THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

In the Interests of Children
Response to Bill C-560

NATIONAL FAMILY LAW SECTION
CANADIAN BAR ASSOCIATION

May 2014

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PREFACE

The Canadian Bar Association is a national association representing 37,500 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 Response to Bill C-560

I. INTRODUCTION

The Canadian Bar Association National Family Law Section (CBA Section) appreciates the opportunity to explain why it is critical 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 the past,[1] and are prompted to reiterate it once again in response to Private Member's Bill C-560 that would instead impose a presumption of equal parenting time.

The CBA represents more than 37,500 lawyers across Canada. The CBA Section includes family lawyers from every part of the country. We are collaborative practitioners, litigators, mediators, arbitrators and parenting coordinators. As we extensively assist parties outside the court room, we have no vested interest in whether parties argue in court or not. We have no bias or preference. We represent all parties in family law proceedings: our clients are fathers, mothers, same sex partners, surrogates, step-parents, grandparents, extended family members and children. We help people involved in all perspectives of family breakdown and are concerned about their outcomes.

The CBA Section believes that mandatory minimum parenting time is misguided when resolving arrangements for children. The sole focus must be what is best for children. In this light, we vigorously oppose passage of Bill C-560.

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

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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).

divorcing parents cannot do that, for whatever reason, courts must not only be free to, but required to do so.

As lawyers with many years 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 the interests of children;
- making resolution of family matters in children's best interests even more difficult;
- creating nonsensical situations for many families;
- detracting from the individual justice required by the *Divorce Act*; and
- promoting fractious litigation.

II. GENERAL COMMENTS

In 1995, the *Divorce Act* was changed so that in matters of custody and access the paramount consideration would be the "best interests" of children. The point of this change was to ensure that the unique circumstances of each family are taken into account when making orders about the care of children. To quote from the Supreme Court of Canada in *Gordon v Goertz*:

> 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... The inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected ...[2]

The laws of all provinces and territories also require a focus on the best interests of each child as a primary or only consideration. The proposed bill would take federal law completely out of step with the rest of Canada.

It would also be out of step with the United Nations Convention on the Rights of the Child,[3] which likewise mandates individual justice, based on the best interests of each child.

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2 [1996] 2 SCR 27, at paragraph 44.

3 1989 (UNCRC)

Bill C-560 simply presumes that equal parenting time will work best for all families, regardless of the individual abilities, circumstances, needs, history, challenges or attitudes of those involved. Worse, it would require judges to act on that presumption unless it can be shown that the best interests of the child would be "substantially enhanced" to do otherwise. Under this one-size-fits-all approach, the best interests of each child would become a secondary concern.

A presumption may seem like a harmless starting point for discussion, but we know presumptions create expectations and a sense of entitlement. These are the very things we work so hard to avoid when trying to resolve issues regarding children. As lawyers, mediators and collaborative practitioners, we know that separated parents more readily and willingly come to resolutions that work best for their family when they focus on their children, rather than themselves.

Parents may read the bill and ask, "The law says I am entitled to equal parenting rights and equal time; why would I take anything less?" Or worse, "My spouse is a terrible parent. Why should he or she have equal rights and time?" Without a presumption, parents are better able to approach the problem with a blank slate, and ask instead, "Given our individual circumstances, what works best for our children, and us?" The former is called position-based negotiation. The latter is called interests-based negotiation. Mediator will tell you that interest-based negotiations are more successful.

As we will show later in this paper, international experience with presumptions similar to those proposed in this bill has proved what we know from experience. They encourage rather than avoid argument. This will add to pressures on family courts, financial and emotional stress for parents and disparities in access to the law between 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.

Any presumption requires work to overcome. Negotiation, mediation and court processes would all be affected, causing extra time and expense.[4] A presumption is a thumb on the scale – Why would we weigh the scales in family court in anyone's favour but that of the child?

Proponents of Bill C-560 would have us believe that joint custody or the equal sharing of time are not supported or permitted by existing law. That is not true. Joint custody has long been an option – even a favoured one – and maximum contact with each parent is already mandated as a factor. If joint custody or exactly equal time is not ordered in any particular case, it is because the court has concluded that would not be in the child's best interests.

Finally, the Bill proposes retroactive application, which would be disastrous for Canadian families and family courts. All existing parenting orders across Canada under the *Divorce Act* could be re-opened – including cases that were 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.

The Bill is inconsistent with how we currently mediate and arbitrate: with the interests of children first. This must remain the primary principle in Canada's family law.

Finally, the bill conflates the concepts of equal parenting responsibility and exactly equal parenting time. They are not the same. Neither shared parenting nor joint custody mean or

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[4] Proponents of the bill often accuse lawyers of trying to drive up the cost of litigation. Ironically, if this were our goal, we would support the bill. It not only gives more to fight about, it reopens all settled files! Family lawyers have been in the forefront of reforms aimed at reducing family conflict and expense and promoting access to justice, through mediation, negotiation, collaborative practice, unbundled legal services, duty counsel services, pro bono advice and representation, case conferencing, and so forth.

require equal time. Many erroneous statements and conclusions surrounding the bill can be traced to this confusion.

III. SPECIFIC PROBLEMS

Bill C-560 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"

Exactly equal parenting arrangements are not always either possible or ideal. Animosity between parents may be too high, or their circumstances may not allow the child to benefit from equal shared time. Further, effective 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-560 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.

Bill C-560 (section 16(4)(a)) states that the court making a parenting order shall apply the presumption that allocating parenting time equally between the spouses is in the best interests of a child. It would direct the court to apply the presumption that equal parental responsibility is in the best interests of a child (section 16(4)(b)).

This section encapsulates the fundamental problem with the Bill. Every child is different and every family has its own strengths and weaknesses.

Furthermore, the Bill treats equal shared parenting time and equal parenting responsibility as if they were the same thing – or even necessarily related. The law currently accepts that parents have equal responsibility toward their children. It provides only that they should discharge that responsibility in the best interests of their children. The court often finds that joint legal custody – sharing of all legal rights and responsibilities – is appropriate without any division of responsibilities. It does not follow that equally shared parenting time is always appropriate, or even practicable. Both lived experience and social science research tell us that parenting time does not have to be exactly equal to be meaningful.

Bill C-560'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 possible for the children. Why would a regime that is just better for the child (rather than substantially better) not prevail? It serves only parents who puts their interests ahead of their child's.

Rebutting a presumption is not easy. Simply arguing what is best for the child would be insufficient. 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-560 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-560 assumes that such contact is always desirable for a child, elevating that status over other considerations. 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-560 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" as suggested in the Bill, or what mechanisms would provide those views. Many jurisdictions have no services to assist children to express their views or preferences, or to address challenges they may be facing or influences they may be under. 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-560 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 children, whether committed in their presence or not. The Bill seems to weigh factors in this section (16(16)) lower than those in the previous section (16(15)), but neither group is more important in all cases. 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 child's best interests.

Bill C-560 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 would be considered, in light of a presumption that trumps any of these considerations by saying that the children's interests do not matter. 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' rights to exactly equal time, rather than what is best for the child.

Bill C-560 section 16(18) requires the court 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 it is 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 to add a hurdle for the judge to act in the best interests of children.

Bill C-560 section 16(8) 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 to obtain services, the court would not need to make an appointment. This section is meaningless and does not add resources for families or courts. We fully support use of these services when dealing with children on separation, but not all separating parents have resources for or access to them. Rather than legislative change, governments should provide funding to make services more universally available and accessible.

Bill C-560 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(11) would enable a court to require a relocating parent to give notice and information to the other parent, 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 who moves in spite of an order granting the other parent specified access or parenting time is breaching the order.

Similarly, courts can already make an order for the expenses of parenting time when a parent moves. The Child Support Guidelines also contemplate such orders.

Bill C-560 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 supports providing families and judges with greater direction on what might be included in a parenting order. However, some parents can be flexible. This provision should be discretionary, to assist families who need it and not impede those who do not.

Bill C-560 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)

This 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. It would have no reference to the interests of the children, but would empower parents to change orders *despite* what is best for their children. This change would invite endless litigation, which is plainly not in the best interests of children.

IV. INTERNATIONAL SUPPORT FOR "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-560, stating "Belgium, Denmark, Norway and selected US states have

implemented joint custody preferences with positive outcomes."[5] This is not accurate. While some jurisdictions expressly support joint custody, they do not have a presumption of equally shared parenting time. Also, there is no objective consensus that outcomes of similar initiatives have been positive. The distinction between absolutely equal parenting time and joint custody should be clarified. Joint custody (or shared parenting) can include many variations in terms of sharing parenting time, not just an equal share. Rather, joint custody or shared parenting more broadly is considered to 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 50 American states as well as Puerto Rico and Washington D.C.,[6] three states have statutory preferences for joint legal custody[7] and six have a shared parenting preference if both parents agree.[8] Another six states include some statutory language that creates a preference for maximum contact with both parents.[9] 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.[10]

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5 www.mauricevellacott.ca/maurice.html

6 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.

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

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

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

10 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 have created a preference for equal shared parenting time in its legislation, but the presumption applies only until a court considers an award of custody.[11]

Oregon created a "presumption" of joint parenting in 1997. This presumption resulted in the judiciary encouraging and imposing joint (or shared) custody in cases which otherwise may have resulted in sole custody arrangements. This had several implications for divorce behavior. It brought about different custody outcomes (less sole custody to mothers, more sole custody to fathers). It resulted in more mediation, longer times until the final divorce, and more acrimonious divorces. There was also an increase in allegations of abuse and in post-decree litigation.[12]

After Minnesota put into effect a presumption that child custody should go to the parent who had been the primary caregiver, there was a large increase in litigation.[13]

In 2013, Arkansas passed legislation that favours an award of joint custody in an action for divorce, meaning that both parents have "approximate and reasonable equal division of time" with the child.[14]

While legislative changes in this area are ongoing and preferences for shared parenting are increasing, our research indicates that at this time no states have equal parenting presumptions similar to Bill C-560.

B. Australia

In 2006, Australia enacted *The Family Law Amendment (Shared Responsibility) Act 2006* which creates a presumption of equal shared *responsibility* for children and an obligation on family courts to consider whether spending equal or substantial *time* with each parent would be in the best interests of the children involved. Unlike Bill 560, the Australian legislation does not create a rebuttable presumption of equal parenting *time*.

Since its enactment, the Australian legislation has been heavily criticized. For example:

- Equal custody is focused on parental rights and places the best interests of children second. An equal parenting presumption fails to consider

11 *Supra* note 5 at 170.

12 Young Children, Attachment Security and Parenting Schedules, Daniel J. Hunan, Family Court Review vol. 50, no.3, July 2012

13 *Ibid*

14 www.arkleg.state.ar.us/assembly/2013/2013R/Acts/Act1156.pdf

whether it would be in the child's best interests to spend equal time, substantial time or significant time with each parent.[15]

- Since parenting is not equal in non-divorced families, it is wrong to assume that it should be after divorce.[16]
- 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.[17]
- Conflicted parents are inappropriate for joint custody arrangements,[18] let alone equal or substantial parenting time. One study found that shared parenting arrangements intensified parental conflict.[19] In another, 73% of parents involved in equal parenting agreements in Australia reported "almost never" co-operating with each other.[20]
- Children of high conflict parents who have been ordered to have equal custody have high levels of psychological strain.[21] In one study, shared parenting arrangements were found to have increased the level of clinical anxiety in children after the first year.[22]
- There may be pressure placed upon courts to "apply the law,"[23] in situations where there are allegations of abuse but where there may be insufficient admissible evidence to support the allegations.

A 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 possibilities in determining what is likely to be best for the child."[24] The report states that with hindsight, it

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15 Hardcastle, *supra* note 9 at 216.

16 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

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

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

19 *Ibid.* at 283 and 295.

20 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.

21 *Supra* note 15 at 280 and 283.

22 *Supra* note 17 at 2.

23 *Supra* note 13.

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

has become obvious that the amendments led parents to focus on their own entitlements rather than what is best for their children.[25]

Due to many concerns raised subsequent to enacting the legislation, the Australian government also commissioned a $6 million research project from the Australian Institute of Family Studies which also concluded that the legislation is problematic and requires changes.[26]

Most recently, Professor John Wade, former family law practitioner, consultant to the Australian Law Reform Commission and chair of the Family Law Council of Australia (2008 - 2010), refers to the Australian legislation as a "failed experiment"[27] and states that scholars and practitioners have virtually unanimously concluded that more harm than good has been caused to children by the reforms. He states that existing and emerging research in Australia and elsewhere confirm that in conflicted families (that includes any case which reaches a full-blown court hearing), substantial time or equal time, is *prima facie* unsuitable for the health of the children involved. He further notes that the rate of allegations of violence towards or in the presence of children increased dramatically in contested court matters, becoming a "key bargaining chip" in an effort to rebut the possibility of equal or substantial time arrangements; an unintended but predictable result of the legislation.

In considering the implications of Bill C-560 in Canada, Professor Wade opines that the proposed reforms have predictable serious and expensive side effects for national health in Canada including risk of harm to children. He recommends that any reforms be weighed carefully against the mistakes that have already been made and measured in Australia.

The negative effects of the legislation in Australia may have been mitigated by the concurrent development of Family Relationship Centres, which provide education, counseling, mediation and other resources to separating families. This initiative has been considered successful in helping families restructure, and may have improved outcomes despite an unsuccessful legislative framework.[28]

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25 *Ibid.* at 8.

26 Rae Kasouew et al, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, 2009, www.aifs.gov.au.

27 Professor John Wade, Law Foundation Visiting Chair at the College of Law, University of Saskatchewan, Lecture February 11, 2014: The Failed Experiment with Legal "Equal Parenting" in Australia.

28 Getting in Right for Families in Australia,: Commentary on the April 2013 Special Issue on Family Relationship Centers, Joan B. Kelly, Family Court Review, Vol. 51, No.2, April 2013.

C. Belgium

Belgian family law statutes were reformed in 2006 to introduce the concept that shared residency should be taken into serious consideration by family courts and judges on the request of either one of the divorcing parents.[29] This is more a consideration than a legal presumption. If shared parenting is requested by either parent, the court must consider, as a matter of priority, whether shared custody is in the best interests of the child. Judges, lawyers, and mediators reported a slight increase in equally shared parenting requests by divorcing parents. The shared residency preference appears to have changed litigation practices. Lawyers report that, with the preference, they argue that the other parent is incompetent, whereas previously they focused more on their own client's competency as a parent.

D. Denmark

The *Danish Act on Parental Responsibility* says 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 can 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.

V. UN CONVENTION ON THE RIGHTS OF THE CHILD

The proposed bill would be contrary to the UN Convention, which, like the current *Divorce Act*, requires that "in all actions concerning children, the best interests of the child shall be a primary consideration."[30] The Convention requires participating nations to treat children as individuals. Determinations of what is in the best interest of the child "should start with an assessment of the specific circumstances that made the child unique."[31]

Canada was a key player in the creation of the Convention in 1989, ratifying it in 1991. It is the most widely ratified UN Convention, indicating international consensus on its importance to meaningful, individual access to justice for children. Canada must "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized"

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29 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/>.

30 Article 3(1)

31 General Comment No. 14 (2013), Committee on the Rights of the Child, adopted at its 66th session (14 January – 1 February 2013), at para. 49.

in it.[32] So far, Canada has consistently reported to the UN Committee on the rights of the child that its legislation complies with the Convention. The proposed bill would change that.

The Convention recognizes the important role parents play in children's lives in several ways, including a specific article requiring states parties to respect the right of the child who is separated from one parent to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.[33] Canada must ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.[34] Parents, when exercising these responsibilities, must make decisions in the best interests of their particular child by taking into account *all* of the rights of the child found in the Convention.

Under the Convention, children have broad participatory rights, including the right to be heard in all judicial and administrative proceedings that affect them,[35] that are "inextricably" linked to their best interests.[36] Laws which advance joint parenting in principle advance the universal rights of children. However, laws which require a preference or default approach in favour of mothers, or fathers, or equal parenting time, preempt the search for individual justice and the careful balancing of rights to which children are entitled under the Convention.[37] This individual justice is especially important when considering the rights of Indigenous children, who may face distinct challenges accessing justice and who may more likely have an extended community who take responsibility for their wellbeing, beyond their biological parents.

The fact that this presumption can be rebutted does not remedy this significant legal shortcoming. To the contrary, it shifts the legal responsibility onto the shoulders of children and their advocates who seek a different result, to show why the interests of a particular child may require a different result. It puts children, who are vulnerable to begin with, at an even greater disadvantage. These children may be more disadvantaged if they lack an independent advocate or if those advocating for them lack resources, as is often the case in family matters.

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32 UNCRC Article 4.

33 UNCRC Article 9.

34 UNCRC Article 18(1). See also Article 7.

35 UNCRC Article 12.

36 General Comment No. 14 (2013), Committee on the Rights of the Child, adopted at its 66th session (14 January – 1 February 2013), at para. 43.

37 Legal Professionalism and Access to Justice: Lawyers as Champions for Children, The Honourable Donna Martinson QC and Dr. Nancy Bell, http://ethicsincanada.files.wordpress.com/2014/02/d-martinson-and-n-bell-legal-professionalism-and-access-to-justice-lawyers-as-champions-for-children.pdf.

The greatest disadvantage will be experienced by those children who are particularly vulnerable, such as Indigenous children, refugee children, children with disabilities, children living in poverty, LGBTQ children and children with combinations of disadvantage.

VI. CANADIAN LAW AND PARLIAMENTARY STUDIES

The *Divorce Act* applies only when parties are legally married and wish to divorce. In other circumstances, child custody in Canada is determined by provincial or territorial laws. All employ the "best interests" test in one way or another. Most say the purpose of their legislation is to ensure decisions of courts on custody or access will be determined in the best interests of the child.[38] Two say that the best interests of the child is a paramount consideration,[39] while three say it is the only consideration.[40]

If the Bill is enacted, federal jurisdiction will be at odds with the law in the rest of Canada.

In British Columbia, the latest jurisdiction to reform its family law, the *Family Law Act* specifically says,

> In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed: (a) that parental responsibilities should be allocated equally among guardians; (b) that parenting time should be shared equally among guardians; (c) that decisions among guardians should be made separately or together.[41]

In some circumstances, the laws also provide for consultation with Indigenous communities or Indian Bands to determine custody issues. This recognizes the special cultural experience of Aboriginal children, whose best interests cannot be presumed as a two parent shared arrangement, but must be considered in the context of a wider community, including access to knowledge of Indigenous law and culture, especially where one parent is not Indigenous.

The Special Joint Committee on Child Custody and Access reviewed the issues in detail in 1998, resulting in *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access*.[42] The report concludes that "children are not served by legal presumptions in

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38 Yukon, Northwest Territories, Nunavut, Ontario, Quebec, Prince Edward Island, New Brunswick and Newfoundland and Labrador

39 Manitoba and Nova Scotia

40 Alberta, British Columbia and Saskatchewan

41 s.40(4)

42 Ottawa: Parliament of Canada, 1998.

favour of either parent, or any particular parenting arrangement."[43] 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.*[44]

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 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".[45] 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 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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43 *Ibid.* at chapter 2.

44 *Ibid*.

45 *Ibid*. at chapter 4.

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, the 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 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.[46]

The CBA Section submission to the Joint Committee recommended that criteria similar to those 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.[47]

Ultimately, the Report recommended that the *Divorce Act* be amended to assist decision makers in making shared parenting determinations under sections 16 and 17 by adding a list of criteria to consider in determining the best interests of the child.[48] Given the degree to which the Report strongly supports the primacy of the best interests test, any suggestion that Bill C-560 is consistent with that Report is entirely incorrect.[49]

VII. SOCIAL SCIENCE RESEARCH

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 empirical research on the amount of time children spend with each parent in different types of parenting relationships. Importantly, Dr. Kelly has strongly supported father's involvement with children. She argues against historical biases and supports increased roles for fathers in many circumstances. However, she rejects any presumptions:

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46 *Ibid*.

47 Ottawa: CBA, 1998.

48 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.

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

> 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.[50]

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.[51]

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.[52] 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 non-custodial parent. Some argue that the key factor in children's well-being is a low level of conflict between parents."[53]

Such legislative changes clearly target the amount of time a child spends with each parent. However, the quantity of time a child spends with each parent can be irrelevant for attachment security, and that legislation thus ignores an important aspect of child development.[54]

As a recent reviewer of these studies noted,

> There are a number of possible reasons that it is a mistake for there to be a presumption of equally shared or near equal parenting. There are often different qualities of relationship that a child has with each parent. For many school age children, in particular, going back and forth in order to spend about the same amount of time with each parent can be quite stressful because of practical matters, such as adequately keeping track of school material and clothing.[55]

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50 (2006) 46:1 *Family Process* 239.

51 *Ibid*.

52 Hardcastle, *supra* note 9 at 210.

53 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.

54 Hunan, *supra* at p. 478

55 Hunan, *supra* at p. 478

These stressors can be exacerbated by simple things like the distance between parents' homes or their work schedules, or more complex matters like challenges in the parents cooperating sufficiently to make these issues smooth for the children.

When considering what is best for young children, it is crucial to strongly consider con research findings that indicate exposure to interparental conflict, parental psychological dysfunction, stress, and loss of contact with a parent are all significant contributors to negative outcomes for children of separation and divorce.[56]

The Association of Family and Conciliation Courts (AFCC) recently released a thorough review of the social science literature on this issue, and suggests different approaches. Like the Joint Committee, the AFCC rejected the notion of a presumption of equal shared parenting time. It expressly noted that:

> When there is a dispute over the care of a young child's care, decision makers (including parents) should consider all relevant factors. No single factor trumps the influence and importance of the aggregate.[57]

And later,

> Negotiations and determinations about parenting time after separation that involves third parties (mental health, legal) is inescapably case-specific.
>
> Research informs areas of inquiry and illuminates key considerations for determining the most appropriate parenting arrangements for particular families. However, research cannot prescribe caregiving arrangements suitable for all families in all situations.
>
> …

Children's best interests are furthered by parenting plans providing for continuing and shared parenting relationships that are safe, secure, and developmentally responsive, and which avoid a template calling for a specific division of time imposed on all families.

Mediation and collaborative approaches require the parties to consider interests, rather than positions, about the issue at hand. In parenting decisions, it is critical that the parents focus on examining options by considering the interests of their children. Mediation and similar strategies to assist families would be less effective in some circumstances if either parent can

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56 *Ibid*.

57 Closing the Gap: Research, Policy, Practice and Shared Parenting AFCC Think Tank Final Report, Marsha Kline Pruett and J. Herbie DiFonz, to be published in the April 2014 issue of the Family Court Review (p. 35, 36).

say that the law tells them that they get "equal" parenting and do not have to critically examine what is best for their children given all of their unique family characteristics.

Family mediators, when surveyed, were clear that the best interests test must remain in the law[58] and that better services and better definitions in the law would assist in the consensual resolution of parenting issues.

Ultimately, research in support of both parents' role in a child's life after separation is frequently quoted to be in support of parenting presumptions. However, these conclusions generally ignore the need to examine the individual circumstances of whether and how shared parenting could be a successful outcome for an individual child.

VIII. CONCLUSION

As lawyers, we assist all family members inside and outside of court in restructuring their responsibilities and arrangements following separation and divorce. CBA Section members see 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-560 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 family breakdown, and would cause thousands of children to be re-exposed to litigation and conflict as settled cases were reopened. It would create potentially devastating issues for resolving custody and parenting responsibility disputes for Indigenous children, who may face circumstances that require courts to give special consideration of a broad range of family, social and cultural perspectives. Finally, C-560 would further exacerbate problems with access to justice faced by Canadian parents, who already struggle to find affordable legal services in the context of an underfunded legal aid system.

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. To replace the current, substantively equal, unbiased "best interests" test, Bill C-560 proposes a false idea of equality:

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58 Family Mediation Canada Consultation on Custody, Access and Child Support, Department of Justice Canada, http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2001_11/sum-som.html.

rather than considering a fair result best for the children involved, children must be split right down the middle. The Bill does not advance equality for either fathers or mothers. The appropriate focus in child custody determinations is solely on what is best for children.