

Shared Parental Responsibility: A Harm Reduction-Based Approach to Divorce Law Reform

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ABSTRACT. The purpose of this article is twofold. First, our aim is to provide a selective overview and analysis of divorce research in the past five year period (2000-2005), during which important new data on children, families, and divorce have appeared. Much of this data challenges current socio-legal policy and “practice wisdom,” and includes: (1) the emergent perspective of adult children of divorce reflecting upon their experiences and preferences growing up as children of divorce; (2) studies comparing child and family outcomes in joint and sole custody families; and (3) new data on the distribution of child care tasks and responsibilities in families. These data support an approach to postdivorce parenting based on reducing the harms attendant to divorce for children and parents, parental equality, and family autonomy as most in keeping with children’s needs and the principle of “the best interests of the child, from the perspective of the child,” which, it is argued, provides a more child-focused standard for child custody determination than current approaches. Second, building on this research foundation, we propose a new model of post-divorce parenting: a “shared parental responsibility” framework, in which parental responsibilities precede custodial rights, and children’s

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“best interests” are addressed by means of identifying both their needs and parental and societal responsibilities corresponding to these needs. [Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2005 by The Haworth Press, Inc. All rights reserved.]

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For many years, policymakers and legislators have had access to a wealth of data related to child, family and community outcomes of current divorce law and practice, but have had to sift through what often appear to be contradictory findings, interpretations of data, and research conclusions from different studies, many reflecting particular ideological positions.¹ The result is confusion, lack of unanimity, and inaction in regard to any new approaches intended to serve children’s and families’ needs and interests, despite general agreement that the existing adversarial “winner takes all” framework is causing harm.

In many jurisdictions, policymakers and legislators have chosen to delay recommended action to reform divorce law, which may prove to be a wise maneuver. In the past five-year period in particular, a number of important “benchmark” studies have shed a new light on the nature of the problems surrounding divorced children, families, and the law, which provide a new direction for divorce law reform. Clouding previous research efforts were the competing claims of the “mothers’ rights” and “fathers’ rights” constituencies, and some important gaps in the research. These new studies, which have uncovered the missing pieces in the child custody puzzle, clearly point to the need for a radically different approach—not a “band-aid” method—to those espoused by both “rights” camps. This new approach emphasizes shared parental *responsibility* over custodial *rights*, and a concerted effort to reduce the harms attendant to divorce for children and family members. This philosophy is the cornerstone of some of the current divorce law reform initiatives in the United States, Canada, Europe, and Australia.

The purpose of this article is twofold. First, a selective overview and analysis of selected divorce research since 2000 will be provided, with an eye to implications for divorce law, policy, and practice. In addition to being considered benchmark studies, the research cited utilizes large and representative samples, and has largely overcome the methodologi-

cal limitations of existing research. Second, building on this new research evidence, an alternative approach to child custody determination—a “shared parental responsibility” framework based on children’s needs, or “the best interests of the child, from the perspective of the child”—will be articulated. It will be argued that a new look at the child custody debate is warranted as new research on the perspective of children of divorce, child and family outcomes in joint and sole custody families, and the distribution of child care tasks in families, supports an approach based on children’s needs for harm reduction, parental equality, and family autonomy in postdivorce child care arrangements. This orientation is fundamentally different to those promoting a “primary caregiver” presumption based on the assumption that “the equal treatment of unequals does not lead to equality” (Boyd, 2003).² It will be argued that clearer guidelines are needed for judges, as they are not professionally trained in the finer points of child development and family dynamics, and the discretionary power of judges in the child custody realm has long been identified as an area of concern to sociolegal scholars, legislators, and the judiciary themselves (Bala, 2000).

The “shared parental responsibility” approach to postdivorce parenting presented here is emerging as a preferred model in a range of jurisdictions both in the United States and abroad. In Australia, shared parental responsibility has been institutionalized as the legal norm; and British legislators are currently debating the parameters of that country’s shared parenting legislation. It is not only the principal recommendation of the Canadian Joint Parliamentary Committee on Custody and Access, but is the preferred option in Canadian public opinion polls and the focus of proposed changes to the Canadian Divorce Act. U.S. states like Iowa are now leading the way toward divorce law reform. The approach is primarily defined by its emphasis on harm reduction, equal status between the genders, and freedom from constraint in parent-child relationships.

THE “BEST INTERESTS OF THE CHILD” STANDARD

Currently in most Western states, the “best interests of the child” remains the sole criterion upon which contested child custody determinations are based. This standard provides the background or context within which any attempts at law reform must be situated.

The indeterminacy of the “best interests” custody criterion has come under increasing scrutiny (Woodhouse, 1999). Bala (2000) considers the current “best interests” principle to be “so vague as to be meaningless,” as there is no operationalized definition from which to assess and determine these “best interests.” Courts lack the capacity to reliably determine to discern the child’s “best interests” with certainty, and the high level of discretion vested in judges in regard to child custody matters is problematic (Woodhouse, 1999). Examining Canadian court-based data, Bala (2000) argues that the traditional “best interests of the child” standard, as has traditionally been applied by the judiciary, reflects a fundamentally paternalistic orientation based on what adults, not children, consider to be of primary importance to children’s well-being. Children’s voices are rarely considered in the proceedings that determine their fate, and as researchers have been largely unable to obtain data directly from children of divorce, judges are forced to rely on adult interpretations of children’s needs and interests, which vary widely.

In many jurisdictions, although “joint physical custody” is not ruled out by statute, in practice it has been assumed that children’s best interests are best served, in cases where there is a trial over the issue, by awarding postdivorce care and control of children to one parent only. Thus, decisions prevalent in the arena of family law have reflected the presumption that only one parent, usually the mother, is to care for children, while the other, usually the father, provides financial support. Thus, although the “best interests” standard is touted as gender-neutral, the most recent Canadian court file analysis data (Department of Justice Canada, 1990), for example, indicate that *in those cases where there was a trial* over the issue of post-divorce parenting arrangements, mothers were awarded sole custody 77% of the time, fathers 8%, with the remaining 15% of cases resulting in a variety of arrangements such as split custody or custody assigned to third parties, but not joint custody (Millar & Goldenberg, 1998).³ Joint physical custody of children following divorce is generally seen to be unworkable by the Canadian judiciary in cases where child custody is in dispute, and therefore not “in the best interests of children.” Joint physical custody orders are rarely made, as divorcing parties are advised by their legal counsel. The result is that when there is a trial, parents typically petition for sole custody, and with the high stakes involved in such a “winner-take-all” forum, family disputes are among the most bitter battles waged in court. Current practice has thus promoted litigation when child custody is at issue, and as rules of evidence are applied in a highly flexible fashion, and as

“almost anything might be relevant to a child’s best interests,” contested custody cases are increasingly complex, costly to litigate, and potentially harmful to all affected parties (Bala, 2000). Thus a large proportion of non-resident parents who wish to have equal time do not petition the courts for it, and over 90% of Canadian fathers that are involved in court-determined custody arrangements receive less than equal time with their children, compared to mothers (Kruk, 1993).

Current family studies research reveals a tremendous heterogeneity of parenting patterns on a global and international scale. In North America, mothers and fathers are increasingly sharing caregiving responsibility for their children (Higgins & Duxbury, 2002), a marked departure from patterns observed a decade ago. Thus proponents of a “primary caregiver” presumption, basing their claims on a perceived “invisibility of caregiving labor that women perform in families” (Boyd, 2003), are giving way to the general recognition that both mothers and fathers today are experiencing significant “role overload” attempting to discharge their paid work and family obligations (Higgins & Duxbury, 2002). In addition, the constant in families is change; diverse families constantly find themselves in transitions of different kinds and intensities, and their needs are constantly changing (*ibid.*).

New Directions in Research on Children, Families, and Divorce

A fundamental problem in the current approach to child custody determination is the lack of a clear definition of what constitutes “the best interests of the child (Bala, 2000). Judges are thus compelled to define these interests in their own idiosyncratic manner, and the potential for bias is high when no such criteria exist. Judges may fall prey to the influence of various “rights”-based lobbies, such as those representing one gender in the “custody wars” (Mason, 1996).

The concept of “harm reduction” in child custody and postdivorce parenting focuses attention away from parental “rights” toward a consideration of children’s fundamental needs, and parental and societal obligations or responsibilities to meet those needs. Protection against violence is a key aspect of children’s physical needs, which also include food, warmth, sleep, health, rest, exercise, and fresh air. Beyond these physical needs, there are other fundamental needs that are largely neglected during the divorce transition: the need for order; the need for roots; the need for equality; the need for autonomy, or freedom from constraint; the need for authorities recognized as legitimate; the need for initiative and responsibility; the need for security, as well as the need

for risk; the need for privacy (Weil, 1952). These fundamental human needs could serve as the foundation for a "statement of obligations" to children and families of divorce, as for every need there is a corresponding obligation or responsibility. Such a statement of needs and responsibilities could provide a concrete definition of "the best interests of the child, from the perspective of the child" and serve as the foundation for divorce law reform.

From where does most of the harm to children and families in a custody conflict emerge? According to Kelly (2000), in a comprehensive literature review on the subject, and Lamb and Kelly (2001), harm to children in the divorce aftermath results, first, from broken positive attachments, or estrangement from one or both parents; and second, from exposure to parental conflict. A third factor is the instability and discontinuity in children's lives in the aftermath of divorce; and a fourth is the marked decline in children's standard of living, as both mothers and fathers suffer financially subsequent to divorce (Kelly, 2000). Although some would argue that the differences in adjustment between children of divorced and married families are small on average (Amato & Keith, 1991), it is now generally accepted that the psychological distress and pain of children of divorce is substantial, and related to the four factors above, particularly the first two (Laumann-Billings & Emery, 2000; Lamb, Sternberg, & Thompson, 1997; Amato, 2000; Booth, 1999; Emery, 1999).

Tragically, current outcomes in divorce are such that all four conditions are present for large numbers of children who have experienced the divorce of their parents, particularly those who have been the subject of child custody litigation. A significant number of children have lost contact with their "non-custodial" or "non-resident" parents, typically fathers but also mothers, subsequent to divorce, with the resultant stresses on all members of the former family system. The child is uprooted in this sense; his or her primary attachments to one parent and set of kin are effectively severed. At the same time, custodial parents, usually mothers, are "overwhelmed" by the assumption of sole responsibility for their children (Se'Ver, 1993) while non-custodial/resident parents are suffering the absence of their children (Kruk, 1993; Braver & O'Connell, 1998), and children's adjustment to the consequences of divorce in "father-absent" situations is often highly problematic (Lamb, Sternberg, & Thompson, 1997; Amato, 2000; Booth, 1999; Emery, 1999). Conflict between parents does not seem to abate in many cases, particularly those in which the court is involved in determining custody. A suicide "epidemic" among divorced fathers has been

documented by Kposowa (2000), who explores its link to family court judgments. Child poverty remains a pressing issue, as does women's traditional economic dependence on men, neither of which are effectively addressed in the current child custody system (Se'Ver, 1993).

One of the primary challenges for courts in child custody matters is that of balancing two recognized elements of the "best interests" criterion: ensuring that children are not placed in harm's way when their parents are in conflict with each other; and ensuring meaningful contact between the child and both parents, in which children are able to receive the love and nurture of each of their parents to the fullest possible extent. Rarely, however, are both of these fundamental needs addressed. With sole physical custody determinations and "primary residence" arrangements, the disenfranchisement of one parent from children's lives is justified by the courts as a protective measure, as parents who are in trial over the matter of child custody are considered to be incapable of shared parenting (Mason, 1996). The dominant thinking among many judiciary, as reflected in contested child custody judgments, is that shared or equal parenting can only work when parents are cooperative with each other, and not engaged in a custody conflict (Millar & Goldenberg, 1998). It is assumed that where it exists, and even when it does not exist, the risk of violence will increase as a consequence of joint custody. There is no empirical data, however, to support this claim; recent research data, summarized below, indicate the opposite.

Four Key Findings

The following North American studies have uncovered new data directly relevant to policymakers and legislators in the field of child custody. In particular, four important new findings call into question the desirability of present divorce laws and practices:

1. *Children of divorce want equal time with their parents, and consider shared parenting to be in their best interests. Seventy percent of children of divorce believe that equal amounts of time with each parent is the best living arrangement for children; and children who had equal time arrangements have the best relations with each of their parents after divorce.*⁴

The few studies that have attempted to examine the issue of child custody from the standpoint of children themselves have tended to

rely on clinical samples (Wallerstein, Lewis, & Blakeslee, 2000), or simply have neglected to ask children about their desires or needs respecting living arrangements (Smart, 2002). A new large-scale ($n = 829$) U.S. study of children who have lived through their parents' divorces concludes that children want equal time with each of their parents, and consider shared parenting to be in their best interests, as well as in the best interests of children generally. Fabricius (2003) and Fabricius and Hall (2000) shed light on the child custody debate with their focus on the perspective of children in divorce. The authors found that equal time with each of their parents is precisely what the majority of children desire and consider to be in their best interests. The authors sought young college students' perspectives on their postdivorce living arrangements, and also gathered data from students from non-divorced families, between 1996 and 1999. Their findings are consistent with earlier research focused directly on children of divorce (Lund, 1987; Derevensky & Deschamps, 1997). Fabricius (2003) compared children's actual post-divorce living arrangements with the living arrangement they wanted, the living arrangement their mothers wanted, the living arrangement their fathers wanted, the living arrangement they believed is best for children of divorce, the living arrangement they believed is best for children of divorce if both parents are good parents and live relatively close to each other, the relative number of days in a typical week with each parent they believe is best for children of divorce for children at different ages, how close they now felt toward their mothers and fathers, the degree of anger they now felt toward their mothers and fathers, the degree to which each of their parents wanted the other parent to be involved as a parent, and the degree to which each of their parents undermined the other parent as a parent. Equal time with each of their parents is what the majority of divorced respondents wanted as children and considered to be in their best interests, regardless of their actual living arrangement. The authors noted the fact that although children of divorce perceive a large gender gap in their parents' generation on the issue of child custody, there was no evidence of this gap in their generation. As young adults who have lived through the divorce of their parents, it may be argued that they are, in a sense, the real "experts" on the "best interests" of children of divorce. They certainly felt an injustice in not being allowed to have an equal voice in the proceedings. Finally, Fabricius (2003) found that children in sole custody arrangements experiencing a history of unavailability of the non-custodial parent articulate feelings of insecurity in their relationship with that parent,

perception of rejection by that parent, and anger toward both their parents. Consistent with this finding, Amato and Gilbreth (1999), in their meta-analysis of the father-child postdivorce relationship, found that children who were less close to their fathers after divorce had worse behavioral and emotional adjustment and lower school achievement.

2. *Not only do children of divorce want equal time but it works. A review of 33 major North American studies comparing sole with 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.*⁵

This meta-analysis of the major North American studies over the past decade comparing outcomes in joint versus sole custody homes, found that joint custody is associated with more salutary outcomes for children. Bauserman (2002) 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 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.

Although many of the studies reviewed by Bauserman compared "self-selected" joint custody families with sole custody families, some examined families with legally mandated joint physical custodial arrangements, where joint custody was ordered over the objections of the parents. These families fared as well as the self-selected samples, reinforcing the findings of earlier studies that joint custody works equally well for conflictual families in which parents are vying for custody (Benjamin & Irving, 1989; Brotsky, Steinman, & Zimmelman, 1988).

3. *Shared custody works for parents, too. Interparental conflict decreases over time in shared custody arrangements, and increases in sole custody arrangements. Interparental cooperation increases over time in shared custody arrangements, and decreases in sole custody arrangements.*⁶

One of the key findings of the Bauserman meta-analysis was the unexpected pattern of decreasing parental conflict in joint custody families, and 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. It may be argued that the current “best interests” framework and sole physical custody determinations have done little to prevent the 46% of first-time battering cases that emerge after parental separation (Corcoran & Melamed, 1990), as these occur within the traditional adversarial forum, a “winner-loser” arena where the emotional stakes—the relationship with one’s own children—could not be higher.

4. *Both U.S. and Canadian research indicates that mothers and fathers working outside the home now spend about the same amount of time caring for their children. According to research by Health Canada, on average, each week mothers devote 11.1 hours to child care; fathers devote 10.5 hours—a 51-49% split of child care tasks. Over the past decade, mothers’ child care involvement has dropped by 33%, while fathers’ participation has decreased by 15%.⁷*

Although research on child-to-parent attachment has revealed that children form primary attachment bonds with each of their parents (Rutter, 1995), until recently there has been very little evidence that fathers contribute to child care to the same degree as mothers, and popular beliefs about the division of child care activities assume primary maternal responsibility. The attachment theory-based research is now reinforced by a Health Canada study utilizing a representative sample of 31,571 Canadian workers, which found that working fathers and mothers are now equal partners with respect to the amount of time they devote to child care, as measured by the number of hours spent in the previous week in child care-related activities. Although this finding runs counter to popular beliefs about gender differences in the division of family labor, these data are consistent with time use data from the United States (Bianchi, 2000). In her U.S.-based research, Bianchi (2000) attributes the decline in maternal child care to six factors: (1) the reallocation of mothers’ time to market work outside the home (child care time declines as time in work has increased); (2) over-estimations of maternal time with children in previous research (it was assumed that time at home was all invested in child care when in reality a large amount was given to household chores not involving children); (3) smaller families have reduced total time with young children; (4) more pre-school children spend time in daycare and play group set-

tings, regardless of the mother's employment status; (5) women's reallocation of their time has facilitated a relative increase in fathers' involvement in child care; and (6) technology such as cell phones has allowed parents to be "on call" without being physically present with children. Thus as the gender difference in time spent in child care has diminished, shared parenting is now the norm in U.S. and Canadian two-parent families, and men and women are becoming equal partners with respect to the amount of time they spend in child care, regardless of perceptions of who is primarily responsible for child care. Shared child care is also emerging as the norm in the majority of divorced families where child custody has not gone to trial. Shared parenting or "joint physical custody" is now the choice of over one-third of divorced parents in Canada (Statistics Canada, 2003) who are not involved in a legal contest over the custody of their children.

AN ALTERNATIVE APPROACH TO CHILD CUSTODY

It is in the contested cases where courts impose a sole custody criterion that are the focus of current child custody debates. The rights-based claims of some mothers and fathers groups in this realm has led to an impasse and a state of confusion as to what exactly is "in the best interests of children" in divorce (Mason, 1994). Judges have consistently awarded sole custody in contested cases, but their reasons for judgment—their interpretations of "the best interests of the child" standard—vary tremendously. The high potential of judicial bias in child custody disputes results from the fact that judges are not trained in the finer points of child development and family dynamics. Thus divorce service consumers are beginning to question the legitimacy of judges' authority in these matters, and the appropriateness of the adversarial system as a legitimate forum for the resolution of child-related disputes.

In most U.S. states, as elsewhere, judges have asserted that shared parenting is unworkable in situations where parents cannot cooperate (Mason, 1994). Thus, rather than providing support services, such as mediation, that connect parents in a cooperative direction to the degree that a "winner-take-all" approach is established, the adversarial system polarizes and disconnects parties in dispute, and the problem of judicial bias in the direction of sole custody or "primary residence" determinations remains unaddressed.

It is clear that an alternative approach is needed that goes beyond “cosmetic” divorce reforms toward fundamental changes in divorce law, policy, and practice. It seems clear that an effective model of divorce law should ensure that harm to children and family members will be reduced, and that children’s basic needs and best interests will be met. This requires an understanding of children’s fundamental needs in the divorce transition, and the development of a corresponding set of parental and societal responsibilities to meet those needs.

Such a “harm reduction” approach, given the flaws of the current “best interests” standard, many would argue, requires a new standard of the “best interests of the child” *from the perspective of the child*, particularly with respect to what children, as those most affected by parental divorce and thus the real “experts” on the matter (Fabricius, 2003), have identified as their core needs. By their own account, three essential elements stand out for children of divorce, as identified by Fabricius (2003) and others: equality in their relationships with each of their parents; autonomy, to identify one’s own best interests in the divorce transition; and protection from harm, the actual reduction of harms attendant to divorce. The harm reduction obligation requires attention to the essential needs of human beings: for each need there is a corresponding obligation; for each obligation a corresponding need. Harm reduction work in the divorce realm involves the discernment or “reading” of harm to both children and parents involved in a divorce, but through the eyes of children in particular, as the most vulnerable and affected parties in family divorce. Effective intervention to reduce those harms could then proceed based on a framework in which parents are each expected to fulfill their parental responsibilities in relation to their children’s needs, and social institutions such as the court is responsible to support each parent in the fulfillment of his or her parental responsibilities.

A fundamental assumption underlies any harm reduction approach: human beings will naturally gravitate, under circumstances where they can make a free and informed choice, to the situation that causes them least harm. Often it is beyond children’s capacity to articulate their needs with any degree of clarity, and it falls on parents to decipher those needs and address them in a responsible way. From children’s perspective, that which leads to “good” (as they define it) and away from “harm” (as they define it), is in their “best interests.” As all human beings, children *expect* that good and not harm will be done to them, and they will seek that “good” as best they can. Children will want the least harmful situation, but are not always able to freely decide or articulate

their preferred arrangement, such as their living arrangement. Children's need for protection from harm carries with it the obligation of parents and all members of society to shield them from harm. Children's needs for roots, order and security carries with it the obligation that all members of society will support and not undermine parents in the fulfillment of their parental obligations.

Listening to the voices of children themselves, we now have clear evidence of a fundamentally different perception of children of divorce (as now-young adults) to that of most policymakers and legislators. Most children want to be in the shared physical care of their parents after divorce (Fabricius, 2003; Fabricius & Hall, 2000). And children in shared parenting arrangements adjust significantly better than those in sole custody arrangements on all general and divorce-specific adjustment measures (Bauserma, 2002). Shared parenting arrangements may well reduce ongoing conflict between parents (*ibid.*) And western societies are moving toward an equal distribution of child care tasks between the genders (Higgins & Duxbury, 2002; Bianchi, 2000).

Divorce law, policy and practice should also help divorcing parties arrive at a precise working definition of "equality." These could include, from a child's perspective, either spending time with each parent equal to the amount of time in the pre-divorce situation, or simply spending an equal amount of time with each parent after divorce regardless of the pre-divorce arrangement.

The current language of "child custody"—a rights-based language connoting ownership, possession, and imprisonment—is clearly incompatible with a shared responsibility approach. And an over-concern with parental rights undermines the importance of meeting parental obligations and responsibilities, as our duties and obligations toward others become secondary matters in a rights-based forum. Rights are asserted in a tone of contention, with force in the background, and to gain certain rights we end up taking away from someone else's rights. Measurement and apportionment, "taking" rather than "giving," are the overriding concerns.

The language of rights and entitlements for the most part involves claims and counterclaims, allegations and counter allegations, numbers and calculation. This blunts the pursuit of justice as harm reduction, by diminishing our capacity for attention to and discernment of harm or abuse, and our obligation to reduce harm. One may succeed with a rights claim, but harms may not only continue, but multiply. It is the exceptional person who is able to extricate him or herself from rights-

based conflict. It is possible only within an orientation toward children's needs and parental responsibilities toward their children.

Fundamental to many current proposals for divorce law reform is an alternative language to that of "child custody" and "custodial rights." "Parental responsibilities" are increasingly emphasized, and the "shared parental responsibility" idea is increasingly favoured. A method by which parental responsibilities may be articulated is the "parenting plan," a detailed articulation of postdivorce shared parenting responsibilities, including specific arrangements regarding time spent by the children in each parent's household, holiday schedules, how decisions are made, and how costs will be allocated, which is the foundation of Washington state's divorce law. Tompkins (1995) outlines a number of fundamental assumptions underpinning the parenting plan concept, which are now substantiated by the research cited above. First, he assumed that parents need a divorce process that helps them to focus on their children's needs at a time when their own multiple transitions and losses render them relatively insensitive to these needs. The parenting plan approach focuses primarily on children's needs, mandating that parents consider the variety of functions that constitute postdivorce parenting and allocate responsibility for these functions. Second, he assumed that the interests of the majority of children are best served by the substantial and continued participation of both parents in child rearing within some form of cooperative shared parenting arrangement. To this end, parenting plans avoid use of words such as "custody" and "access," replacing them with the language of "shared parental responsibility" and "parental obligations," tailored to each family's unique circumstances.

THE "SHARED PARENTAL RESPONSIBILITY" APPROACH

In cases of parental dispute, by what means can warring parents be encouraged to develop a parenting plan in which they will not only share parental responsibilities, but do so in a manner that contains their hostilities and shields their children from exposure to their parents' conflict? The shared parental responsibility approach to postdivorce parenting, developed below as a proposal for divorce law reform, is one that seeks to reduce the present harms endured by children and families undergoing the divorce transition, by means of a focus on the fundamental needs of children and families in divorce, and parental and societal responsibilities corresponding to these needs.

The “shared parental responsibility” approach to divorce law reform is comprised of four main elements, as follows. Each element has been implemented separately, with varying degrees of success; no jurisdiction, however, has yet sanctioned the model in its entirety:

1. *The establishment of a legal expectation that parents must jointly or separately develop a parenting plan before a court hearing is held on matters related to their divorce.*
2. *The establishment of a legal expectation that existing parent-child relationships will continue after separation; that is, the post-divorce parenting arrangements will reflect the predivorce parenting arrangements in regard to the relative amount of time each parent spends with their children. This is intended to guide the development of a parenting plan, and allows parents to present “tailor-made” plans that reflect existing parental arrangements to the court for legal ratification.*
3. *In cases of dispute, shared parental responsibility, defined as children spending equal time with each of their parents, will be the legal rebuttable presumption; that is, the “default” position of the court. Thus in cases of parental dispute over child custody, children will spend equal time with each of their parents upon divorce.*
4. *Exempt will be established cases of abuse and domestic violence which will continue to be dealt with via third party intervention, with child protection as the overriding concern. Such cases would be established via both criminal conviction and child protection agency determination of a child being in need of protection.*

This proposed framework is based on current research on the adjustment of children and families to the consequences of divorce, and on recent data on children’s desires and views regarding their needs and “best interests.” The first element, the parenting plan, is currently the foundation of Washington state’s approach to child custody determination, which encourages parental planning and agreement about children’s living arrangements. It reflects a principal concern with reducing the harms attendant to divorce by identifying the fundamental needs of children and families, and delineating obligations or responsibilities with respect to those needs, in the form of a parent-developed parenting plan before a court hearing is held on any matters related to divorce. The court’s role is to legally ratify the negotiated plan. The legal expectation is that parents develop a plan through direct negotiation, parent educa-

tion programs, court-based or independent mediation, or lawyer negotiation. If a joint plan is not possible, then each parent is expected to develop a separate plan for judicial review. Parents are thus not required to negotiate face-to-face, but the parenting plan is aimed at helping them negotiate in the future, as any postdivorce living arrangement, whether sole or joint parenting, requires ongoing communication. Here children's needs become a means of connecting the parents in a positive direction at a time when conflict has divided them, and parents are deemed to have the capacity to resolve their own dispute, rather than it being assumed that they must turn to the court system to determine parenting arrangements.

The second element of the shared parental responsibility approach is the legal expectation that, in the interests of security, stability and continuity in children's relationships with their parents, preexisting parent-child relationships will continue after separation. In developing their parenting plans, parents are thus encouraged to negotiate living arrangements that reflect past caregiving patterns. The courts do not become involved in this process, as the legal expectation is that the status quo will continue for children, who are provided continuity and stability in their attachment and relationship with each of their parents, as the postseparation parenting arrangements will reflect pre-separation patterns of child care.

Endorsed by the American Law Institute and referred to as the "approximation rule" (Kelly & Ward, 2002; Woodhouse, 1999) such an expectation is the antithesis of a "one-shoe-fits-all" approach. It educates parents that security and continuity in positive parental (and other) relationships is a fundamental need and in children's best interests in divorce. At the same time, the need for equality is addressed, particularly from the child's perspective, in regard to enjoying (as closely as possible) an equal amount of involvement with, attachment to, and influence of each parent as before: an equal amount of time with each parent after as before the physical parental separation. This ensures that there is no sharp discontinuity of parent-child relationships as exists at present with sole custody awards.

As the emerging norm in North American families is that of a dual-earner family sharing the care of children, it may be foreseen that in the majority of families, spending about equal time with each parent would become the norm for children of divorce. History of care and cultural, linguistic, religious and spiritual upbringing, and heritage are important factors to consider in postdivorce parenting arrangements. Above all, it

is important to recognize children's needs for roots and security in maintaining existing primary parental relationships.

The third element of the shared parental responsibility approach addresses the question of how to deal with disputes regarding postdivorce living arrangements, and strikes at the heart of current debates over divorce law reform. It is proposed that in the interests of maintaining meaningful contact between children and each of their parents, a rebuttable legal presumption of shared parental responsibility be established in those cases where both parents consider themselves to be primary caregivers, and are in disagreement regarding the exact proportion of time their child should spend with each parent. Here "shared parental responsibility" would be legally defined as "children spending equal time with each of their parents." Although a blunt instrument, which will not always reflect pre-existing child care arrangements, an "equal time" rebuttable presumption would honor the importance and centrality of each parent in the child's life, and would protect the child's relationship with each parent as a parent, not merely as a "visitor." It would also result in the court not becoming involved in disputes over the relative amount of time each parent should have with the children after separation, and a destructive court battle would be averted.

A rebuttable presumption of shared parental responsibility for children is in keeping with current trends in North American families, as mothers and fathers, the great majority both working outside the home, are now spending about the same amount of time, on average, in child care tasks. Children's need for equality would prevail, and their relationship with each parent would be fully protected.

The fourth and final element of the shared parental responsibility approach focuses on the need of children for security from exposure to physical and emotional harm, and addresses the concerns of women's advocates, as well as those of an increasing number of men's advocates, about domestic violence and spousal abuse. An "equal time" time arrangement for children of divorce may expose children to a violent parent who is primarily seeking to control the other parent and the children (Boyd, 2003).

Allegations of abuse are not uncommon in child custody cases, and in those situations where child or spousal abuse exists, it is the court's responsibility to ensure the safety of both the victimized spouse and the children. However, when abuse is alleged but not substantiated, via criminal conviction or a finding that a child is in need of protection, equal parenting is the only effective method of ensuring that children are protected from the *exclusive* parenting of an abusive parent. An alle-

gation of abuse is not equivalent to a criminal conviction of abuse, or the result of an investigation by trained child protection authorities. An equal parenting presumption ensures that children have equal time with a non-abusive parent, and thereby receive a positive influence, as opposed to the exclusive care and control of an abusive parent who has mounted the stronger case in a contested custody proceeding. In the family realm, where many parties see themselves (and their children) to have been "abused" by the other, and given the laxity of rules applied to fact-finding and perjury in family court, "victim politics" are widespread. Thus, absent criminal conviction or a finding of "child in need of protection," shared parental responsibility may well be the least harmful and most protective option for children.

Given that detection of abuse is not always a straightforward matter, as at one extreme a significant proportion of family violence situations are hidden to state authorities, while at the other extreme false allegations can sway the court, it behooves legislators and policymakers to make efforts to protect children in these circumstances. A rebuttable shared parenting presumption lessens the impact of undetected abuse as a child who has equal time with each of his or her parents is less likely to suffer adverse consequences than a child who spends most of his or her time with an abusive parent.

Established cases of domestic violence which involve either a criminal conviction such as assault, or a finding of a child in need of protection requiring alternative placement by a statutory child welfare authority, should be followed by judicial determination of child custody. Cases that would benefit from diversion to counseling or mediation could be referred to that arena, or a judge could determine child custody, as in current practice.

In any child custody situation where assault is alleged, a thorough, informed, and expeditious assessment is required. The criminal prosecution of those family members who are alleged to direct violence toward any other member of the family would be more effective in holding accountable both the perpetrators of violence and those who falsely allege abuse than at present, particularly in those cases where allegations of abuse are dealt with exclusively within the family court arena. The use of family courts as "quasi-criminal courts" that do not have the resources to apply due process when abuse allegations are made, leaves judges susceptible to making wrong decisions, leading to greater harm to children. Women's advocates have long argued that the adversarial system does not adequately protect abused women, and men's advocates are beginning to identify the ineffective and harmful practices of

family courts when abuse of men is a factor. Detection of genuine abuse cases is a critical, yet extremely difficult matter, and strengthening current child protection and/or criminal prosecution responses to these cases will require refining our ability to discern abuse where it exists, as well as dealing effectively with unproven allegations.

Noncompliance with Custody Orders

There is no question that the issues are complex in child custody matters, but this should not be used as an excuse for inaction. Courts have an important role to play with respect to non-compliance with custody agreements and orders. However, a shared parental responsibility presumption in divorces where non-abusive parents wish to play an active role in their children's lives would be a powerful symbol of the immutability of parent-child relationships after the termination of the marital relationship, and thus would more likely be respected by divorced parents. A legal presumption of shared parenting after divorce would also provide a meaningful incentive for mediation and non-adversarial dispute resolution.

Recent variations on parenting plans have demonstrated their success in different contexts. The option of parents alternating between the "family home" of the children and their own home when the other parent is responsible for parenting, rather than having children moving between two homes is receiving increasing attention. Although issues of relocation, repartnering and stepfamily formation, each presenting considerable challenges to the post-divorce "bi-nuclear family" (Ahrons, 1994), are beyond the scope of this paper, there are creative ways to establish shared parenting arrangements within such circumstances, allowing parents to redirect their energies toward constructive solutions rather than destructive and protracted battles over child custody.

CONCLUSION

Despite the fact that legal statutes do not favor mothers or fathers as potential custodial parents, in practice mothers continue to assume legal custody in the majority of cases. Although judges decide custody in only a small minority of cases, their decisions have a profound impact on uncontested cases—they serve as the baseline for the determination of cases settled via negotiation, mediation, or lawyer negotiation, and as the basis upon which lawyers advise their clients.

It has also become clear that judicial discretion in the child custody arena is highly problematic: judges are not trained in the area of child development and family dynamics; they are largely guided by their own personal biases regarding what is best for children. Taking decision-making out of the hands of parents with respect to their children's future, heightens conflict between the former spouses; and options for judges are limited to maternal or paternal custody in contested cases. The results of effectively removing a parent from a child's life is reflected in the high rate of non-custodial parent disengagement, often involving parents previously highly involved in their children's lives.

This paper has proposed an alternative approach to child custody determination: a "shared parental responsibility" approach which essentially embodies the principle of the "best interests of the child, from the perspective of the child," emphasizing children's needs for protection from harm, parental equality and family autonomy as core interests of children in the divorce transition. This approach encourages parents to carefully scrutinize the predivorce history of child care and strive toward an equal and equitable arrangement from the perspective of their children. For the majority of families, this will translate to shared parenting after divorce.

A shared parental responsibility approach would replace the notions of "child custody" with "shared parenting," "custodial rights" with "parental responsibilities," and "child custody determination" with the "development of a parenting plan." It would seek solutions that would cause the least harm to family members, establishing a simple criterion: the postdivorce parenting arrangement will be one that is most in keeping with what we know about children's needs and their adjustment to the consequences of divorce. New research results challenge policymakers and legislators to take a new look at the child custody debate and point to a new direction for divorce law reform.

NOTES

1. In this article, all references to "divorce" mean the final physical parental separation, and "postdivorce" refers to the period after the final parental separation. As a legal designation, "child custody" refers to physical care arrangements, and not solely decision-making responsibility, and "contested custody" refers to those cases which go to trial (including interim custody) where a judicial determination is made regarding children's living arrangements, with enforcement measures in place to ensure compliance.

2. Despite arguments about "substantive equality," it is argued here that "unequal treatment" in the child custody arena only reinforces inequality, as any rights-based ap-

proach involves the transfer of rights from one group to another, which among other drawbacks, inhibits the quest for harm reduction in social conflicts.

3. These court-determined outcomes may be compared to outcomes in non-contested cases. In 1988 in Canada, in all divorce cases, contested and non-contested, joint custody was the outcome in 30% of cases. This rose to more than one-third of cases by 2002.

4. W.V. Fabricius, "Listening to children of divorce: New findings that diverge from Wallerstein, Lewis, and Blakeslee" (2003) *52 Family Relations*; W.V. Fabricius & J.A. Hall, "Young adults' perspectives on divorce: Living arrangements" (2000), *38, Family and Conciliation Courts Review*, at 446.

5. R. Bauserman, "Child Adjustment in Joint Custody versus Sole Custody Arrangements: A Meta-analytic Review" (2002), *16, Journal of Family Psychology*, at 91.

6. Bauserman, *ibid.*

7. C. Higgins, & L. Duxbury. *The 2001 National Work-Life Conflict Study*. (Ottawa: Health Canada, 2002).

REFERENCES

- Ahrons, C. (1994). *The Good Divorce*. New York: Harper Collins.
- Amato, P. (2000). "The consequences of divorce for adults and children," *Journal of Marriage & the Family*, *62*.
- Amato, P.R., & Gilbreth, J.G. (1999). Non-resident fathers and children's well-being: A meta-analysis. *Journal of Marriage & the Family*, *61*, 557-573.
- Amato, P.R., & Keith, B. (1991). Parental divorce and the well-being of children: A meta-analysis. *Psychological Bulletin*, *110*, 26-46.
- Bala, N. (2000). *The Best Interests of the Child in the Post-Modern Era: A Central but Paradoxical Concept*. Paper presentation at the Law Society of Canada Special Lectures 2000, Osgoode Hall, Toronto.
- Bauserman, R. (2002). Child adjustment in Joint Custody versus Sole Custody Arrangements: A Meta-analytic review. *Journal of Family Psychology*, *16*, 91-102.
- Benjamin, M., & Irving, H.H. (1989). Shared Parenting: A Critical Review of the Research Literature. *Family and Conciliation Courts Review* *27*: 21-35.
- Bianchi, S. (2000). Maternal employment and time with children. *37, Demography*.
- Booth, A. (1999). Causes and consequences of divorce: Reflections on recent research. In *The Postdivorce Family*. (Ed.) By R.A. Thompson and P.R. Amato, Thousand Oaks, CA: Sage.
- Boyd, S. (2003). *Child Custody, Law, and Women's Work*. Toronto: Oxford University Press.
- Brotsky, M., Steinman, S., and Zimmelman, S (1988) Joint custody through mediation reviewed. *Conciliation Courts Review* *26*, 53-58.
- Corcoran, K., & Melamed, J.C. (1990) From coercion to empowerment: Spousal abuse and mediation. *Mediation Quarterly*, *7* (4).
- Department of Justice Canada. *Evaluation of the Divorce Act, Phase II: Monitoring and Evaluation* (Canada: Bureau of Review, 1990).
- Derevensky, J.L., & Deschamps, L. (1997). Young adults from divorced and intact families: Perceptions about preferred custodial arrangements. *Journal of Divorce & Remarriage*, *27*, 105-122.
- Emery, R.E. (1999). Postdivorce family life for children: An overview of research and some implications for policy. *The Postdivorce Family*, (Ed.) By R.A. Thompson and P.R. Amato, Thousand Oaks, CA: Sage.

- Fabricius, W.V., & Hall, J.A. (2000). Young adults' perspectives on divorce: Living arrangements. *Family and Conciliation Courts Review*, 38, 446-461.
- Fabricius, W.V. (2003). Listening to children of divorce: New findings that diverge from Wallerstein, Lewis, and Blakeslee. *Family Relations*.
- Higgins, C., & Duxbury, L. (2002). *The 2001 National Work-Life Conflict Study*. Ottawa: Health Canada.
- Irving, H.H., & Benjamin, B. (1995). *Family Mediation: Contemporary Issues*. Thousand Oaks, CA: Sage.
- Kelly, J. (2000). Children's adjustment in conflicted marriage and divorce: A decade review of research. *Journal of the American Academy of Child & Adolescent Psychiatry*, 39, 963-973.
- Kelly, R.F., & S.L. Ward (2002). Allocating custodial responsibilities at divorce: Social science research and the American Law Institute's Approximation Rule. *40 Family Court Review*, at 50.
- Kposowa, A. (2000). Marital status and suicide in the national longitudinal mortality study. *Journal of Epidemiology & Community Health*.
- Kruk, E. (1993). *Divorce and Disengagement*. Halifax: Fernwood.
- L'Heureux-Dube, C. (1998). A Response to Remarks by Dr. Judith Wallerstein on the Long-term Impact of Divorce on Children. *Family and Conciliation Courts Review*, 36, 384-391.
- Lamb, M.E. and Kelly, J. (2001). Using the empirical literature to guide the development of parenting plans for young children. *Family Court Review*, 39 (4), 365-371.
- Laumann-Billings, L., & Emery, R.E. (2000). Distress among young adults from divorced families. *Journal of Family Psychology* 14 (4), 671-687.
- Lund, M. (1987). The Non-Custodial Father: Common Challenges in Parenting after Divorce. In C. Lewis and M. O'Brien (Eds.), *Reassessing Fatherhood*. London: Sage Publications.
- Mason, M.A. (1996). Read my lips: Trends in judiciary decision-making in custody disputes. *Family Law Quarterly*, 31 (2).
- Mason, M.A. (1994). *From Father's Property to Children's Rights*. New York: Columbia University Press.
- McWhinney, R. (1995). The 'winner-loser syndrome': Changing fashions in the determination of child 'custody.' *Family and Conciliation Courts Review*, 33, 298-307.
- Millar, P., & Goldenberg, S. (1998). Explaining child custody determination in Canada. *Canadian Journal of Law & Society* 209-225.
- Rutter, M (1995). Clinical implication of attachment concepts. *Journal of Child Psychology & Psychiatry*, 36, 549-571.
- Se'Ver, A. (1993). *Women and Divorce in Canada*. Toronto: Canadian Scholars' Press.
- Smart, C. (2002). From children's shoes to children's voices. *40 Family Court Review*.
- Statistics Canada (2003). *Divorce in Canada: A statistical profile*.
- Tompkins, R. (1995). Parenting plans: A concept whose time has come. *Family and Conciliation Courts Review*, 33, 286-297.
- Wallerstein, J.S., J. Lewis, & S. Blakeslee (2000), *The unexpected legacy of divorce: A 25 year landmark study*. New York: Hyperion.
- Weil, S. (1952). *The Need for Roots*. New York: Harper Colophon Books.
- Woodhouse, B.B. (1999). Child custody in the age of children's rights: The search for a just and equitable standard. *33 Family Law Quarterly*.