In the Interests of Children

NATIONAL FAMILY LAW SECTION
CANADIAN BAR ASSOCIATION

June 2010

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Family Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Family Law Section of the Canadian Bar Association.

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In the Interests of Children

I. INTRODUCTION

The Canadian Bar Association National Family Law Section (CBA Section) appreciates the opportunity to explain why it is critical for legislators to retain the "best interests of the child" test as the paramount consideration in making determinations of custody and access of children. We have frequently stressed this point in past submissions,[1] and are prompted to reiterate it now in response to a Private Member's Bill sponsored by Maurice Vellacott that would instead impose a presumption of equal parenting time.

The CBA represents more than 37,000 lawyers across Canada. The CBA's mandate includes improvement in the law and the administration of justice. The CBA Section includes family lawyers from every part of the country. We are collaborative practitioners, litigators, mediators, arbitrators and parenting coordinators. Our clients are fathers, mothers, same sex partners, surrogates, step-parents, grandparents, extended family members and children. The CBA Section believes that any discussion of "parental rights" is misguided when resolving arrangements for children. The sole focus must be what is best for children. In light of this position, we vigorously oppose passage of Bill C-422.

At first glance, it could seem that the ideas proposed by the Bill are only about equal treatment of mothers and fathers. We certainly support equality between the sexes. However, the Bill would actually not advance equality. Rather, it would change the primary focus in custody and access matters from what is best for children to equal parental rights. Parenting is not about adults claiming rights. It is about the desire and ability to put children's interests first. Where divorcing parents cannot do that, for whatever reason, courts must not only be free to, but required to do so.

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[1] Examples of the many past CBA Section submissions in support of the "best interests of the child" test include: *Custody and Access Review* (Ottawa: CBA, 1998); *Submission on Custody and Access* (Ottawa: CBA, 1994).

We oppose passage of Bill C-422. As lawyers with centuries of combined experience in family law and the operation of the *Divorce Act*, we believe the Bill would be a tremendous step backward in the development of family law. The Bill would represent a disservice both to children and families by:

- taking the focus away from children in favour of parental rights
- detracting from the individual justice required by the *Divorce Act* and
- promoting further and more fractious litigation.

II. GENERAL COMMENTS

At present, there is one paramount consideration for resolving conflicts over the care of a child under the *Divorce Act* – the best interests of that child. When parents focus on their children, rather than themselves, they are more likely to put aside their differences and self-interest and come to a resolution that works for their family. Under existing law, equal time is already an option, if in the child's best interests. The change proposed by Bill C-422 would make consideration of the best interests of the child secondary.

The Bill would instruct judges to apply a presumption of equal sharing of parenting responsibilities and time, unless shown that the best interests of the child would be "substantially enhanced" to do otherwise. This is a significant departure from current Canadian law. It would sublimate a focus on the best interests of children to a presumptive regime of equal parenting time for all parents, regardless of abilities, circumstances, needs, history, challenges or attitudes of the people involved. It would inappropriately limit judges in exercising their discretion based on the parents and children in the case before them.

A rebuttable presumption of equal parenting would encourage some families to engage in litigation to prove that the other parent is somehow inept. This would add to pressures on family courts, financial and emotional stress for parents and disparities in access to the law for those with funds to engage lawyers and those without. This stress is compounded as many jurisdictions provide little to no legal aid funding for family matters.

The Bill proposes retroactive application, which would be nothing short of disastrous for Canadian families and family courts. Retroactive application would mean that all existing orders across Canada could be re-opened – including cases that were most difficult to settle, perhaps after years of tension and litigation. Resolved issues would have to be negotiated or

argued all over again from the vantage point of the new presumptive threshold. Our experience suggests that this would throw many families back into court and disrupt thousands of children's lives.

Parents make many decisions before resorting to the courts, and they need support from their communities. The goal of true co-parenting would be better served by greater funding for parental education, alternative dispute resolution services, parenting coordination and counseling services.

We support the Bill's emphasis on counseling, mediation and arbitration. We also support consideration of the effect of divorce on relatives and extended family members. However, the current law includes all those considerations, but always through the filter of what is best for the individual child under consideration. This must remain the primary principle in Canada's family law.

III. SPECIFIC PROBLEMS

- **Bill C-422 states that "amendments to the Divorce Act are necessary in order to clarify the purpose and underlying principles of the Act"**

We disagree. Section 16 of the *Divorce Act* clearly and appropriately puts children first, rather than parents.

- **Bill C-422's expressed goal is to "encourage divorcing spouses to assume more responsibility for their affairs, with less reliance on adversarial processes"**

As practicing lawyers from every part of the country, we know that family law is primarily about achieving out of court settlements. This Bill would have the opposite impact, reopening many files and generating new litigation. Improving services to separating couples and families would better achieve the desired goal.

- **Bill C-422 states that "the interests of the child are best served through maximal ongoing parental involvement with the child, and the rebuttable presumption of equal parenting is the starting point for judicial deliberations"**

The best interests of the child are not always met by exactly equal ongoing parental involvement. Each case must be evaluated on the facts and each child treated as an individual. Joint parenting arrangements are not always either possible or ideal. The animosity between parents may be too high, or their circumstances may not allow the child to benefit from equal shared time. Further, joint parenting can happen without absolutely equal time with children and many considerations impact the best schedule for the family. Mandating exactly equal time comes from a perspective of parents' rights, not a focus on the best arrangements for children.

- **Bill C-422 says it would "clarify relocation considerations by placing the onus on the relocating parent to maintain continuity of relationship"**

No clarification is required. The onus currently rests on the relocating parent. The relevant principles are fully discussed by the Supreme Court of Canada in *Gordon v Goertz*[2] where the Court stated:

> Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the Divorce Act for a contextually sensitive inquiry into the needs, means, condition and other circumstances of "the child" whose best interests the court is charged with determining.[3]

- **Bill C-422 states (in section 16(4)(a)) that when making a parenting order, the court shall apply the presumption that allocating parenting time equally between the spouses is in the best interests of a child of the marriage. It would direct that the court apply the presumption that equal parental responsibility is in the best interests of a child of the marriage (section 16(4)(b)).**

This section encapsulates the fundamental premise and problem with the Bill. Presumptions of this nature have no place in family law. Every child is different and every family has its own strengths and weaknesses. Allocating exactly equal parenting time between the parents will often not be the most beneficial situation for the child.

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2 [1996] 2 S.C.R. 27.

3 *Ibid*. at par. 44.

- **Bill C-422's presumption would only be "rebutted if it is established that the best interests of the child would be substantially enhanced by allocating parenting time or parental responsibility other than equally" (section 16(5))**

Rather than seeking the arrangement in the best interests of individual children, this section would force presumptive arrangements on all children unless proven they would be *substantially* better off with something else. It begs the question of why either the court or the parents would choose a regime that is not the best for the children, or why a regime that is just better for the child (rather than substantially better) should not prevail.

As lawyers, we know that rebutting a presumption is not easy. It would be insufficient to simply argue what is best for the child, and instead all available ammunition would be needed to reach this advanced threshold of "substantially enhancing" the child's situation by the child not living equally with the other parent.

The *Divorce Act* requires the court to consider maximizing parental contact and each parent's willingness to facilitate contact with the other in making a determination of the best interests of the child. The best interests test should continue to be the starting point for this analysis.

- **Bill C-422 states that the primary considerations to be taken into account in determining the best interests of a child of the marriage, to be assessed in aggregate, are…the continuity of relationships with relatives**

Contact with extended family is already among several considerations used to assess the best interests of a child. Bill C-422 assumes that such contact is always desirable for a child, seeming to elevate that status over what exists now. If an extended family has not played an ongoing or more important, a healthy role in the child's life, this is problematic.

- **Bill C-422 proposes consideration of any views voluntarily expressed by a child**

Children's input into determinations that will affect them is a good thing, but it is not clear how a court would decide if the child's views were "free from influence of either spouse". In many jurisdictions, there are no services to assist children to express their views, or to address influences they may be under. We believe that children would be best served with meaningful support services that allow them to participate in their family reorganization in healthy and appropriate ways.

- **Bills C-422 proposes the court consider "Family violence that is committed in the presence of the child"**

Family violence should be relevant in determining the best interests of a child, whether committed in the presence of the child or not. The Bill seems to weigh factors in this section (16(16)) lower than those in the previous section (16(15)), but it is unreasonable to think that either group is more important in all cases. We believe that sections 16(14) through 16(16) would have the result of consistently elevating parental rights and interests over those of the child. In our view, the court should decide the appropriate weight to give these issues in each individual case, in each individual child's best interests.

- **Bill C-422 provides principles in section 16(17) for the court to use in allocating parenting time, to the extent they are compatible with the best interests of the child**

It is unclear how these principles are to be considered in light of a presumption that trumps these considerations. Also, the term "lesser aggregate time" is cumbersome and not defined. The focus again is on the impact of various factors on a formal notion of parents' right to exactly equal time, rather than what is best for the child involved.

- **Bill C-422 requires the court in section 16(18) to give detailed reasons explaining why the presumption was not followed**

Requiring reasons for not applying the presumption would pressure judges to apply the presumption in all situations. The more cumbersome the mechanism to deviate from the presumption, the more likely the presumption will stand, in spite of the best interests of children. If the judge believes it best for the children to award something other than equal time, there is no legitimate reason for legislation to add a hurdle for the judge to act in the best interests of children.

- **Proposed new section 16(8) in Bill C-422 reads "With the consent of the spouses, the court may appoint a counsellor, advisor, mediator or parental coordinator, with or without arbitral powers, to assist the spouses in co-parenting in the best interests of the child"**

If spouses consent, the court would not need to make an appointment. We fully support use of such services when dealing with children on separation, but not all separating parents have

resources for or access to these services. Rather than legislative change, governments should provide funding so services are more universally available and accessible.

- **Bill C-422 suffers from unclear drafting and redundant provisions**

There are a number of ambiguities and redundancies in the Bill. The *Divorce Act* already allows each spouse an equal right to information held by professionals about their children, unless the court orders otherwise. Proposed section 16 would enable a court to require a relocating parent to provide notice and information to the other parent, in section 16(11), but courts can and do make such orders now. Section 16(12) would direct the court to prohibit a change in residence without consent if it would make compliance with the parenting order impractical, but under current law, if a parent moves in spite of an order granting the other parent specified access or parenting time, the parent moving is breaching the order. Similarly, courts already have the ability to make an order for the expenses of parenting time when a parent moves. The Child Support Guidelines also contemplate such orders.

- **Bill C-422 would require every parenting order to include a lengthy list of required terms, including the form of consultations between spouses, communication the child will have with others, possession of records, and rules applicable to the change of residence, in addition to the necessary terms of parental time, responsibility and child support**

The CBA Section has supported providing judges with greater direction as to what might be included in a parenting order, as appropriate. However, some parents are able to be flexible. This provision should be discretionary, rather than mandatory, so that it can assist families who need it and not impede those who do not.

- **Bill C-422 states that the coming into force of section 17(5), as enacted by section 9(2) of this *Act*, constitutes a change of circumstances within the meaning of subsection 17(5)**

The proposed retroactive application in the Bill would have serious negative consequences. It would invite all parents with existing court orders or agreements to return to court, regardless of how the order or agreement was achieved or how the children are faring under the present arrangement. This change would invite endless litigation, which is plainly not in the best interests of children.

IV. INTERNATIONAL SUPPORT FOR THE "BEST INTERESTS" TEST

The Bill's sponsor lists on his website jurisdictions that have reformed their child custody laws along the lines of Bill C-422, stating "Belgium, Denmark, Norway and selected US states have implemented joint custody preferences with positive outcomes."[4] In fact, while some jurisdictions support joint custody, none has a presumption of equally shared parenting time. Also, there is no objective consensus that outcomes have been positive. The distinction between absolutely equal parenting time and joint custody should be clarified. Joint custody can include many variations in terms of sharing parenting time, but common elements include both parents participating in major decisions impacting the child and being actively involved in the child's life.

A. United States

According to a recent law review article studying custody provisions in each of the 52 American states,[5] three states have statutory preferences for joint legal custody[6] and six have a shared parenting preference if both parents agree.[7] Another six states include some statutory language that creates a preference for maximum contact with both parents.[8] The legislation in most states generally provides for "frequent and continuing contact" with both parents, similar to section 16(10) of Canada's *Divorce Act*.

In 1979, California adopted a joint custody presumption, but amended that law in 1994 to allow joint custody only when the parents agree. In a survey of California's family court judges, two-thirds concluded that joint custody imposed under a presumption led to mixed or worse results for children, pointing to lack of parental cooperation, continuing parental conflict, instability caused by moving between households and logistical difficulties for parents.[9]

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4 www.mauricevellacott.ca/maurice.html

5 Melissa A. Tracy, "The Equally Shared Parenting Time Presumption – a Cure-All or a Quagmire for Tennessee Child Custody Law?" (2007) 38 *U. Mem.L.Rev.* 153.

6 *Ibid.* at 171 indicates that Kansas, Massachusetts and Minnesota all have a statutory preference for joint legal custody, but not equal parenting time.

7 *Ibid.* at 172, indicates that Tennessee, Connecticut, Michigan, Mississippi, Nevada and Washington have a joint custody preference where both parents agree.

8 *Ibid.* at 170 indicates that Alaska, Iowa, Oklahoma, Texas, Vermont and Wisconsin all have statutory language that creates a preference for maximum contact.

9 Thomas J. Reidy, *et al*., "Child Custody Decisions: A Survey of Judges" (1989) 23 *Fam. L. Q.* 75 at 80; Gerald W. Hardcastle, "Joint Custody: A Family Court Judge's Perspective" (1998) 32 *Fam. L. Q.* 201.

Alaska appears to be the only state that has created a preference for equal shared parenting time in its legislation, but the presumption applies only until a court considers an award of custody.[10]

While legislative changes in this area are ongoing, our research indicates that at this time no states have equal parenting presumptions similar to what is proposed by Bill C-422.

B. Belgium

Belgian family law statutes were reformed in 2006 to introduce the concept that shared residency should be taken into serious consideration by the Belgian family courts and judges on the request of either one of the divorcing parents.[11] This is more a preference than a legal presumption.

C. Denmark

The *Danish Act on Parental Responsibility* indicates that parents who share custody should continue to have the right to do so even if they are separated or divorced, although the family court is able to terminate joint custody for compelling reasons. This legislation speaks broadly of parental rights to joint legal custody and does not mandate an equal shared parenting schedule.

D. Australia

Australia seems to be the only jurisdiction that has recently enacted legislation that requires the court to consider equal parenting time. The *Family Law Amendment (Shared Responsibility) Act 2006* introduced a presumption of equal shared parental responsibility by requiring family courts to consider a child spending equal time with both parents if practical and in the best interests of the child. This can be distinguished from Bill C-422, as courts must consider it but there is no presumption to rebut.

Even while the legislation was in its infancy, there were numerous concerns raised, for example:

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10 *Supra* note 5 at 170.

11 Peter Tromp, "Benefits of Post-Divorce Shared Parenting and the Situation in the Netherlands, Belgium and Germany", paper delivered at International Conference on Family and Equality "Justice and Father's & Men's Dignity" Drama Greece (3 January 2009) http://fkce.wordpress.com/2009/01/03/13/>.

- Equal custody is a parental rights based approach, which places the best interests of the child second. An equal parenting presumption fails to consider whether it would be in the child's best interests to spend equal time, substantial time or significant time with each parent.[12]
- Since parenting is not equal in non-divorced families, it is wrong to assume that it should be after divorce.[13]
- Psychologists take issue with the potential effects of equal time sharing on children and indicate that research has not established the amount of contact which is necessary to maintain a "close relationship" between a parent and child.[14]
- Conflicted parents are inappropriate for joint custody arrangements,[15] let alone equal parenting time. One study found that shared parenting arrangements intensified parental conflict.[16] In another, 73% of parents involved in equal parenting agreements in Australia reported "almost never" co-operating with each other.[17]
- Children of high conflict parents who have been ordered to have equal custody have high levels of psychological strain.[18] In one study, shared parenting arrangements were found to have increased the level of clinical anxiety in children after the first year.[19]
- Courts have no choice but to "apply the law,"[20] in situations where there are allegations of abuse but where there may be insufficient admissible evidence to support the allegations.

More recently, a report commissioned by the Australian government recommended significant changes to the legislation to clarify that it did not intend to create a shared parenting presumption. The 275 page report authored by retired Family Court Judge Richard Chisholm found that legislative changes are necessary to make it clear that judges are not to apply a "one size fits all" approach to custody, but rather "to consider equal time as well as all other

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12 Hardcastle, *supra* note 9 at 216.

13 Matthew Fynes-Clinton , "Children Suffer When Law Splits Parenting Equally", *The Courier – Mail* (November 10, 2008) online www.news.com.au/couriermail/story/0,23739,24624845-953,00.html

14 *Ibid.* citing Melbourne child psychologist Jennifer McIntosh.

15 Helen Rhoades, "The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform" (2008) 36 *Fed. L. Rev.* 279 at 280.

16 *Ibid.* at 283 and 295.

17 Jennifer McIntosh & Richard Chisholm, "Shared Care and Children's Best Interests in Conflicted Separation: A Cautionary Tale from Current Research" (2008) 20 *Aus. Fam. Law* 1 at 3.

18 *Supra* note 15 at 280 and 283.

19 *Supra* note 17 at 2.

20 *Supra* note 13.

possibilities in determining what is likely to be best for the child."[21] The report states that with hindsight, it has become obvious that the amendments led to parties thinking about their own entitlements rather than what is best for their children.[22]

These comments are informative. In Australia where equal parenting is not mandatory but must be considered by the court, the experience has been problematic and changes are now being recommended. Clearly, making any parenting arrangement mandatory would serve to intensify the negative outcomes to date.

V. PARLIAMENTARY AND OTHER STUDIES

A federal government Special Joint Committee on Child Custody and Access reviewed the issues in significant detail in 1998, resulting in *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access*.[23] The report clearly concludes that "children are not served by legal presumptions in favour of either parent, or any particular parenting arrangement."[24] It includes a chapter referring to the *Divorce Act* entitled "No Presumptions". Many interest groups supporting various presumptions testified before the Committee, but in the end, it concluded that the best interests of children must remain paramount. The Committee recommended:

> a series of criteria defining the best interests of the child, among which would be the principle that children benefit from consistent, meaningful contact with both parents, except in exceptional cases, such as those where violence has occurred and continues to pose a risk to the child. Whether an equal time-sharing arrangement is in the interests of a particular child would have to be determined on a case-by-case basis, with a full evaluation of the child's and parents' circumstances.[25]

Recognizing the benefits of joint parental responsibility, the Committee said that "legislation that imposes or presumes joint custody as the automatic arrangement for divorcing families

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21 Professor Richard Chisholm, *Family Courts Violence Review Report* (Australia: November 27, 2009) at 131.

22 *Ibid.* at 8.

23 Ottawa: Parliament of Canada, 1998.

24 *Ibid.* at chapter 2.

25 *Ibid*.

would ignore that this might not be suitable for all families, especially those with a history of domestic violence or of very disparate parenting roles".[26] They further found that:

> It is our view that the courts must retain the discretion to deal with the unique facts of each case. Relying upon a presumption will not assist, whether the presumption is based upon the status quo prior to separation or based upon assuming that parents are equally willing or capable of meeting the needs of their children.
>
> Presumptions can also have the negative effect of compelling families who might otherwise have been able to make constructive, amicable arrangements to apply to a court if they want to avoid the application of the presumptive form of parenting arrangements.
>
> On the basis of this argument, a number of witnesses concluded that the *Divorce Act* should not be amended to include any presumption in favour of a particular type of parenting arrangement. Instead, they suggested strengthening the "best interests of the child" test, which is the current basis for custody and access decisions. In addition, it was argued that families would benefit from the expanded availability of non-litigation services to give divorcing couples better information about their options. With more resources and better information, parents would be able to promote the best possible outcomes for their own children through their post-separation behaviour and decision making.
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> A number of witnesses recommended that the *Divorce Act* be amended to include a list of criteria or a definition of the best interests of the child, to guide judges and parents applying the test. Without being exhaustive, such a list would set out all matters decision makers should consider. Some children's circumstances might necessitate consideration of factors other than those listed in the legislation. The presence of a list of guiding criteria would improve the predictability of results and encourage consideration of factors considered particularly important to the well-being of the child.[27]

The CBA Section submission to the Committee recommended that criteria similar to those set out in *Ontario's Children's Law Reform Act*, as amended, be enumerated in the *Divorce Act* to reflect any new terminology adopted in the federal legislation. We suggested several additional items to those in the *Ontario Act*, including the care-giving role assumed during the child's life, any past history of family violence perpetrated by any party applying for custody or access, the child's established cultural ties and religious affiliation, and the importance and benefit to children of having an ongoing relationship with their parents.[28]

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26 *Ibid*. at chapter 4.

27 *Ibid*.

28 Ottawa: CBA, 1998.

Ultimately, the Report recommended that the *Divorce Act* be amended to provide that shared parenting determinations under sections 16 and 17 be made on the basis of the "best interests of the child". It further recommended that decision makers, including parents and judges, consider a list of criteria in determining the best interests of the child.[29] Given the degree to which the Report supports the primacy of the best interests test, any suggestion that Bill C-422 is consistent with that Report is incorrect.[30]

In her article "Children's Living Arrangements Following Separation and Divorce: Insights From Empirical and Clinical Research," Dr. Joan B. Kelly reviews various arrangements and schedules. She reviews the empirical research regarding the amount of time children spend with each parent in different types of parenting relationships. Importantly, Dr. Kelly argues against any historical biases and supports increased roles for fathers in many circumstances. However, she rejects any presumptions:

> Such guidelines are inherently flawed because of the one-size-fits-all standard, and because they do not, in fact, address the best interests of many children. They failed to consider the children's ages, gender, developmental needs and achievements, the history and quality of the child's relationships with each parent, quality of parenting, and family situations requiring special attention.[31]

In Australia, where joint parenting must be considered by the court, psychologists took issue with the effects of equal parenting on children under four. They advised that it may not be "developmentally appropriate" to have a parenting arrangement that disrupts a young child's routine and can result in a lack of secure attachment to either parent.[32]

Further, research has not definitively established the amount of contact necessary to maintain a "close relationship" between a parent and child. Studies have found that even a small amount of contact can be sufficient to maintain close parent-child relationships, at least from the perspective of the child.[33] This is consistent with the Justice Canada's 1993 Discussion Paper, which says that "not all experts stress the importance of a continuing relationship with the

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29 We note also that the dissenting reports from the Reform Party, Bloc Quebecois and NDP all supported the primacy of the best interests of the children and none suggested a presumptive parenting regime.

30 See Bill Sponsor's website, *supra* note 4.

31 (2006) 46:1 *Family Process* 239.

32 *Ibid*.

33 Hardcastle, *supra* note 9 at 210.

non-custodial parent. Some argue that the key factor in children's well-being is a low level of conflict between parents."[34]

VI. CONCLUSION

As lawyers, we assist all family members in restructuring their responsibilities and arrangements following separation and divorce. As a result, the CBA Section sees this issue from all sides. We firmly believe that the only perspective to foster outcomes that are best for children is to require that the courts and parents focus solely on the children's interests in making decisions.

Bill C-422 does not accomplish what it proposes. It does not give parties tools to resolve differences, nor does it assist them in making plans to share decision-making and physical care of children to minimize conflict and maximize children's benefits. It would move from considering the individual child to preferring parents' rights. It would encourage contentious litigation in future cases of family breakdown, and equally important, would cause thousands of children to be re-exposed to litigation and conflict as many settled cases would be reopened.

Under current law, the legal playing field is even; there is no gender bias in law requiring judges to consider "the best interests of the child" as paramount. Instead, the Bill proposes an overly simplistic idea of equality: rather than considering a fair result best for the children involved in the case at hand, children must be split right down the middle. The Bill does not advance equality for either fathers or mothers. Its proposals would come at the sacrifice of the appropriate focus, solely on what is best for children.

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34 Jonathan Cohen and Nikki Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" (2001) 19 *Can. Fam.L. Q.* 121 at 126.