, it is frequently the case that Judges do not get to the right answer.
- V. Science supports the view that it is the perpetuated conflict of the current system, as opposed to not getting the precise customized plan that is most damaging to children. There is no science behind a determination that post-separation a parent who interacted with the children daily should see them 37.2% of the time.
- VI. The parenting schedule itself is rarely an adequate solution to concerns about a particular parent’s logistical or parenting challenges. It is usually the case that equal parenting supported by driving assistance, after-school care, a parenting or other course or the addition of a parenting coordinator can more granularly resolve the particular concern and therefore permit the scientifically supported benefits of two primary parents. Even a parent reduced to 1/3 of the time (if they have logistical or parenting impairments) can still create the same issues and therefore the parenting schedule is not the right tool to deal with the vast majority of concerns in assisting a family in restructuring post-separation.
- VII. The leading social science research clearly concludes that the amount of time spent is crucial in fostering and maintaining parent-child relationships. There is no substitute for actual time spent together and sharing life’s experiences together in supporting parent-child bonding.
- VIII. The vast majority of parents, due to the cost of litigation, cannot afford the detailed granular review of issues that is theorized by the proponents of the current system. Their search of “best interests” with merely a list of criteria is simply aspirational – in practice it rarely happens, due to cost, delay, and the overwhelming impact of the continuing conflict during the time that the case is proceeding on its laborious path.

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Meanwhile the children are necessarily being triangulated into the dispute as both parents lobby for their loyalty.

IX. Surveys of children and of parents who have experienced separation refute this myth

3. **Myth:** Equal shared parenting is not appropriate for all families.

Facts:

- I. 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 range (as both parents are normal range), the very expensive family law system can devote its resources to the families with significant issues.
- II. Many who contest equal shared parenting as the appropriate outcome for most families usually have a vested stake in the current litigious system, either because they feel that if that favours their constituency or because they are remunerated from the current system as a service provider or academic in some fashion.
 - a. For decades, public opinion in Canada and across North America has been very strongly in favour of a presumption of equal shared parenting. Canadian polling has consistently indicated that over 70% of the population (notably measured across all demographics – age, gender, political affiliation and region) support ESP. Support is over 80% once undecided responses are factored out. Opposition is typically less than 10%. The public, who have directly experienced (the divorce rate is approaching 50%) the current litigious system or who have immediate family members or close friends who have directly experienced the current system uniformly is of the view that it is costly, wasteful and harmful to children and that the results do not advance children's best interests and the perpetuation of the conflict is itself a palpable harm. Science supports the view that the conflict itself, as opposed to the particular parenting plan, is the greatest risk to children. The science is clear that the closer you get to two equal primary parents, the better the long-term outcomes for children of separated families.
 - b. The overwhelming scientific consensus in favour of equal parenting for most families as a means of enhancing child outcomes is widely published and summarized in Professor Fabricius' presentation. It is accessible on various websites that compile this including those of the Canadian Equal Parenting Coalition, Lawyers for Shares Parenting, Leading Women for Shared Parenting, National Parents Organization and the International Council on Shared Parenting. Meta Analyses by Professor Linda Nielsen and by Professor Edward Kruk of UBC and Professor Paul Millar of Nipissing University demonstrate that the only published studies which so not support ESP were biased and/or poorly

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structured and/or of limited sample size or not even peer-reviewed in a leading Journal.

- c. The public experience with the current dysfunctional system – it does not advance children’s best interests – is so pervasive, that this informed experience trumps the views of those who make their living off of the current system. Millions of Canadians’ collective experience (representing millions of affected children) cannot be wrong, rather this experience should inform those charged with considering reforms to the system and updating the legislation for today’s realities.
- III. A rebuttable presumption of equal shared parenting does not impose that solution for all families. It merely recognizes public opinion (i.e. the actual consumers and clients of the current dysfunctional system) and the applicable science to indicate that the needs of the children must be “substantially enhanced” for a departure from an equal parenting solution. In other words, a presumption of ESP is just the starting point for the analysis. Courts are now recognizing that parenting coordinators and more granular directives and remedies (therapy, parenting courses) are the appropriate solution to perceived issues, particularly if they are transitory, as opposed to crafting an unbalanced parenting plan, which leaves the issue unresolved.
 - IV. In intact families the state does not intervene in the parenting dynamic unless there are child protection issues. That should be the similar standard post-separation – parents who are “normal” in that their parenting knowledge, skill set, attitude and aptitude is within a broad range of normality should have equal parenting, since the science does not support any precise parenting plan other than equal parenting in such circumstances. There is no “science” in a determination that a particular parent should have the children in their care 37.2% of the time.
4. **Myth:** Equal parenting initiatives have been attempted and the results have not been favourable and there has been a move to undo the reforms.

Facts:

- I. 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-

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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%.

- II. Kentucky became the first state of the United States to introduce a rebuttable presumption of equal parenting. All of the public opinion polls since then have indicated broad based satisfaction with the reforms in practice and similar supportive experience reported from professionals advising family law litigants.
 - III. Arizona several years ago instituted broadly worded maximum contact provision. All of the opinion polls since have ratified the positive developments that resulted therefrom and the fact that, in practice, Defacto equal shared parenting now exists in Arizona. A further follow-up study by Professor William Fabricius, who was a witness on November 26, reported broad based satisfaction with the Arizona reforms.
 - IV. Legislative proposals to introduce equal parenting are pending in at least half of the states of the United States, according to Leading Women for Shared Parenting and National Parents Organization. Professor Fabricius corrected an erroneous assertion by another witness – there has never been an equal parenting law in the US which was subsequently withdrawn.
 - V. Broad-based international initiatives under the auspices of the International Council on Shared Parenting are also creating traction throughout the developed world.
5. **Myth:** Equal parenting is not suitable in situations where the parents do not get along and cannot make decisions jointly.

Facts:

- I. 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.
- II. Equal parenting allows for fewer transitions between houses and supports children's adjustment after separation by maintaining two primary parent relationships. Children experience a loss from a family separation regardless of post-separation family structure. By maintaining two primary parents the loss is lessened.
- III. Decision making on major topics such as health education and religion can be dealt with differently than the parenting time schedule. Therefore, conflict is irrelevant to the parenting time schedule. Parental coordination is a further answer to any issues over conflict. The British Columbia Provincial Legislation allows a Court to impose parental coordination. This should be an addition to the Divorce Act amendments.

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6. **Myth:** Equal parenting supports the rights of child or spousal abusers or parents with addictions or other parenting impairments.

Facts:

- I. 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 child care have been substantiated, the presumption will be rebutted.
 - II. The current maximum contact principle exists harmoniously with the provisions of the statute and jurisprudence which address these concerns. There is no reason why a rebuttable presumption of equal shared parenting cannot live harmoniously with additional provisions meant to address these concerns.
 - III. The current system is about “parental rights” – the right to litigate to have yourself declared the primary parent. A rebuttable presumption of equal shared parenting constrains litigation and is therefore child-focused and about children’s rights to a primary relationship with both parents and children’s rights to not have one parent marginalized from their lives.
7. **Myth: A** Rebuttable presumption of equal shared parenting does not reflect parents’ and children’s expectations based on prior child care arrangements before separation.

Facts:

- I. The mental health literature and jurisprudence makes it clear that families restructure after separation and prior child care arrangements are not necessarily determinative of an optimal post-separation arrangement where parents make adjustments to their work life and other interests in order to step up and fulfill their role as a primary parent. Children universally want both parents to remain involved as primary parents after separation according to numerous surveys and studies.
- II. Parental roles prior to separation are a mix and even when there is a stay-at-home parent, the other parent is usually substantially involved in the evenings and on weekends. As a societal value, if parenting arrangements prior to separation were determinative, couples would be well advised to insist on nannies and daycare as opposed to a stay-at-home parent when children are young and parents would avoid contributing to the children’s welfare through working in order to maintain a tactical advantage by being a “stay at home parent”. The needs of working women need to be respected and merely because they are working (in order to help the entire family budget) this should not impact on post-separation parenting decisions.

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

Facts:

- I. The science is overwhelmingly in favour of equal parenting arrangements for infants and toddlers and has recently been revalidated through an international consensus. There are ways to support equal parenting of infants and toddlers in order to achieve that goal – the practical impediments can overcome with a proper judicially imposed structure and logistics.
- II. Science has proven that infants and toddlers are capable of multiple primary attachments and that their outcomes are better as a result i.e. the more caregivers the better, such a grandparents, new partners as well as their biological parents. The old adage of “it takes a village to raise a child” applies equally well after separation and there is no benefit in searching for a “primary” parent – indeed the science is strongly against that. Objections to equal shared parenting for infants and toddlers are based on outdated and unsupported assumptions that have been refuted by the current science.

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

Facts:

- I. 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. While a family is intact the children are supported by the joint resources and incomes of both parents. There is no reason why that should not continue to be the case post-separation.
- II. Appropriate allowance for the overhead (food, shelter, clothing) provided by the payor parent is a social justice issue and enhances the children’s experience during the time they are with that parent. There is social injustice and an impaired ability to support the children in situations where a payor parent who has less than 40% of the time with the children is paying child support to a parent who earns way more.
- III. The best interest of the children trump any concern over child support, which is a separate issue that could be addressed, however, there is a settled policy in this regard under section 9 of the Child Support Guidelines and the related jurisprudence. There is no empirical or jurisprudential evidence that shared parenting child support arrangements do not work today.

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Myth: Alternative Dispute Resolution proposals can solve the current litigation issues.

Facts:

- I. The types of families who would benefit from ADR are doing so today, with broadly-based resources. The types of families who are litigating are not amenable to the influence of a mediator or not eligible due to power imbalances.

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.

Facts:

- I. The current system is built to foster litigation for those couples unable to successfully restructure on their own. The current system, even supplemented with a long list of criteria for Courts to consider, provides too broad a range of discretion for actual.
- II. There is no evidence that the supposed aspirational goals of a customized solution justify the immense cost and damage due to the conflict.
- III. Post-separation experience in Scandinavian countries and other jurisdictions where equal parenting applies provides a model for better outcomes for children.

Myth: There should not be any principles or presumptions in the Divorce Act

Facts:

- I. For decades jurisprudence has relied on the existing maximum contact principle in the Divorce Act. It 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.
- II. The maximum contact principle reflects Canadian value systems and understanding that children need two primary parents and not one parent and someone they go to “visit” from time to time.
- III. Accordingly, the maximum contact principle for 25 years has been a hallmark of the goals of the Act and lives harmoniously within the broader context of “best interests”, as would a rebuttable presumption of equal shared parenting..
- IV. Experience with the inconsistent application of the maximum contact principle has demonstrated that the maximum contact principle does not go far enough to serve its

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purpose and that is why a rebuttable presumption of equal shared parenting as a starting point is required to cure the current inability of the system to actually protect the best interests of children after separation.

- V. The proposed changes in Bill C-78 at least seek to preserve this core principle that Courts have, albeit inconsistently, used as a boundary issue in an otherwise overly-broad discretion. The “friendly parent” principle currently contained in Section 16(9) has been moved elsewhere and should be reinserted as a core principle in the proposed Section 16.2(1).
- VI. The proposal of the Canadian Bar Association to weaken the maximum contact principle to the point that it is meaningless should be rejected. It is a regressive proposal that will be a set-back in helping families restructure in a healthy manner and it will overturn decades of jurisprudence which has been used to help protect relationships and to provide a background to encourage settlements. Maximum contact was deemed by previous Parliaments and decades of jurisprudence to be consistent with children’s best interests. It remains so today.
- VII. Both the title and the content of proposed Section 16.2(1) should be retained, to be applied even if there is a rebuttable presumption of equal shared parenting.
- VIII. There is going to be some sort of presumption in the proposed mobility provision – so it is inconsistent to state there should not be any presumptions or principles elsewhere.

Respectfully submitted, November 27, 2018

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