SHARED PARENTING IN CANADA: INCREASING USE BUT CONTINUED CONTROVERSY

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There is a complex interplay between federal and provincial parenting statutes in Canada. Although most statutes continue to use the traditional concepts of "custody" and "access," in practice most lawyers and judges use more child-focused terminology for parenting plans. There is a lack of reliable data on postseparation parenting in Canada, though a number of studies and data sources clearly indicate that there is growing use of various forms of shared parenting. Child support law in Canada defines "shared custody," as occurring if each parent has the child at least 40% of the time, and this arrangement currently is used in about a fifth of parenting orders. Reform of the parenting-related provisions of Canada's Divorce Act remains contentious. We argue for statutory change to abandon the archaic terminology of "custody" and "access" and for adoption of more child-focused terminology. We do not support proposals made by fathers' rights advocates in Canada for a presumption of equal parenting time.

Key points for the Family Court Community:

- Although most Canadian statutes continue to use "custody" and "access" terminology, in practice lawyers and judges are often using more child-focused concepts, such as parenting time and parental responsibility.
- There have been great changes over the past thirty years in postseparation patterns of parenting in Canada: only a minority of cases now involve the traditional "custody to mother and access to the father" arrangement, with some form of shared parenting (shared custody or joint legal custody) now being the most common arrangement.
- About one in five postseparation parenting arrangements in Canada involve "shared custody" (where children spend at least 40% of their time with each parent), with about half of these involving roughly equal time.
- The prevalence of different types of parenting arrangements varies markedly by province, with shared custody being more common in provinces where there has been legislative reform.
- Research from Canada suggests that in this country shared parenting is more likely to be the result of negotiated arrangements than court orders. Shared custody imposed by courts occurs more often when parental conflict is lower and children are younger. Shared custody also appears to be related to parenting roles during cohabitation, as well as higher parental income.
- Qualitative Canadian studies suggest that in a significant portion of cases, shared custody is often not a durable arrangement, but can be a positive experience for many children and parents.

Keywords: *Divorce Act (Canada); Joint Custody; Postseparation Parenting; Reform of Parenting Laws; Shared Custody; and Shared Parenting.*

I. INTRODUCTION

The traditional postseparation parenting regime in Canada was based on one parent (usually the mother) having sole custody and full legal responsibility for the child, while the other parent (usually the father) has access with a limited set of rights and role. Although this traditional regime still has legislative recognition in Canada, there has been a significant decline in its use. There has been growing use of various forms of shared parenting in Canada, though the concept has only limited statutory recognition and lacks reliable data on the extent of its use. Under Canadian law, "shared custody" occurs when each parent has responsibility for the child at least 40% of the time. In contrast, the

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concept of "shared parenting" is more broad and vague, referring to a range of arrangements that have both parents significantly involved in postseparation care and decision making, including shared custody, but also arrangements with lower and specific time thresholds.

Part II reviews the legal framework for parenting care and decision making in Canada. Most statutes governing postseparation parenting in Canada continue to use the archaic concepts of "custody" and "access," though there has been legislative reform in some provinces and there is growing use of various forms of shared-parenting terminologies. In Part III, data are considered on the extent of use of shared parenting in Canada. Governments in Canada do not collect data on postseparation parenting, and each of the available data sources has its limitations. However, drawing on a number of sources, including some research recently undertaken specifically for this article, we conclude that at least one fifth of postseparation parenting arrangements in Canada now involve shared custody, defined by at least 40% of time with each parent, and that more than two thirds involve some form of joint legal custody or shared decision making. Our work also reveals significant variation across the country and that the use of shared parenting has increased the most in jurisdictions where there has been legislative change, such as in British Columbia, Alberta, and Quebec, where statutory reform has abandoned the traditional custody and access concepts.

Part IV reviews the limited empirical research on shared parenting in Canada. One study suggests that shared parenting is more likely to be the result of negotiated arrangements than orders by the courts. Another study indicates that shared-custody arrangements also appear to be related to parenting roles and responsibilities prior to separation, as well as to higher parental income. A study of reported Canadian cases finds that judges are more likely to order shared custody when parental conflict is low and when children are younger. Another recent qualitative study suggests that in many cases shared custody may not be a stable long-term arrangement, though it does remain positive for many children and parents.

In Part V, we discuss the controversies regarding efforts to reform the parenting-related provisions of Canada's Divorce Act. We express opposition to a recent proposal, put forward by a Conservative politician, that would have enacted a statutory presumption of equal parenting time; although legislative reforms should encourage shared parenting, there are cases where safety concerns require that parenting time be restricted, supervised, or even suspended. In Part VI, we offer some concluding comments on the Canadian experience. Based on a comparison of experiences in different provinces, it would appear that the reform of parenting legislation may both reflect and support the increased use of shared parenting. The Canadian experience also reveals that significant changes in practice and professional culture, and increases in the use of shared parenting, can occur without legislative reform.

II. CANADA'S LEGAL CONTEXT

A. CONSTITUTIONAL COMPLEXITY

There is a complex interplay between Canada's federal and provincial legislation governing parenting postseparation and divorce. The present federal Divorce Act came into force in 1986,[1] and, at least in terms of constitutional theory and the Canadian doctrine of federal paramountcy,[2] governs all cases where separated parents are getting a divorce. The concepts of custody and access are used in the Divorce Act, though the Act also allows for parents to have joint custody. Each province (and territory) also has its own statutory regime for parenting, which at separation, only directly governs parents who are not divorcing, generally those who have cohabited without marrying or who never cohabited. In practice, however, provincial legislation has had an effect on how judges in different provinces are interpreting or applying the federal Divorce Act in that province.[3] In particular, as will be discussed, Alberta, British Columbia, and Quebec have adopted legislative regimes that have moved away from the concepts of custody and access. Courts in those jurisdictions are making greater use of various forms of shared parenting, even when dealing with cases under the Divorce

Act, than courts in provinces that continue to use custody and access, most notably Ontario, Canada's most populous province.

In 1997, the federal and provincial governments in Canada agreed to introduce *Child Support Guidelines* that apply the same provisions within a province to both unmarried separated partners (under provincial law) and married parents who are divorcing (under the federal Divorce Act). These *Guidelines* establish a regime with interprovincial variation; while most provinces have a percentage of payor income model of child support (with limited possibilities for increase or reduction), Quebec has an income shares model of support. In all provinces, if a parenting arrangement involves each parent having the child at least 40% of the time, this becomes a situation of shared custody,[4] with a different, more individualized approach to determination of child support.[5] Significantly for present purposes, this means that agreements and court orders clearly specify whether each parent has the child at least 40% of the time and legally establishes a parenting arrangement as shared custody.

B. POSTSEPARATION PARENTING CONCEPTS IN CANADA

The federal Divorce Act[6] uses the concepts of custody and access, although the legislation does not provide definitions of either term. It also specifies that parents may have joint custody,[7] and provides that access normally includes the right of a parent to have information about the child from third parties like schools and doctors.[8] Each of Canada's ten provinces also has legislation that governs parenting, which in most jurisdictions is premised on the expectation that in the event of separation, there will be an agreement or court order to allocate "guardianship," "custody," or "parental authority" between the two parents.[9]

Some provinces have enacted legislation to adopt concepts that replace custody and access, and to encourage some form of shared parenting. In Alberta, since 2005, the Family Law Act has specified that both parents presumptively have guardianship rights and "shall use their best efforts to cooperate with one another in exercising their powers, responsibilities and entitlements of guardianship."[10] In the absence of a court order or agreement, both parents are joint guardians of a child; courts in Alberta are authorized to make parenting orders that include provisions relating to parenting time, as well as termination of some or all guardianship rights if required to promote the best interests of the child.

In British Columbia, a new Family Law Act[11] came into force in 2013, also adopting the concepts of guardianship, parental responsibility, parental arrangements, and parenting time. The Act creates a presumption that each parent will exercise "parental responsibilities with respect to the child in consultation with the child's other [parent], unless consultation would be unreasonable or inappropriate in the circumstances."[12] Notably, the Act explicitly provides that "in the making of parenting arrangements . . . [it] must not be presumed that the parenting time should be equal among the guardians."[13] Further, as in most other provinces, the British Columbia Act specifies that in determining the child's best interests, the court shall consider the "impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member."[14] The child's views are also to be considered, "unless it would be inappropriate to consider them."[15]

In Quebec, the only province that does not have a common law tradition, the Civil Code has provided since 1991 that even if one parent is given custody by a court order or agreement, both parents continue to have "parental authority" and must make joint decisions concerning such issues as health and education, unless a court order specifically deprives a parent of this right.[16] In this province, there is in practice a strong preference ("tendance lourde") toward shared parenting arrangements.[17]

C. EVOLUTION OF APPROACHES TO POSTSEPARATION PARENTING

In the nineteenth century, divorce was very rare in Canada but when it occurred, the law viewed the father as the natural guardian of the children, entitled to custody, though fathers often delegated actual care to female relatives.[18]

During the first half of the twentieth century, divorce and separation were still relatively uncommon, but when they occurred, Canadian courts applied the "tender years doctrine." Reflecting on the parenting arrangements within marriage during that period, mothers almost always had custody of their children, unless they committed adultery, thereby demonstrating a lack of "moral fitness."

In the latter part of the twentieth century, the divorce rate rose in Canada, and the law evolved from a presumption of maternal care to require courts to make decisions about the care of children based on an assessment of the best interests of the child, at least in theory requiring individualized assessment of cases. In practice in Canada, even after the adoption of the best interests test, until relatively recently most children were in the custody of their mothers, while fathers received access, which was typically limited to two weekends a month and some vacation time, or even less. As recently as the 1970s, the Supreme Court of Canada considered it a matter of "common sense" that children should normally be in the custody of their mothers in the event of parental separation or divorce.[19]

Under the Divorce Act and similar provincial legislation, the courts accepted that the parent with custody had full parental control and was exclusively responsible for the "care, upbringing, and education of the child."[20] The access parent, almost always the father, clearly had a limited role, sometimes characterized as a "passive bystander" or "visitor" in the child's life.[21]

By the late 1970s, the concept of joint legal custody was starting to be used in Canada, in recognition that it is often in the best interests of children for parents to share legal responsibility for decision making after separation.[22] Initially, the courts were very reluctant to make joint custody orders in the absence of the agreement of both parties. Judicial caution was reflected in the 1979 Ontario Court of Appeal decision in *Baker v. Baker,* where Lacourcière J.A. stated that "joint custody [is] an exceptional disposition, reserved for a limited category of separated parents."[23]

Gradually, however, there was a growing recognition that in most cases it is valuable for children to have a strong relationship with both parents after they separate. While still using the concepts of custody and access, since 1986 the Divorce Act has expressly allowed for joint custody, and subsection16(10) has specified that in making orders for the care of a child "the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."[24] In the 1993 Supreme Court of Canada decision in *Young v. Young,* McLachlin J. commented on this provision:

> To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent. *Parliament's decision to maintain maximum contact between the child and both parents is amply supported by the literature*.[25]

In 2005, the Ontario Court of Appeal heard and decided two cases involving claims for joint custody. In *Kaplanis*,[26] the Court of Appeal overturned the lower court's order for joint custody and equal parenting time, but in *Ladisa*[27] the Court upheld the decision of the trial judge imposing joint legal custody. In both cases, the mother, at trial, opposed the imposition of an order for joint custody and sought sole custody. The distinguishing feature of these cases was that the Court of Appeal in *Ladisa* was satisfied that the parents were able to put aside their differences and were able to communicate and cooperate effectively in the interests of the child and thus upheld a decision for joint legal custody and shared custody with equal parenting time.[28] The court in *Ladisa* based its decision on the actual history of parenting postseparation, as the parents equally shared care of their children, and while there was conflict between the parents, they did not involve their children in the disputes and were able to resolve their disagreements. However, in *Kaplanis*, the Court of Appeal ordered that the mother was to have sole legal custody and declined to order joint custody, based on the history of parental conflict, stating:

> The fact that one parent professes an inability to communicate with the other parent does not, in and of itself, mean that a joint custody order cannot be considered. On the other hand, hoping that

> communication between the parties will improve once the litigation is over does not provide a sufficient basis for the making of an order of joint custody. There must be some evidence before the Court that, despite their differences, the parties are able to communicate effectively with one another.[29]

These appellate decisions have established that in considering whether to order some form of shared parenting, a court's focus should be on the actual history of the parenting and relationships, not just on statements by one of the parents regarding a lack of willingness to share care, as negative statements about a former partner are not uncommon—especially during litigation.

There is a tension in these litigated, high-conflict cases over parenting. Judges do not want to give one parent (usually the mother) an effective veto over joint custody and substantial involvement of the other parent in the child's life,[30] simply by asserting that cooperation is not desired or in the child's interests. However, the courts do not want children placed in a situation where both parents are expected to cooperate closely in making decisions and caring for children while the parents display ongoing anger for each other and cannot communicate effectively. As a result, judges are willing to order a regime of joint custody even without each parent agreeing that they can work with the other, but judges generally are reluctant to do so if the parties get as far into the process as a trial over parenting issues.[31] However, the judicial receptivity to some form of shared parenting for the relatively small portion of litigated parenting cases has almost certainly had a major influence on the much larger number that are settled.

In cases that proceed to trial in Canada, especially if they are high conflict, there is very likely to be a specified schedule for residence, parenting time, or access. However, in cases where parents have a better relationship, especially those resolved by agreement, there may simply be a specification that the parenting schedule or arrangements are to be "as mutually agreed" by parents, giving them the flexibility to vary the arrangements as circumstances change. Because of the child support law, there is likely to be clearer specification of parenting arrangements if there is a situation of shared custody with each parent having the child at least 40% of the time.

III. PARENTING ARRANGEMENTS: CANADIAN DATA

A. PARENTING IN INTACT FAMILIES

Consideration of the changes in parenting by married and cohabiting couples, and in particular the increasing role of fathers in childcare, provides an important context for understanding the changes in postseparation parenting. There are only limited Canadian data available on parenting in intact families or by separated parents. It is, however, clear that, as in many countries, there has been a gradual gender convergence in Canada, with fathers having more childcare responsibility in both intact and separated families than in previous generations. This change reflects both shifting expectations of the parenting roles of fathers and the increased role of mothers in the labor force, which created the need for fathers to pull their weight and contribute more to childcare ("tag-team parenting").

Statistics Canada undertakes a time-use study of the Canadian adult population every five years.[32] The agency reports that there have been "converging gender roles," with women doing more work in the paid labor force and men being more involved in childcare and housework. For married and cohabiting couples, both mothers and fathers are increasingly involved parents and earners. Though gender roles have been converging, there is still a notable gender gap, with men on average doing more paid work (and enjoying more leisure time) and women still undertaking more of the domestic responsibilities.[33] There is, however, also a growing number of dual-parent families where the parents share childcare equally and are equally involved in the labor force or where there has been role reversal, with the father assuming the role of the primary caregiver and the mother as the primary earner. For instance, although families with a stay-at-home parent have declined substantially since 1986, the proportion with a father in this role has almost tripled from 4% in 1986 to 11% in 2005.

Further, by 2014, 27% of fathers of newborn infants participated in the paid parental leave program under Canada's government-sponsored employment insurance scheme.[34]

B. PATTERNS OF PARENTING AFTER SEPARATION AND DIVORCE

Neither the federal nor provincial governments collect data on court orders concerning parenting or custody orders or on actual parenting arrangements postseparation or divorce. Some data on shared custody in Canada are nonetheless available from official data collections and surveys; these data report on both court orders and living arrangements, which are important given that court orders often do not reflect children's actual living arrangements. We examine here a number of Canadian government data sources and studies, including some we undertook ourselves.

All studies have limitations, and the Canadian studies are no exception. The various sources of Canadian data provide different types of information, tap different populations of separated parents, and cover different geographical regions. Studies comparing different provinces at the same point in time, of course, shed light on different legislative and demographic factors that might be at play in shared-time parenting. Studies of court orders reveal different patterns of parenting arrangements from studies of actual parenting, as court-based studies report on arrangements for families at one point in time (the time of making the order), and parents often change their arrangements after a court order is made. There are also families that have parenting arrangements that are not based on a court order and not reflected in court-based studies. Further, studies are time and place limited, and there is much variation between Canadian jurisdictions as well as within society over time. However, broad trends do emerge from the different data sources, in particular reflecting a growing use of various types of shared parenting, including increased use of shared custody, albeit with significant interprovincial variation.

1. Divorce Order Data

Until 2004, Statistics Canada required staff at each court site to collect data and report on court orders concerning parenting arrangements made at the time a court made a decree of divorce, resulting in a national data set.[35] The proportion of children in sole custody of the mother at the time of divorce declined steadily after 1988, when divorce orders gave mothers sole custody in 76% of cases. By 2004, mothers received sole legal custody in just 45% of cases, while joint custody was ordered for 47% of divorce cases. Although the time share with each parent in joint custody arrangements was not reported in this data set, it is clear in most of the joint custody cases that it did not involve equal time sharing. Sole legal custody was awarded to the father for 8% of children in court orders in 2004, down from a high of 15% in 1986. These data do not distinguish between orders made on consent and contested cases, but as at present, there were relatively few trials. It is thus apparent that many cases, where in the 1980s there would have been sole legal custody to the mother or father, by 2004, joint legal custody arrangements occurred (with joint responsibility for decision making but the child having a primary residence with one parent).

2. Selected Court Site Data (2010–2012)

A study undertaken by the Department of Justice Canada of court files for divorcing parents during 2010–2012 from four selected court sites found that in about six in ten cases, children were to reside primarily with their mothers; in one tenth of cases children were to live primarily with fathers; in two in ten there was a shared-custody arrangement (i.e., the child lived with each parent at least 40% of the time—the threshold at which a shared-parenting time adjustment for child support purposes takes effect); and one in ten had other arrangements, including split custody of children.[36] This study also found that in three quarters of the cases there was an order for joint legal custody (i.e., shared legal responsibility for decision making). This review of documents filed by parents revealed

that "family violence" was mentioned in only 8% of divorce files as a concern of either or both spouses.

Statistics Canada undertook a court-based study of all divorce files from 2010 to 2011 in four provinces and three territories.[37] The substantial majority of divorce cases (80%) were uncontested, with no documents filed to contest the parenting or support claim. Among the 20% of cases where documents were filed to oppose any of the claims, a pretrial conference hearing was held in more than half (55%) of these contested cases. The vast majority of divorce cases are resolved before reaching the trial stage. Many of the cases that are uncontested are settled by negotiation or mediation before filing of court documents; further, most of the cases that are initially contested are also settled, not infrequently after mediation, a judicially led conference, or an interim order from a judge. This study, which did not include Quebec, reported that only 2% of divorce cases reached a trial; most divorce cases that involved a trial reached that trial twelve months or more after initiation of proceedings.[38]

3. Census Data (2016) and General Social Survey (2011)

The 2016 Census, conducted by Statistics Canada, reported that the portion of lone-parent families headed by a male was up to 22%, the highest rate of male-headed lone-parent families in Canada's history—though a substantial majority of lone-parent families continued to be headed by women (78%).[39] This study reflects actual living arrangements rather than court orders and includes families where one parent has died as well as separated and divorced parents.

In 2011, as part of its broader General Social Survey, Statistics Canada undertook a study of 1,055 separated or divorced parents.[40] Because the sample size is not large, the results may not accurately reflect the total population, but the study is interesting because of the amount of detail provided. Parents reported that in the prior twelve months the mother's home was most often the child's primary residence (70%), 15% of parents reported that the child lived mainly with the father, and 9% of parents reported that children's time was divided equally between parents' homes. The remaining 6% indicated other living arrangements, such as the child living with grandparents or split residence of siblings. Parents with equal-time arrangements were most likely to live close to one another (80% lived within a ten-minute drive of each other). Just over one third (35%) of parents reported that major decisions about children were made jointly with their ex-partner. Over half (59%) of primary-care parents reported having a written agreement or court order for children's living arrangements, but almost a third (32%) said that parenting arrangements were only verbally made and agreed to; almost one in ten (9%) reported that there was no agreement in place regarding the child's living arrangements. It should be noted that this study represented arrangements at a point in time, and some of those parents without formal arrangements may later make verbal or written agreements. However, it is apparent that a significant portion of the population never formalizes parenting (or child support) arrangements.[41]

4. Survey of Family Lawyers

In a 2016 survey[42] completed by 177 Canadian family lawyers, respondents indicated that 42% of their clients had a shared physical custody or shared residence arrangement according to their order/agreement (operationalized as at least 40% of time with each parent). While in many of these cases the lawyers did not know how stable or long lasting these arrangements were, among the cases where lawyers were aware, slightly more than half of these arrangements continued until the children reached adulthood, with most of the rest lasting two to five years. In a similar survey of 176 family lawyers and judges undertaken in 2014, respondents were asked a different question, this one about changes over time in the use of shared custody; a substantial majority (77%) of respondents indicated that over the previous five years the number of their cases that resulted in a shared-custody

Table 1
Ontario and Quebec Court Study, Files Closed 2011–2014

	Ontario (n = *668)*	*Quebec* (n = *916)*
Sole custody to mother	65% (424)	1% (6)
Sole custody to father	5% (29)	0.2% (2)
Joint custody, primary residence mother	19% (117)	61% (560)
Joint custody, primary residence father	2% (11)	7% (64)
Shared custody (40–60%)	5% (35)	26% (239)
Other (e.g., grandparent custody; split custody)	8% (52)	5% (45)

Source: Rachel Birnbaum et al., unpublished data (2016).

arrangement (each parents at least 40% of the time) had increased somewhat or increased substantially, and viturally none reported a decline.[43]

5. Court File Data: Ontario and Quebec (2011–2014)

As part of a larger research project on the family justice system in Canada, we undertook two studies intended to provide more information about how parenting disputes about children's matters are resolved in the courts. In one study, we[44] reviewed a total of 2,000 court-closed family files from courts in Canada's two largest provinces, Ontario and Quebec, as summarized in Table 1.[45] These data reflect both settled and litigated cases. Most of the Ontario and Quebec cases were resolved without a trial (98% and 95%, respectively); the Quebec cases had more use of shared and joint custody but had more trials about parenting.[46]

Shared custody (at least 40% of the time with each parent) was significantly more likely in Quebec if the parents used mediation, had higher incomes, reported low levels of interparental conflict, or had children over the age of three years old.

Among the 2,000 files examined, about one sixth ($n = 325$; 16.25%) included claims of domestic violence by one or both parents.

6. Reported Canadian Decisions (2015)

In another related study, we[47] reviewed all of the reported Canadian family law judicial decisions in 2015 on the Westlaw database that dealt with parenting, custody, or guardianship of children.[48]

Among the four largest provinces, there was substantially less use of various forms of shared parenting in Ontario, a province that continues to use the custody and access terminology in its legislation. Notably, even though this is a relatively high-conflict group given the cases were litigated and decided by a judge, there are high rates of shared custody ordered (i.e., not sole custody), especially outside of Ontario.

Table 2
Reported Parenting Decisions 2015, Canada[49]

	Quebec (n = *873) %*	*Ontario* (n = *108) %*	*Alta* (n = *22) %*	*B.C.* (n = *117) %*	*National* (n = *1,205) %*
Sole custody mother	6	56	23	26	14
Sole custody father	0*	9	9	6	2
Joint custody (mother primary residence)	52	16	23	28	44
Joint custody (father primary residence)	15	2	27	5	13
Shared custody (40/60)	22	14	9	30	22

Source: Nicholas Bala & Shawna Leclair, unpublished data (2016).
Note: *$n = 3$.

Table 3
Parenting Arrangements Over Time in Canada

	1988 (Stats Can) all divorce orders	*2002 (Stats Can) all divorce orders*	*2010–12 (Justice Canada) Court files at selected sites*	*201573 Reported Canadian Cases*
Mother sole legal custody	76%	45%	20%	14%
Father sole legal custody	5%	8%	3%	2%
Joint legal custody & shared custody	19%	47%	75%	79% (57% joint & 22% shared)
Total	*100%*	*100%*	*100%*	*100%*

7. Summary of Statistical Data

While different Canadian studies vary in the details that they provide regarding family life and postseparation parenting arrangements, the broad picture is clearly one of increasing father involvement, both in intact families and postseparation. Among separated parents, in roughly six out of ten cases the mother has primary residence; in about one in ten cases, the father has primary care; and in about one fifth of cases, each parent has the child at least 40% of the time. There was marked regional variation in the prevalence of shared custody in the reported judicially determined cases in 2015, with shared custody most prevalent in Britsh Columbia (30% of cases), followed by Quebec (22%), then Ontario (14%), and then Alberta (9%). Ontario had by far the highest rate of sole custody (65%), almost more than twice the rate of Alberta and British Columbia (32%), while in Quebec only 6% of the cases were sole custody.

While there is not a reliable, continuous basis for comparison over time, a number of studies over the past three decades suggest there has been a marked decrease in court orders for sole custody and a corresponding increased judicial use of joint legal custody and shared custody. The proportion of cases in which there is shared decision making or joint legal custody has increased sharply over the past three decades, and at least two thirds of cases in the Canadian court system now involve some form of joint legal custody or shared parental responsibility for decision making.

The results of a number of studies discussed in this article are summarized in Table 3, showing clear trends over time away from sole custody and toward shared parenting.

Relatively few parenting disputes in Canada are resolved by a judge after a court hearing. Most cases result in a parenting arrangement based on negotiation, judicially led case conferencing, or mediation. Some cases are resolved informally without a written agreement or court order; one might speculate that many of these are cases where the parties did not cohabit and the nonresidential father has little or no contact with the children.

IV. EMPIRICAL RESEARCH ON SHARED PARENTING IN CANADA

There has been limited case-based empirical research in Canada on shared parenting and shared custody, but the studies that are available are summarized here.

A. ALBERTA SHARED- CUSTODY STUDY

A qualitative study published in 2004 of fifty divorced parents in Alberta who had a shared custody order or agreement (at least 40% of the time with each parent) found that in about 75% of the cases the arrangement evolved in practice into an actual sharing of parenting on a day-to-day basis, while in about 25% of the cases it became a situation where one parent was clearly the primary residential caregiver.[51] Most of the parents reported an ongoing ability to work cooperatively with their

former spouses to share the parenting of their children. Most of the parents were in frequent contact with each other and on friendly terms, discussing parenting issues as they arose and supporting the parenting decisions of the other. Most of the orders or agreements were the result of informal arrangements evolving into a formal shared-custody regime, with the details of the arrangements evolving over time; few of the cases involved the original arrangement being made by lawyers or the courts.

B. NATIONAL LONGITUDINAL STUDY OF CHILDREN AND YOUTH

Juby, Le Bourdais, and Marcil-Gratton undertook a prospective study in the 1990s using data from Canada's National Longitudinal Survey of Children and Youth and a sample of families that started the study with both parents together with their children and then experienced parental separation between successive survey cycles (two years apart; $n = 758$ families) to study shared parenting arrangements.[52] About one sixth of the families experiencing separation had shared-custody living arrangements. The mother's employment during cohabitation and higher family income were significantly related to shared custody. Couples were less likely to share custody when fathers worked weekends or evenings on a regular basis; Juby et al. suggest that fathers working these hours may have had less opportunity to acquire the childrearing experience necessary to undertake shared living arrangements after separation.

Shared custody was more common among couples in which, while they cohabited, the mother had identified caring for the family as a principal activity of the father, confirming that mothers' perception of father involvement is important for custody outcomes. If the mother formed a new union after separation, there was an increased probability of shared custody, with Juby et al. suggesting that perhaps this was because both the relative disadvantage in custody negotiations and the change in custody preferences work in the same direction. However, if the father formed a new union, this did not significantly alter the probability of having shared custody.

C. REPORTED ONTARIO FAMILY DECISIONS

Birnbaum, Bala, Polak, and Sohani[53] analyzed 176 reported Ontario court cases from 2010 to 2015 to assess the factors that are used by the courts to determine whether to order shared parenting as opposed to sole custody.[54] They found that shared parenting (joint legal custody or shared custody) was ordered more often for younger children; this was a bit surprising as some consider that younger children may be more vulnerable to the conflict that is not infrequently present between parents who litigate, but this result may reflect a judicial desire to give parents of younger children an opportunity to develop relationships with their children.

This study also found some form of shared parenting was ordered more often at the interim stage than at the trial stage. This too was an interesting finding given that the court typically has less information at the interim stage about parent child relationships and children's circumstances, and there is less time to establish a history of parental cooperation. However, at the interim stage, judges may be attempting to convey the message to both parents that each parent is important and should presumptively play a major role in their children's lives postseparation. Further, in some interim decisions, the judge emphasized the need to maintain the status quo and avoid giving one party an apparent advantage at trial, so if the interim decision was soon after separation, the judge may want to preserve an arrangement where both parents are responsible for the children;[55] many cases are effectively resolved at the interim stage and never proceed to trial. The relationship between interim and trial orders for shared parenting requires further research.

Birnbaum et al. also analyzed the frequency of cases where judges indicated in their decisions that there were recommendations by an independent court-appointed mental health evaluator; recommendations were made in about a third of the cases (60/176). Typically, recommendations of an independent professional have significant weight, and in three quarters of the cases where an evaluation was

prepared (45/60), these recommendations were followed by the court. The most common recommendation was for joint or shared custody (34/60). Most of these recommendations for some form of shared parenting were followed, but it is also notable that most (11/15) of the cases where the recommendations were not followed, resulted in sole custody rather than a shared-parenting arrangement.

In reviewing the reported cases, Birnbaum et al. were able to identify some important themes that judges articulated in deciding whether to make an order for shared parenting as opposed to sole custody. In many of the cases, the judge indicated more than one factor was important. They identified a number of factors favoring shared parenting, though none were decisive, including:

- parent's history of cooperating;
- parent's ability to communicate;
- lack of parental agreement to shared parenting;
- child's relationship with each parent;
- child's education plan and parental proximity, and;
- complementary parenting styles.

Birnbaum et al. also identified a number of factors in the cases where one parent was seeking a joint or shared custody arrangement, but the court found that sole custody was more appropriate:

- lack of communication, cooperation, and high parental conflict;
- parents unable to jointly make decisions or power imbalance;
- historical lack of involvement of one parent;
- lack of parenting capacity of one parent; and
- child's need for structure and stability.

D. STUDY OF RETROSPECTIVE REPORTS OF YOUNG ADULTS WITH SHARED CUSTODY

In a qualitative study published in 2015 of twenty-eight Canadian young adults who as children of separated and divorced parents experienced at least one year of shared custody (at least 40% of time with each parent), Whitehead[56] concluded that this type of arrangement often requires the children to do the "heavy lifting" in terms of adjusting their lives and living arrangements to meet their parents' expectations and needs. These children largely had the initial care arrangements made by their parents on a fairly amicable basis but without real input from the children.

About half of them had experienced a significant change in their arrangements, generally in adolescence. Of those who experienced a change, most moved from a shared-custody arrangement to one of primary residence with one parent, though some moved from a primary residence or sole custody to a shared-custody arrangement. Although remarking on the lack of stability of many shared-custody arrangements, Whitehead observed that change in a custody arrangement does not mean that shared custody was not appropriate when entered into, as it may have been a good plan with parents who had the flexibility to change as their children grew older. Indeed, one of the concerns expressed by some young adults who experienced a stable shared-custody arrangement was the rigidity of their parents and the perceived need to maintain a fair division of time rather than being child focused.

V. REFORMING CANADA'S PARENTING LAWS

With the increasing role of fathers in both intact and separated families, it is not surprising that in the three decades since its coming into force in 1986, there have been attempts to reform the parenting provisions of Canada's Divorce Act. It is instructive to consider these efforts; even though none resulted in reform at the national level, some of the concerns raised did result in provincial reforms.

At the national level, debates about these proposals resulted in sometimes polemical rhetoric: fathers' groups[57] argue that the present law "disenfranchises fathers," while feminists castigate proponents of reform for "demonizing mothers."[58]

A. BILL C-22 (2002)

As a result of the controversy arising out of the introduction of the *Child Support Guidelines* in 1996, a special parliamentary committee was established to consider changes to the Divorce Act to better protect the interests of children and parents in the context of divorce, with much of the impetus for reform coming from father and grandparent advocacy groups. Committee hearings were held across the country, with fathers' groups and women's advocates often bitterly attacking one another. The committee also heard from family justice professionals and researchers.[59]

In 1998, the committee issued its report, *For the Sake of the Children,* with forty-eight recommendations for legislative reform and a broad range of changes to the family justice system, intended to increase the role of noncustodial parents in the lives of their children and encourage consensual resolution of family disputes.[60] In the view of many critics and the Department of Justice, this report gave inadequate attention to some important issues, in particular domestic violence, so further consultations were undertaken by the Department of Justice after its release. The Minister of Justice proposed amendments to the Divorce Act by introducing Bill C-22 in late 2002.[61] That bill would have replaced the concepts of custody and access with parental responsibility and contact as well as supported shared parenting but with no presumptions for time sharing. Perhaps inevitably it was criticized both by fathers' groups for not sufficiently advancing their rights and by feminists for dealing inadequately with domestic violence.[62] Bill C-22 also failed to adequately articulate new principles for making parenting decisions or explicitly recognize the rights of children. However, there was significant support for the reform project, and after the bill expired due to the end of the parliamentary session, the Liberal Minister of Justice at the time, Irwin Cotler, pledged to bring back a revised version of the bill.[63] Before this occurred, the issue of same-sex marriage took over the Canadian family justice reform agenda, and then in 2006 the Liberals were voted out of office and replaced by the Conservatives.

B. BILL C-560 (2013)

Bill C-560[64] was introduced by backbench Conservative M.P. Maurice Vellacott in 2013, with significant support among fellow members of his caucus, which at the time was the government caucus. Bill C-560 proposed abandoning the concepts of custody and access, and the adoption of concepts of parental responsibility and parenting time. This bill would also have created a statutory presumption that equal parenting time is in the best interests of children.[65] Bill C-560 also discounted the issue of "family violence," characterizing it as an "additional consideration" rather than a "primary consideration" and indicating that partner violence would only be taken into account if "committed in the presence of the child." The fathers' rights agenda reflected in this bill was clearly at odds with the historic approaches of the Department of Justice and the views of most family judges and lawyers in Canada. Bill C-560 had strong support from fathers' rights and equal-parenting groups,[66] but the Canadian Bar Association and many family justice professionals were opposed.[67] In a 2014 survey of family lawyers and judges, only 23% of respondents supported the equal parenting time presumption of Bill C-560, but 78% favored reform of the Divorce Act to replace the concepts of custody and access with terms like parental responsibility and parenting time.[68]

It is likely that the Conservative government decided that it was better to take no action on this bill rather than risk sustained opposition from family justice professionals by supporting it or risk the wrath of the caucus by introducing a less radical set of reforms. Although Bill C-560 had significant support in the Conservative caucus, the Cabinet did not support it and it was opposed by the Liberals and New Democrats; it was defeated in Parliament without committee hearings at second reading on

May 27, 2014. The Conservative government was replaced by the Liberals in the election of October 2015. The Liberal government has announced that establishment of Unified Family Courts throughout Canada is a priority; but there has been no real progress on the court issue since the 2015 election and it seems doubtful that there will be any significant reform of federal family legislation before the 2019 election.

C. THE PATH TO REFORM

As reflected in the reforms in a number of provinces and many other countries, the concepts of custody and access in Canada's Divorce Act are outdated and unhelpful, and in some cases may promote a winner–loser mentality between separated parents that promotes conflict. The Act should be reformed to use concepts that reflect the actual needs of children for time with each parent and for parents to assume responsibilities and make a range of decisions about children. In most cases there should be a sharing of time and decision making; indeed that is already the practice in Canada. There are, however, good reasons to have concerns about a statutory presumption of equal parenting or equal parenting time, including:

- Most Canadian families are not characterized by equal time or care when parents are cohabiting, in the sense that childcare is often not divided equally in intact families, and it is therefore unwise to presume that this should be the best arrangement if the parents separate or even to expect that such arrangements would be feasible in most cases.
- It is clear from experience in Canada and elsewhere that parental work schedules, relative location of residences, and new relationships make equal parenting time practical in only a minority of situations.
- Social science research does *not* support enactment of a presumption of equal parenting time.[69] While social science research suggests an association between shared custody (roughly equal time) and positive child outcomes, it does not establish a causal relationship.[70] Indeed, shared custody is more likely to be the result of a parental agreement than a court-imposed resolution, which suggests that these are more likely cases with higher levels of parental cooperation. The research also reveals real concerns about the negative effects of high parental conflict or violence, especially if there is shared custody. A legal presumption of equal shared time would most likely have an impact in the highest-conflict cases that are resolved in court, which are also the cases where this outcome raises the greatest concerns. Thus we do not support that type of legal presumption.
- Indeed, given the uniqueness of each child and family, and the changing needs of individual children as they develop, any type of legal presumption about parenting time is problematic.

While a *presumption* of equal time is not appropriate, there are many cases where equal time is practicable and in a child's best interests. Indeed, as intact Canadian families slowly move toward greater equality in childcare, one would expect that there will continue to be a trend toward a gradual increase in the number of equal parenting-time arrangements in the future.

In our view, there should *not* be a legislative specification of an expected amount of parenting time, as parenting-time arrangements need to take account of individual needs and circumstances of each child, and should be altered as children get older and their circumstances change. However, it would be appropriate to adopt a version of the Australian "meaningful involvement" provision to indicate that "where it is reasonably practicable" and consistent with the child's best interests, parenting time would include care, not only on weekends and during holiday periods, but also some parenting time during the week, referred to as care for "substantial and significant periods of time" in Australia.[71] Such a statement of principle about postseparation parenting would not be intended to establish the kind of presumptions found in Bill C-560, rebuttable only if it can be established that

another arrangement would substantially enhance the interests of the child. Rather, this principle would be a starting place for consideration of an individual case, effectively codifying present Canadian judicial practices.

Any shared-parenting principle always needs to be balanced with consideration of other best interests factors that also should be identified in legislation, such as the level of conflict between the parents; a history of family violence; the ability of the parents to communicate and cooperate; the age and developmental needs of the child; the distance between the parents' homes; the closeness of the child's relationship with each parent; and, where appropriate, canvassing the child's views and preferences.[72] Adopting a principle that it is normally in the interests of children to have a shared-parenting arrangement is consistent with widely held Canadian values about the importance of both parents in the lives of their children,[73] the social science research about the value of continuing, significant involvement by both parents in the lives of their children, and current Canadian postseparation parenting practices.

VI. CONCLUSION: REFORMING LAWS AND CHANGING THE CULTURE

Since Canada's Divorce Act came into force in 1986, there has been much greater recognition of the value of various forms of alternative and consensual dispute resolution in Canada and greater use of various forms of shared parenting postseparation. Canada may be seen as offering something of a natural experiment, with some jurisdictions undertaking reforms of parenting laws and others not. While details of the provincial reform schemes have varied, all have moved away from traditional concepts of custody and access. The timing of reforms in different provinces may reflect social or cultural differences between jurisdictions but is more likely a reflection of differing political pressures and priorities. The experiences in Quebec, British Columbia, and Alberta suggest that the statutory abandonment of the traditional concepts like custody and access—with their focus on parental rights—is associated with greater use of various forms of shared parenting if not causally connected. However, experience in jurisdictions where there has not been legislative reform, such as Ontario, also reveals that there have been changes over parenting arrangements even without legislative reform. While in provinces where there has been legislative change, it is not clear that there was a direct causal link between legislative reform and changes in professional culture and practice, it would seem that legislative reform both reflects and supports changes in professional and greater support for shared parenting.

NOTES

* We gratefully acknowledge financial support from the Social Sciences and Humanities Research Council of Canada.

1. Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

2. *See, e.g.*, Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188 (Can.); Hughes v. Hughes, 1976 B.C.C.A 220 (Can.); S.Z. v. D.Z., 2015 B.C.S.C 2157 (Can.).

3. *See, e.g.*, Zhang v. Sun, 2016 B.C.S.C 1418 (Can.) (accepted that concepts used in provincial parenting statutes can be used to interpret or add to the provisions of the Divorce Act that govern parenting, as long as there is not an "express contradiction").

4. Federal Child Support Guidelines, SOR/97-175, s. 9 (1997).

5. Not surprisingly, in higher-conflict cases there are often disputes about exactly how to determine whether the 40% threshold has been crossed and how to determine an appropriate amount of child support. *See* Contino v. Leonelli-Contino, 2005 S.C.C. 63 (Can.); Nicholas Bala & Marie Gordon, *Kids & Cash: Interconnections of Child-Related and Economic Issues in Family Proceedings*, 31 Can. Fam. L.Q. 309 (2012); Rollie Thompson, *The TLC of Shared Parenting: Time, Language and Cash*, 32 Can. Fam. L.Q. 315 (2013).

6. R.S.C., 1985, c. 3.

7. *Id*. c. 16(4).

8. *Id*. c. 16(5).

9. *See, e.g.*, Nicholas Bala & Christine Ashbourne, *The Widening Concept of "Parent" in Canada: Step-Parents, Same-Sex Partners & Parents by ART*, 20 J. Gender Soc. Pol'y & L. 525 (2012) (The discussion in this article focuses on children who have two parents, with at least one parent being a biological parent. Canadian legislation and case law recognize that with

artificial reproductive technology there may be more than two parents, and that a stepparent or other person may have parental rights and responsibilities; these cases are relatively rare, however.).

10. Family Law Act, S.A. 2003, c F-4.5, s. 21(1).

11. Family Law Act, S.B.C. 2011, c. 25; *see* Susan B. Boyd & Matt Ledger, *British Columbia's New Family Law on Guardianship, Relocation, and Family Violence: The First Year of Judicial Interpretation*, 33 Can. Fam. L.Q. 317 (2014) (an analysis of case law under the new Act).

12. S.B.C. 2011, c 25 s. 40 (2).

13. *Id*. c 25 s. 40 (4)(b).

14. *Id*. c 25 s. 37(2)(g).

15. *Id*. c 25 s. 37(2)(b).

16. Civil Code of Québec, S.Q. 1991, c 64, at 598–607; *see, e.g*., Droit de la famille—151257, 2015 QCCS 2461.

17. Dominique Goubau, *La garde partagée: vague passagère ou tendance locale*, in Benoît Moore edit, Mélanges Jean Pineau, (Montreal QC, Les Éditions Thémis, 2003), 107.

18. For an in-depth discussion of the history of child custody law in Canada's common law provinces, see, for example, Susan Boyd, *Child Custody, Law and Women's Work*, 15 Can. J. Wom. & L. 231 (2003).

19. Talsky v. Talsky, [1976] 2 S.C.R. 292 (Can.).

20. Kruger v. Kruger (1979), 104 D.L.R. (3d) 481(Ont. C.A.).

21. See the comments of L'Heureux-Dubé J. in Young v. Young, [1993] 4 S.C.R. 3 (Can.), and Gordon v. Goertz, [1996] S.C.J. No. 52 (Can.) (although she was dissenting in both cases, her approach reflects the dominant views in the 1960s and 1970s about the limited role of "access parents," almost invariably fathers at that time, after separation).

22. *See, e.g*., Baker v. Baker, (1978), 95 D.L.R. (3d) 529, per Boland J., *rev'd* (1979), 8 R.F.L. (2d) 236 (Can. Ont. C.A.); Jay Folberg, *Joint Custody in* Family Law: Dimensions of Justice (Rosalie S. Abella & Claire L'Heureux-Dubé eds., 1981); Edward J. Rosen, *Joint Custody: In the Best Interests of the Child and Parents*, 1 Rep. Fam. L. 116. (1978).

23. *Baker*, 95 D.L.R (3d) 529.

24. R.S.C. 1985, c. 316(10).

25. Young, [1993] 4 S.C.R. 3 at para. 204 (emphasis added).

26. Kaplanis v. Kaplanis (2005) 10 R.F.L. (6th) 373 (Can. Ont. C.A.).

27. Ladisa v. Ladisa (2005), 11 R.F.L. (6th) 50 (Can. Ont. C.A.).

28. *See* Martha Shaffer, *Joint Custody Since Kaplanis and Ladisa: A Review of Recent Ontario Case Law*, 26 Can. Fam. L.Q. 315 (2007) (discussion and commentary).

29. *Kaplanis*, 10 R.F.L. (6th) 373, para 11.

30. *See, e.g.,* Warcop v. Warcop (2009), 66 R.F.L. (6th) 438 (Can. Ont. S.C.) (the court ordered joint legal custody and a regime moving to equal care of a two-year-old child); Morano v. Coletta, 2008 O.N.C.J. 228 (Can. Ont.C.J.) (alternating week interim schedule for ten-month-old child); Adams v. Nobili, 2011 O.N.S.C. 6614 (Can. Ont. S.C.) (father to have overnights three nights a week for eighteen-month-old child).

31. *See*, Rachel Birnbaum et al., *Shared Parenting: Ontario Case Law and Social Science Research*, 35 Can. Fam. L.Q. 139 (2016).

32. Katherine Marshall, *Converging Gender Roles*, 7 Persp. on Lab. & Income 5 (2006) (In 1976, 3% of couples with dependent children at home were dual-earner families; by 2005, that proportion had increased to 69%. While just over 90% of women with preschool children reported doing significant daily childcare in both 1986 and 2005, the portion of men with daily involvement with these children increased from 57% to 73%. However, unlike housework, where the average time spent has increased for men but dropped for women, time spent on childcare increased for both sexes. Overall, in 2005, fathers with children under nineteen years of age living in their homes spent about 1.0 hour per day on childcare (up from 0.6 in 1986) and mothers 2.0 hours (up from 1.4 hours in 1986)). *See also* Statistics Canada, Changes in Parents' Participation in Domestic Tasks and Care for Children from 1986 to 2015, (2017), which reported that from 1986 to 2015 the portion of childcare that fathers in two-parent families did compared to mothers increased from 28% to 35%.

33. Statistics Canada, General Social Survey—2010 Overview of Time Use of Canadians, 89-647-X (2011) (This study of time use found that women spent more than twice as much time on childcare than men. For example, the total time women spent with children aged zero to four years was six hours and thirty-three minutes per day. For men with children this age, the corresponding duration was three hours and seven minutes. These differences between men and women were only partly attributable to more men working full time. Women with young children who worked full time (thirty or more hours a week) spent a total of five hours thirteen minutes a day on childcare. In comparison, men in the same situation spent two hours and fifty-nine minutes taking care of their children. This study, however, is skewed as it includes both intact and separated couples, and men in situations of separation have less opportunity to care for their children.); *see also* Linda Duxbury & Christopher Higgins, Impact of Gender and Life-Cycle Stage on the Findings of the 2012 National Study on Balancing Work and Caregiving in Canada (2012). These researchers undertook a study of 25,000 people in the Canadian labor force and found that:

> [w]omen are the primary earner or equal partners in the breadwinning equation in just over half the families in our study. . .. Almost one in three of the women said that their partner had primary responsibility for childcare in their families. These data suggest that men are assuming primary responsibility for childcare in families where the woman is the primary breadwinner. . .. Gender is not associated with any of the

forms of work-life conflict considered in this study. This suggests that as men do more at home and breadwinning is shared, work–life balance becomes more of an issue for men who now have to balance competing career demands with their partner and assume more responsibility at home. *Id*.

34. Statistics Canada, *Employment Insurance Coverage Survey, 2014,* The Daily, Nov. 23, 2015.

35. Statistics Canada, *Divorce 2001-02*, The Daily, May 4, 2004 (data only report on divorce, so parenting arrangements of unmarried parents are not included).

36. Department of Justice Canada, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems* 25 (Nov. 2013) (Figures are based on limited data and as a result may not be representative of the entire population of divorced parents. Totals may not add up to 100% due to the exclusion of the "other" category: 2.2% for physical custody and 2.8% for legal custody.).

37. Mary Bess Kelly, *Divorce Cases in Civil Court, 2010/2011,* Statistics Canada (Mar. 28, 2012) (study reported on cases in four provinces: Nova Scotia, Ontario, Alberta, and British Columbia; and the three territories: Yukon, Northwest Territories, and Nunavut).

38. About one third of cases (34%) had a trial within one year of filing; the remaining 66% were held during the second year (42%) or after two years (24%).

39. Statistics Canada, Census Profile, 2016 Census (2017). Between 2006 and 2011 the number of male lone-parent families (+16.2%) increased much faster than the number of female lone-parent families (+6.0%). These lone-parent families included those that resulted from divorce, separation, widowhood, adoption, and other care arrangements.

40. Marie Sinha, *Parenting and Child Support After Separation or Divorce*, Statistics Canada (Feb. 2014), http://www.statcan.gc.ca/pub/89-652-x/89-652-x2014001-eng.pdf (study was based on a sample drawn from the General Social Survey, a survey of 25,000 households).

41. In this study, of those with written agreements or court orders, over a third of primary care parents (35%) reported that they resolved their cases consulting lawyers but without going to court; a slightly greater portion (40%) used the court process, with or without lawyers; about one in ten used mediation (13%); and another one in ten made agreements on their own (10%). There did not seem to be an appreciable difference in terms of the arrangements made (i.e., equal time sharing vs. a primary residence) whether parents used the court process, mediation, or negotiation on their own or with lawyers.

42. Lorne D. Bertrand et al., *The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program*, Can. Res. Inst. for L. & Fam. (2016) (Results are based on responses to five questions from a larger Web-based survey of registrants at the National Family Law Program held in July 2016. The response rate was 47%. An average of 46% of respondents' cases involved some form of joint physical custody, "shared custody" or "shared residence" (where the children spend at least 40% of their time with each parent—the cutoff for "shared custody" for child support purposes). An average of 68% of their cases involved some form of joint legal custody or joint guardianship. They also reported a substantial increase in the use of shared custody or joint legal custody over the past five years (31% reported that this arrangement in creased substantially, 53% that it increased somewhat, 16% that it stayed about the same, and only 1% that it decreased). In only 13% of their cases was there a provision for limited or no contact with the nonresidential parent. There were no significant variations to these questions by region.).

43. The results here are based on the response to one question from a larger Web-based survey of registrants at the National Family Law Program held in July 2014; the question was not asked in the 2016 survey; *see* Susan B. Boyd & Lorne D. Bertrand, *Comparing the Views of Judges and Lawyers Practicing in Alberta and in the Rest of Canada on Selected Issues in Family Law: Parenting, Self-represented Litigants and Mediation*, Can. Res. Inst. for L. & Fam. (2016).

44. The authors were Rachel Birnbaum, Karine Poitras, Michael Saini, and their student researchers.

45. In 2014–15, 500 closed files were randomly selected from two different locations in each province, with the following inclusion criteria: opened after October 1, 2011; inactive or closed for twelve months; and the case involved at least one minor child. As noted, some files did not have sufficient data to include in this report.

46. These data are only based on two court sites in each province.

47. Westlaw has the most comprehensive set of published reports of family law cases in Canada.

48. Percentages do not add up to 100 as the table does not include split custody when there is more than one child and cases where custody was awarded to a person who was not a parent (e.g., a grandparent).

49. The authors were Nicholas Bala and Shawna Leclair.

50. In 2015, there were also 4% of cases where custody of two or more children was split between the parents.

51. Cherami Wichmann & Rick Gill, *Shared Custody Arrangements: Pilot Interviews With Parents, 2004-FCY-5*, Fam., Child. and Youth, Dep't of Just. Can., http://www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2004_5/index.html.

52. Heather Juby et al., *Sharing Roles, Sharing Custody? Couples' Characteristics and Children's Living Arrangements at Separation*, 67 J. Marriage & Fam. 157 (2005).

53. Rachel Birnbaum et al., *Shared Parenting: Ontario Case law and Social Science Research*, 35 Can. Fam. L.Q. 139 (2016).

54. Both LexisNexis and West Law Ontario databases were searched using the search terms "shared decision-making," "shared parenting," and "shared custody."

55. See Button v. Konieczny, 2012 Can LII 5613, para. 22 (Can. Ont. Ct. J.) ("Appreciating that this is an interim motion based on conflicting affidavits, I am of the view that the status quo in this case supports an order of shared parenting similar to the result in Shaw v. Shaw [2010] O.J. No. 4092.").

56. Denise Whitehead, *Is Shared Custody the "Alchemy" of Family Law?*, 35 Can. Fam. L.Q. 1 (2015).

57. While many refer to the supporters of Bill C-560 as "fathers' rights advocates," and that terminology is used here, there are also women who support the "equal parenting movement," just as there are many men who support the feminists' opposition to a presumption of equal parenting. For the views of one prominent female supporter of equal parenting and Bill C-560, *see* Barbara Kay, *After a Divorce, Equal Parenting Rights Should Be the Norm*, National Post, Mar. 19, 2014. For recent polemics supporting of a presumption of "equal parenting" and respect for "fathers' rights," *see*, for example, Edward Kruk, The Equal Parent Presumption, (2013); Grant Brown, Ideology and Dysfunction in Family Law: How Courts Disenfranchise Fathers, (Can. Const. Found. & Frontier Ctr. for Pub. Pol'y, 2014).

58. *See, e.g.*, Susan Boyd, *Demonizing Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes*, 6 J. Ass'n Res. on Mothering 52 (2004).

59. *See, e.g.*, Nicholas Bala, *A Report from Canada's Gender War Zone: Reforming the Child Related Provisions of the Divorce Act*, 16 Can. J. Fam. L. 163 (1999).

60. Special Joint Committee of the Senate and Commons on Child Custody and Access, For the Sake of the Children (1998).

61. Bill C-22, 37th Parliament, 2nd Session, 1st Reading, Dec. 10, 2002.

62. Linda Neilson, *Putting Revisions to the Divorce Act Through a Family Violence Research Filter: The Good, the Bad and the Ugly*, 20 Can. J. Fam. L. 11 (2003); Boyd, *supra* note 58, at 52.

63. *Cotler Likes Custody Reform Package*, Lawyers Weekly, Feb. 20, 2004.

64. Bill C-560, 2nd Session, 41st Parliament, 1st Reading, Dec. 16, 2013; defeated May 27, 2014. Bill C-560 also proposed a presumption against parental relocation and stipulated that the coming into force of the bill would have been a ground for variation of prior orders. There were also serious concerns about these aspects of Bill C-560, but a discussion of them is beyond the scope of this article.

65. The bill resulted in considerable media coverage and public debate; *see, e.g.*, Nicholas Bala, *Equal Time for Custody of Children is a Simplistic Solution*, Toronto Star, Mar. 10, 2014; Tasha Kheiriddin, "*Equal Shared Parenting" Law Doesn't Put Kids First*, Nat'l Post, Mar. 20, 2014; Edward Kruk, *Equal Shared Parenting—Best for Parents, Best for Children,* Nat'l Post, Mar. 25, 2014; Brian Ludmer, *Speaker's Corner: Time for Canada to Embrace Equal Shared Parenting*, Law Times, May 5, 2014.

66. *See, e.g.*, Susan Boyd, Child Custody, Law, and Women's Work (2003).

67. Can. B. Ass'n, Nat'l Fam. L. Section, In the Interests of Children Response to Bill C-560 (May 2014).

68. This was a survey of attendees at the National Family Law program held at Whistler, British Columbia July 13–17, 2014, undertaken by Nicholas Bala, Rachel Birnbaum, John-Paul Boyd, and the Canadian Research Institute for Law and the Family.

69. For very helpful (though now slightly dated) reviews of social science literature on shared parenting by Canadian authors, *see* Sharon Moyer, *Child Custody Arrangements: Their Characteristics and Outcomes*, Dep't Just. Can. (2007), and Martha Shaffer, *Joint Custody, Parental Conflict and Children's Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us*, 26 Can. Fam. L.Q. 285 (2007).

70. *See, e.g.*, Amandine Baude et al., *Child Adjustment in Joint Physical Custody Versus Sole Custody: A Meta-Analytic Review*, 57 J. Divorce & Remarriage 338 (2016).

71. *See* Richard Chisholm, *The Meanings of "Meaningful" Within the Family Law Act Amendments of 2006: A Legal Perspective*, 15 J. Fam. Stud. 60 (2009).

72. For a fuller discussion of a legislative reform proposal for Canada, *see* Nicholas Bala, *Bringing Canada's Divorce Act into the New Millennium: Enacting a Child-Focused Parenting Law*, 40 Queen's L.J. 425 (2015).

73. Opinion polls reveal high levels of public support in Canada for shared parenting laws. *See* Brian Ludmer, *Time for Canada to Embrace Equal Shared Parenting*, Law Times, May 5, 2014.

Nicholas Bala is a leading Canadian expert on family and children's law. He has been a professor at the Faculty of Law at Queen's University since 1980. Scholars and judges from all levels of court, including the Supreme Court of Canada and the Alberta Courts, often cite his work. Much of his research is interdisciplinary, collaborating with psychologists, social workers, and other social scientists to better understand the effect of involvement in the justice system on children, youth, and families, and to help improve outcomes for children and parents. His contributions to family law research and professional education were recognized in 2009 when he received the Law Society Medal and the Family Excellence Award of the Ontario Bar Association. In 2013, he was elected to be a Fellow of the Royal Society of Canada.

Rachel Birnbaum, Ph.D., RSW, LL.M. is a professor, cross-appointed to childhood (interdisciplinary studies) and social work at King's University College at the University of Western Ontario, London, Ontario, Canada. Her teaching, clinical practice, and research focuses on the needs of children and families postseparation to better inform practice, research, and policy development in family justice. She has been elected to

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Francine Cyr is a Full professor (retired in 2015) at the Psychology Department of the University of Montreal. Professor Cyr's research has focused on the Family Breakup with particular interest on parent-child and co-parental relationship following separation/divorce. She carried out several research projects and author or co-authored many publications on the following topics: The impact of parental conflicts on the child's adaptation, Voice of the child in the parental separation process, Judicial interviews with children, Parental Alienation, Shared custody with young children, Access to Justice and Litigants' pathways through the Justice system, Assessment of ADR methods' impact (family mediation, psycho-judicial Case Management protocols for high conflict couples) on children and their parents. Her clinical practice (for over 35 years) as a clinical psychologist, family mediator, divorce counselor, case manager of high conflict divorced families, child psychotherapist deals with all these realities.

Shawna Leclair is a law student at Queen's University (Class of 2018). She previously attended Ryerson University, and obtained a Bachelor of Commerce with a minor in Psychology. She worked as a Research Assistant for Professor Bala after completing her first year, and as a second year summer student at Stikeman Elliott LLP in Toronto.