

EXECUTIVE SUMMARY

CHILD CUSTODY, ACCESS AND PARENTAL RESPONSIBILITY:

THE SEARCH FOR A JUST AND EQUITABLE STANDARD

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December, 2008

This paper was commissioned by the Father Involvement Research Alliance (FIRA) based at the University of Guelph. Funding support for FIRA and this paper was provided through a Community University Research Alliance grant from the Social Sciences and Humanities Research Council of Canada and through additional support from the Public Health Agency of Canada.

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

About the Author

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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