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The Cost of Shared Parenting: An Analysis of Section 9 from 2016 to 2017

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1. INTRODUCTION

Section 9 of the *Child Support Guidelines* ("the *Guidelines*") sets out how to calculate child support for children in a shared parenting arrangement. This section only applies when each parent exercises significant physical care and control over the child measured in time.[1] The text of section 9 reads:

> Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
> (b) the increased costs of shared custody arrangements; and
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.[2]

As interpreted by the Supreme Court of Canada in the leading case of *Contino v. Leonelli-Contino* ("*Contino*"), section 9 sets out a two-step inquiry.[3] First, the court determines whether each parent has care of the child for at least 40% of the time. If that threshold is met, only then can the court consider the three listed factors to determine a quantum of support that meets the child's needs in conjunction with the parents' abilities to contribute to their support. *Contino* clarified several uncertain propositions under section 9, most notably: there was no presumption in favour of the table amount (as exists in section 3); there was no automatic reduction in support after meeting the 40% threshold; and there was no formulaic or mathematical approach to this section.[4] *Contino*

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1 James C. Macdonald & Ann C. Wilton, *Child Support Guidelines Law and Practice*, 2nd ed (Westlaw). This section only applies to care or physical time which used to be called "joint physical custody" prior to the enactment of the *Guidelines* in 1997, not merely when parents share joint legal custody (which involves decision-making only).

2 *Federal Child Support Guidelines*, SOR/97-175 [*Guidelines*].

3 *Contino v. Leonelli-Contino*, 2005 CarswellOnt 6281, 2005 CarswellOnt 6282, [2005] 3 S.C.R. 217 (S.C.C.) at para. 37 [*Contino*].

stressed that the language of section 9 emphasizes flexibility and fairness, which requires discretion by the trial judge to accord weight to each factor depending on the particular facts of each case.[5]

Section 9 attempts to provide fair support for the child based on the parents' abilities to pay. At play here are three kinds of spending that parents undertake for their children.[6] First, there are fixed and duplicated expenses, including housing, utilities, furniture, and household effects, the fixed part of motor vehicle costs, and some portion of clothing, toys, and personal effects. Second, there are variable costs that vary according to the time the child spends with the parent, such as food, the variable part of transportation costs like gas for travel between homes, some aspects of child care, recreation and entertainment expenses, vacation costs, and some school costs. Third, there are costs that do not relate to time at all, such as most clothing, some medical expenses, and extracurricular and school-related expenses. Section 9 deals with the first two, where fixed costs are generally similar for each parent and variable costs depend on the actual time spent with the child, while other sections of the *Guidelines*, such as section 7, deal with the third.

However, section 9 and the directives in *Contino* have proven difficult to apply across the country. From January 1, 2016, to July 31, 2017, a period of 18 months, there were 70 reported cases across Canada dealing with section 9 of the *Guidelines*.[7]

Table 1: Total number of section 9 cases by province

Province or Territory	Total Number of Decisions	Appellate-Level Decisions	Trial-Level Decisions
British Columbia	24	1	23
Alberta	7	1	6
Saskatchewan	4	0	4
Manitoba	0	0	0
Ontario	19	0	19
Quebec	0	0	0
New Brunswick	7	2	5
Nova Scotia	4	0	4
Prince Edward Island	0	0	0
Newfoundland & Labrador	4	3	1

4 Rollie Thompson, "The TLC of Shared Parenting: Time, Language and Cash" (2013) 32 Can.Fam.L.Q 315.

5 *Contino*, *supra* note 4 at para. 39.

6 Thompson, *supra* note 5.

7 This reflects the total number of cases that engaged section 9 and provided enough information about the judicial findings to include in the study.

Table 1: Total number of section 9 cases by province			
Nunavut	0	0	0
Northwest Territories	0	0	0
Yukon	1	0	1
TOTAL	**70**	**7**	**63**

This paper examines the courts' analyses of the section 9 issues in these cases to seek out trends, identify common flaws, and suggest improvements that can be made by the federal government or by appellate courts. Some direction is certainly required, as section 9 still falls within the main objectives of the *Guidelines*:

(a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
(b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
(c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
(d) to ensure consistent treatment of spouses and children who are in similar circumstances.[8]

As currently applied, section 9 often undermines these goals as different applications by different courts create uncertainty in the application of the section, which in turn increases parental tensions as well as litigation. Consequently, in determining these child support issues, parents expend energy and resources that would be better spent on the children. Lead commentator Phil Epstein, along with others, has called for the revision of this section to provide a more formulaic way to address the shared parenting issue that provides more certainty for parties, counsel, and courts.[9] Any revisions to the section 9 application must remain child-focused, as the *Guidelines* intended.

2. ENGAGING SECTION 9

In order for the court to apply section 9 of the *Guidelines*, the court must first determine the threshold question: does a spouse exercise a right of access to, or have physical custody of, a child for *not less than* 40 per cent of the time *over the course of a year*? If that threshold is not met, there is no discretion for the court to apply section 9, and the parent must either pay table support under section 3 or rely on other provisions of the *Guidelines* for direction.

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8 *Guidelines*, *supra* note 3, s. 1.

9 Philip Epstein, "Epstein's This Week in Family Law" (June 11, 2013) Fam. L. Nws. 2013-22.

(a) 40% Threshold

As demonstrated by Table 2, the majority of cases (87%) passed the threshold test. 13% of cases, however, failed the threshold test, which ended the analysis and meant that the court could not utilize section 9 to determine the amount of child support in that case.

Table 2: Was the 40% threshold met?				
Province or Territory	**Yes**		**No**	
	Number	**Percentage**	**Number**	**Percentage**
British Columbia	24	100%	0	0%
Alberta	5	71%	2	29%
Saskatchewan	4	100%	0	0%
Ontario	17	89%	2	11%
New Brunswick	4	57%	3	43%
Nova Scotia	4	100%	0	0%
Newfoundland & Labrador	3	75%	1	25%
Yukon	0	0%	1	100%
TOTAL (70 cases)	**61**	**87%**	**9**	**13%**

(b) Counting Time

The *Contino* test only applies after a parent has met the 40% threshold. In *Contino* itself, the mother did not dispute that the father had care of the child for at least 40% of the time.[10] Courts since have stressed that the court should avoid rigid calculations in this first step and instead look at whether physical custody of the children is truly shared.[11] These 70 cases presented three concrete options for counting time: by days, by overnights, or by hours. In the majority of the cases, however, the court did not specify what measure it was using to count to the 40% threshold because the cases were clearly equal time cases so there was no need to explain the unit of measure. Of the 61 cases that found the parent had met the 40% threshold, the court detailed the way time was counted in only seven cases. Of the nine cases where the parent did not meet the 40% threshold, however, the court detailed the way it counted time in all cases but one. The court thus appears to need to justify not reaching the 40% threshold, but does not need to justify meeting the 40% threshold.

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[10] *Contino*, *supra* note 4 at para. 8.

[11] *Froom v. Froom*, 2005 CarswellOnt 545, [2005] O.J. No. 507 (Ont. C.A.) at para. 2 [*Froom v. Froom*].

Table 3: How did the court count time in the 40% threshold analysis?				
Province or Territory	**Days**	**Overnights**	**Hours**	**Unspecified**
British Columbia	1	0	1	22
Alberta	0	0	1	6
Saskatchewan	0	0	0	4
Ontario	0	1	1	17
New Brunswick	1	1	1	4
Nova Scotia	0	0	0	4
Newfoundland & Labrador	1	1	0	2
Yukon	0	0	1	0
TOTAL (Number)	**3**	**3**	**5**	**59**
TOTAL (Percentage)	**4%**	**6%**	**6%**	**84%**

(i) Method Unspecified

The majority of cases (84%) did not specify how the court counted a parent's time. In nearly all of these cases, the court appears to have accepted that the parent crossed the 40% threshold without needing to explain why. In most of these cases, the parents shared parenting on a regular schedule that gave them equal time with the children, be it a week-about schedule,[12] a 2-2-3 day schedule,[13] a 4-3 day schedule,[14] or a three-month rotation schedule.[15] In these cases where the parenting appeared to be approximately equal, the court did not state what method it used to count time and moved on with the section 9 analysis. This appears to be an exercise in judicial realism. If the parties manage to agree that both parents exceed the 40% threshold, absent any power imbalance or red flags, the court did not disagree or pursue its own calculation to verify.

In four cases, the parties simply agreed that the 40% threshold had been reached without specifying the division of the children's time between parents,

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[12] See, e.g. *H. (N.) v. H. (B.)*, 2016 SKQB 153, 2016 CarswellSask 311 (Sask. Q.B.) [*N.H. v. B.H.*].

[13] See, e.g. *K. (O.) v. K. (V.)*, 2016 BCSC 539, 2016 CarswellBC 823 (B.C. S.C.), varied on reconsideration 2016 CarswellBC 2346 (B.C. S.C.) [*O.K. v. V.K.*].

[14] See, e.g. *T. (B.A.) v. H. (T.P.)*, 2016 BCPC 373, 2016 CarswellBC 3448 (B.C. Prov. Ct.) [*B.A.T. v. T.P.H.*].

[15] See, e.g. *Wyatt v. Galway*, 2016 NLTD(F) 36, 2016 CarswellNfld 518 (N.L. T.D.), affirmed *J.W. v. M.G.*, 2018 CarswellNfld 273 (N.L. C.A.) [*Wyatt v. Galway*].

and the court accepted that agreement to apply section 9. In *S. (J.A.) v. S. (A.C.)*, the parties agreed that they shared parenting of their three children, and that they had "focussed more on providing their children with a flexible, fulsome relationship with both parents rather than on rigid schedules and record keeping."[16] Bayliff Prov.J. applauded this child-focused attitude. In *Harrison v. Falkenham*, the parties agreed that their daughter had remained in a shared parenting agreement, and while each parent suggested that at times the child was more with one parent than the other, neither proved that she was with the other parent less than 40% of the time, so Jollimore J. applied section 9.[17] Similarly, in *McCrate v. McCrate*, the parties agreed that their three daughters would be in a shared parenting agreement, so Jollimore J. applied section 9.[18] Finally, the parties in *B. (R.A.) v. R. (C.W.)* settled the custody and access arrangements before trial, and the parties agreed that the three children would share time equally with both their parents, so Daley J.F.C. moved on to a section 9 analysis.[19]

In one case, the court specifically declined to specify how it was counting time, as this would not be in the best interests of the child. There, in *Pileggi v. Parkin*, Clay J. outlined the father's weekly access: Monday at 7:00 a.m. until Tuesday at 5:30 p.m. and Friday at 7:00 a.m. until Sunday at 4:30 p.m.[20] Even though the parties made some submissions about the nature of the time each spent with the child, the judge found that "there was no doubt that this is a time-sharing arrangement that fits within the shared custody provisions of s. 9 of the *CSG*."[21] Clay J. went on to specifically discourage the father from counting hours with the child: "the parties *share* custody."[22]

Importantly, the cases that did not specify how time was counted almost all passed the threshold test. Conversely, the cases that failed the threshold test nearly all provided explanations for why the parent had failed to meet the 40% threshold. *TLH v. MGD* was the only case where the parent failed to meet the 40% threshold where the court did not specify how it counted time. In that case, the father asked the court to find he had passed the 40% threshold because he "wanted to, tried to, should've and could've" had the children in his care for that amount of time if the mother had not made accusations that he was abusing the

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16 *S. (J.A.) v. S. (A.C.)*, 2016 BCPC 433, 2016 CarswellBC 3738 (B.C. Prov. Ct.) at para. 34 [*J.A.S. v. A.C.S.*].

17 *Harrison v. Falkenham*, 2017 NSSC 139, 2017 CarswellNS 357 (N.S. S.C.) at paras. 4 and 21 [*Harrison v. Falkenham*].

18 *McCrate v. McCrate*, 2016 NSSC 6, 2016 CarswellNS 1207 (N.S. S.C.) at para. 2 [*McCrate v. McCrate*].

19 *B. (R.A.) v. R. (C.W.)*, 2016 NSFC 14, 2016 CarswellNS 466 (N.S. Fam. Ct.) at para. 18 [*R.A.B. v. C.W.R.*].

20 *Pileggi v. Parkin*, 2016 ONCJ 30, 2016 CarswellOnt 478 (Ont. C.J.) at para. 6, additional reasons 2016 CarswellOnt 477 (Ont. C.J.) [*Pileggi v. Parkins*].

21 *Ibid* at para. 7.

22 *Ibid* at para. 20.

children.[23] Mahoney J. used a plain reading of section 9 to find that the court should not disregard existing parenting arrangements in favour of "different arrangements that 'should have' or 'could have' existed had circumstances been different," because this would actually defeat many of the objectives of the *Guidelines*.[24] By no unit of measurement had this father reached the 40% threshold. The other cases where the parent did not pass the threshold are discussed below.

(ii) Days

Three cases used days to measure whether a parent had met the 40% threshold. This method has the benefit of easily measuring 40%; if a parent cares for the child at least 146 days out of 365 days per year, the threshold is passed. This is easy for the parties and the court to count, and its facility is its main attraction. However, this formula could also prove problematic in situations where parents share time with the children in the same day. Each parent could count the day or neither parent could count the day, or each could count part of the day, which negates the ease of the calculation.

In *M. (F.) v. H. (T.)*, the New Brunswick Court of Appeal upheld the motions judge's finding that the father had not met the 40% threshold.[25] The father submitted that the motions judge had erred by using days, not hours, to count his time with the child. The father worked four days then had four days off in an eight-day rotation, and had the child in his care beginning his second day off work until 6:00 p.m. the day prior to his return to work.[26] The appellate court validated days as a method for counting time. Furthermore, the panel reprimanded the father for suggesting that the motions judge had restructured the access arrangement to deliberately deny the father the 40% threshold; the motions judge had based the new arrangement on "the best interests of the child rather than with the minutiae of access time calculations," which was the proper focus.[27]

The Newfoundland and Labrador Court of Appeal reversed the trial court decision in *S. (H.) v. W. (P.)* because the days of parenting time were incorrectly calculated. The court allowed the mother's appeal for a variation in child support since the parties' two children both lived primarily with her rather than equally with both parents as they had at the time of the previous order.[28] One child did not see the father at all, and the other child spent only three days with the father

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[23] *TLH v. MGD*, 2017 ABQB 408, 2017 CarswellAlta 1179 (Alta. Q.B.) at para. 16 [*T.L.H. v. M.G.D.*].

[24] *Ibid* at para. 17.

[25] *M. (F.) v. H. (T.)*, 2016 NBCA 29, 2016 CarswellNB 220, 2016 CarswellNB 221 (N.B. C.A.) at para. 16 [*F.M. v. T.H.*].

[26] *Ibid.*

[27] *Ibid* at para. 24.

[28] *S. (H.) v. W. (P.)*, 2016 NLCA 67, 2016 CarswellNfld 453 (N.L. C.A.) at para. 17 [*H.S. v. P.W.*].

out of every two weeks, which amounted "at most to 78 days or 21 percent of a 365-day year."[29] Thus, the 40% threshold was not even close to being met and the judge had erred in exercising the discretion allowed under section 9 rather than applying the table amount to this child support situation.

In the British Columbia case of *S. (E.L.) v. S. (C.A.)*, the parties were granted joint custody of their two children, with a parenting schedule that gave the father access for four days every two weeks (104 days per year) and meant he paid the table amount of support as section 9 was not engaged.[30] A few months later, Pearlman J. varied the parenting arrangement to a three-day, five-day rotation, where "[m]easured in days, [including designated holiday time,] the respondent's parenting time over the course of the year is 149.31 days, or 40.9% of parenting time."[31]

(iii) Overnights

Three cases used overnights to measure a parent's time. Like days, overnights offer a very simple and predictable method for determining whether the 40% threshold has been met. However, this method is problematic in situations where one parent cares for the child all day but gets no credit toward the 40% mark for that time because the other parent takes the child overnight. This method may be more appropriate for school-aged children, who spend a significant amount of time away from either parent's direct control.

The Newfoundland and Labrador Court of Appeal allowed the father's appeal in *C. (S.) v. H. (S.)* where the trial judge found the father did not have care of the children for 40% of the time because he had failed to take into consideration the extra days outside of the regular schedule where the father worked onshore and had the children in his care.[32] The regular schedule provided that the father cared for the children for 16 overnights out of his forty-two-day work rotation, plus occasional additional overnights as his schedule allowed.[33] This amounted to 139 overnights per year, or 38% of the time.[34] Welsh J.A. found that even if the father only cared for the children for one extra night each work rotation onshore, he would care for them seven more overnights in the year which would amount to 146 overnights in a year, or 40% of the year.[35] The appeal court then remitted the case back to the trial judge to perform the section 9 analysis after determining the threshold had been met.[36]

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29 *Ibid* at para. 16.

30 *S. (E.L.) v. S. (C.A.)*, 2016 BCSC 675, 2016 CarswellBC 1040 (B.C. S.C.) at paras. 4-5 [*E.L.S. v. C.A.S.*].

31 *Ibid* at paras. 7, 47.

32 *C. (S.) v. H. (S.)*, 2016 NLCA 43, 2016 CarswellNfld 327 (N.L. C.A.) at para. 11 [*S.C. v. S.H.*].

33 *Ibid* at para. 5.

34 *Ibid.*

35 *Ibid* at para. 11.

In *Van Heighten v. Catarino*, Clay J. revised the parenting schedule and found that the father met the threshold because the child slept at his house "13 nights out of 28 or 46% of the time."[37] He then proceeded to apply the section 9 analysis to the child support calculation.

The court used overnights to find that the father had not crossed the 40% threshold in *C. (J.C.) v. G. (R.B.)*. After separation, the parties' two children lived primarily with the mother, but the father claimed that over the past few years, the children had spent more time with him than specified in the court order, and he now cared for them more than 40% of the time.[38] However, d'Entremont J. found that in a 14-day period, the father had the children overnight on Wednesday and then from Friday afternoon to Monday morning, plus a few hours after school and on weekdays where the children did not have school.[39] Overall, he cared for the children for five overnights in a 14-day period, whereas the mother cared for them for nine overnights in a 14-day period.[40] The judge was not convinced that the father had care of the children for at least 40% of the time and declined to apply section 9 to determine child support.[41]

(iv) Hours

Five cases utilized hours to count time. Hours provide the most accurate accounting of a parent's time with the children, but it also requires onerous calculations and time spent both calculating and arguing over how many hours the children actually spent with each parent. Furthermore, it raises difficulties when children spend significant hours of the day at school or with third parties. In that situation, neither parent has physical control of the child, but the parties can argue over who has the ultimate care for the child during those hours. What this ultimate care and control means when a child is physically with neither parent is unsettled and leaves room for further disagreement and prolonging of the conflict. Therefore, this method provides accuracy at the expense of time and conflict.

The Alberta Court of Appeal endorsed hours as an appropriate measure in *Mackenzie v. Mackenzie* in dismissing the father's appeal.[42] His application for a retroactive child support adjustment was unsuccessful because he had not met the 40% threshold.[43] The father argued that the hours the daughter was in school should properly be attributed to him, not the mother, on the days that he

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36 *Ibid* at para. 12.

37 *Van Heighten v. Catarino*, 2017 ONCJ 103, 2017 CarswellOnt 2934 (Ont. C.J.) at para. 110 [*Van Heighten v. Catarino*].

38 *C. (J.C.) v. G. (R.B.)*, 2016 NBQB 71, 2016 CarswellNB 132 (N.B. Q.B.) at paras. 9 and 53 [*J.C.C. v. R.B.G.*].

39 *Ibid* at para. 56.

40 *Ibid.*

41 *Ibid* at para. 58.

42 *Mackenzie v. Mackenzie*, 2017 ABCA 71, 2017 CarswellAlta 967 (Alta. C.A.) at para. 8 [*Mackenzie v. Mackenzie*].

dropped the child off at the bus stop and picked her up at the bus stop after school.[44] However, the Court of Appeal agreed with the trial judge that the father had not met his onus to prove the child was in his care 40% of the time.[45] While there was some evidence that the father provided some before- and after-school care and took the child to some appointments during school, there was more evidence that the child's day-to-day care and control was vested in the mother.[46]

In *M. (J.R.) v. H. (K.J.)*, Doulis Prov. J. used hours to demonstrate that the father had met the 40% threshold. Here, the parents shared time with the child in a bi-weekly parenting arrangement, but the 40% question depended on how the court allotted time that the child spent in school and daycare.[47] The judge declined to allot all school and daycare time to the mother, as she requested, and instead allocated it proportionally between the parties.[48] Using the mother's calculations, the child was in her care 188 hours of the 336 hours in two weeks, or 56% of the time, and in the father's care 44% of the time.[49] By the father's calculations, the child was in his care for 159 of the 336 bi-weekly hours or 47% of the time, and in the mother's care 177 hours bi-weekly or 53% of the time.[50] By either calculation, the father met the 40% threshold.[51] The mother further argued that because she was recently unemployed, her time with the child would increase to 205 hours bi-weekly or 61% of the time, but the court found that she had worked full-time for the past 4.5 years and had significant marketable skills, so she would likely return to work soon, at which point the father would regain his over-40% of the time over the course of a year.[52] The 40% threshold was met and section 9 applied.

In the Yukon, the court used hours to determine that the father had not met the threshold in *M. (A.M.C.) v. L. (J.B.)*, despite his submission that his overnights amounted to 40%. Following the father's recent application to increase time with the two children and reduce his table child support obligation accordingly, the court agreed to increase his parenting time to include one additional overnight every other week with one of the two children.[53] But this

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[43] *Ibid* at para. 10.

[44] *Ibid* at para. 10.

[45] *Ibid* at para. 8.

[46] *Ibid* at paras. 8-10.

[47] *M. (J.R.) v. H. (K.J.)*, 2017 BCPC 25, 2017 CarswellBC 371 (B.C. Prov. Ct.) at para. 36 [*J.R.M. v. K.J.H.*].

[48] *Ibid* at para. 37.

[49] *Ibid.*

[50] *Ibid* at para. 39.

[51] *Ibid.*

[52] *Ibid* at para. 38.

[53] *M. (A.M.C.) v. L. (J.B.)*, 2017 YKSC 5, 2017 CarswellYukon 9 (Y.T. S.C.) at para. 6 [*A.C.M. v. J.B.L.*].

was the father's third application from 2014 to 2016, and the court criticized this campaign to decrease child support. It did not seem that the father was pursuing extra time for the best interests of the children, but rather because he believed it was unfair that he was required to pay the table amount of child support to the mother who made twice as much income as he did.[54] Given the new parenting schedule ordered, one child spent three overnights with the father over two weeks, and the other child spent four overnights with the father, plus weekday access from 3:00 p.m. until 6:15 p.m. and shared summer access.[55] The father calculated his time with the children since the July 2016 order as 40% of the time, whereas the mother calculated his time with the children as 34.8% of the time.[56] The court found that the father still did not meet the 40% threshold because he had not increased his time to 40% "over the course of a year".[57] A year had not yet passed since the order that set out this parenting time and it remained to be seen whether he would spend the outlined time with the children, so his application to decrease child support was premature.[58] The judge warned that even if a year had passed, and even if the court excluded the children's time in school during which the mother exercised care and control over the children, the most generous calculation of the father's time with the children was only 36%, so section 9 would not apply.[59]

In the Ontario case of *Chomos v. Hamilton*, the court awarded the mother sole custody of the parties' three-year-old child[60] and set out the timesharing schedule by week in a repeating 28-day cycle. The father had access to the child during Week 1 from Friday at 10:00 a.m. until Wednesday at 7:00 p.m., during Week 2 from Monday at 10:00 a.m. until Thursday at 7:00 p.m., and during Week 4 from Thursday at 10:00 a.m. to Sunday at 5:00 p.m.[61] From this schedule, Pazaratz J. applied section 9.[62] While the judge does not explicitly state that hours were used to reach the threshold, the specificity of the hours in the parenting schedule suggests this was the counting method.[63]

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54 *Ibid* at paras. 4-5.

55 *Ibid* at para. 17.

56 *Ibid* at paras. 19-20.

57 *Ibid* at para. 21.

58 *Ibid.* Note that this statement appears to be unique in the case law. In other variation cases, judges accept that "over the course of a year" is the timespan for a prospective calculation and do not require a year to pass before ordering a new quantum of support payable under section 9.

59 *Ibid* at para. 22.

60 *Chomos v. Hamilton*, 2016 ONSC 5208, 2016 CarswellOnt 13157 (Ont. S.C.J.) at para. 116, additional reasons 2016 CarswellOnt 15962 (Ont. S.C.J.) [*Chomos v. Hamilton*].

61 *Ibid* at para. 126.

62 *Ibid.*

63 In a 28-day period, there are 672 hours. The father cared for the child for 129 hours during Week 1, for 81 hours during Week 2, and for 79 hours during Week 3, for a total of 289 hours, or 43%, of the 28-day period. The threshold is therefore crossed.

In *F. (J.) v. F. (G.)*, Justice Ferguson used hours to determine that the father had not crossed the 40% threshold. The parties had two teenage children, but the eldest was living with an aunt in Michigan, so the court recognized this was a special circumstance where it was only concerned about the custody and access arrangement for the younger child for child support purposes.[64] The father exercised access to the child from Monday at 8:00 a.m. until Tuesday at 6:00 p.m. (34 hours) and every second weekend from Friday at 7:30 p.m. until Sunday at 4:00 p.m. (45.5 hours every other week).[65] The court then applied the following formula: 26 weekends times 45.5 hours equals 1183 total hours on weekends per year, plus weekly access of 52 times 34 hours equals 1768 hours per year. This equals total access per year of 1183 hours (weekends) plus 1768 hours (weekdays) which is 2951 total access hours per year.[66] The court then divided that by 52 weeks in a year to find an average access per week of 56.75 hours, less than the 67.2 hours per week of a total 168 hours in a week to reach the 40% threshold.[67] Therefore, section 9 did not apply.

3. ELEMENTS OF SECTION 9

In *Contino*, the Court interpreted the wording of section 9 as imperative: once the 40% threshold is met, the court *must* use the three listed factors to structure its discretion in determining the appropriate quantum of child support.[68] As a reminder, the three considerations under section 9 are (emphasis added):

(a) the amounts set out in the *applicable tables* for each of the spouses;
(b) the *increased costs* of shared custody arrangements; and
(c) the *conditions, means, needs and other circumstances* of each spouse and of any child for whom support is sought.

Once the court determines the straight set-off under section 9(a), that amount can be increased or decreased based on the factors in section 9(b) and section 9(c). It is important to note that these factors are meant to work in tandem with each other, not in isolation, as the factors are inextricably linked to each other and the court's conclusion. Thus, while there is value in examining each section individually, that is only a partial representation of what is going on in each context-specific case.[69] For this reason, I will expand on each of the

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64 *F. (J.) v. F. (G.)*, 2016 NBQB 46, 2016 CarswellNB 199, 2016 CarswellNB 200 (N.B. Q.B.) at para. 66 [*J.F. v. G.F.*].

65 *Ibid* at para. 67.

66 *Ibid.*

67 *Ibid.*

68 *Contino*, *supra* note 4 at para. 24.

69 It was too unclear in the decisions to merit statistics on how often which factors were considered and what evidence was led.

sections separately, then put forth a complete analysis that shows how the court applies the section as a whole.

(a) Section 9(a)

Section 9(a) is "the starting point"[70] for a section 9 analysis. All the cases that met the 40% threshold went on to discuss this section. It is relatively straightforward. The court determines what amount each parent would pay the other as if there was no shared parenting arrangement and each parent were seeking full table support from the other, then subtracts the lower number from the higher number.[71] The purpose of section 9(a) is to approximate the average amount a parent would spend on their child based on their incomes. It does not, however, represent the maximum the payor can afford or the minimum that he or she should be required to pay.[72] This starting point emphasizes that, first, both parents must contribute to the support of their child and, second, it reminds the court to consider each parent's fixed and variable costs before making adjustments to reach a fair outcome.[73] However, it has no presumptive value.[74] In particular, when the issue is a variation of support, the set-off often requires adjustment to prevent a "cliff effect," where a parent's support obligation decreases markedly from the table amount by assuming that parent is spending more on the children based on increased time, when this in fact may not be the case at all.[75]

A typical section 9(a) analysis is found in *H. (N.) v. H. (B.)*, where Sandomirsky J. determined the set-off amount under section 9(a) after having ordered a shared parenting arrangement.[76] The mother's income was $88,374, which created a table obligation of $1,578 per month, and the father's income was $41,823, which created a table obligation of $751 per month.[77] The judge subtracted $751 from $1,578 to find that under the straight set-off, the payor mother would pay the father $827 per month.[78] This calculation meets the requirements of section 9(a).

(b) Section 9(b)

Section 9(b) allows the court to increase or decrease the set-off amount based on the allocation of increased costs due to the shared living arrangement. This

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70 *F. (G.) v. F. (J.A.C.)*, 2016 NBCA 21, 2016 CarswellNB 152, 2016 CarswellNB 153 (N.B. C.A.) at para. 14 [*G.F. v. J.A.C.F.*].

71 *Contino*, *supra* note 4 at para. 43.

72 *Ibid* at paras. 47-48.

73 *Ibid* at para. 49.

74 *Ibid.*

75 *Ibid* at para. 41.

76 *H. (N.) v. H. (B.)*, *supra* note 13 at para. 143.

77 *Ibid* at para. 149.

78 *Ibid.*

section recognizes that the costs of raising children in a shared custody arrangement may be greater than in sole custody arrangements, with duplicated costs for housing, food, supplies, and transportation costs between houses.[79] However, a court may not assume that costs are greater in this situation; the parties must provide detailed budgets and child care expenses for each parent to guide analysis.[80] The court can then determine the total amount of expenses attributable to each of the parties and the parents' abilities to pay in accordance with their incomes.[81] The court should then calculate the ratio of income between the parties to determine their abilities to absorb the child's expenses and the increased costs of the parenting arrangement.[82] Next the court examines how much the payor parent is actually already contributing to the child's expenses.[83]

The focus of this section is to discern the increased total costs of caring for the child in the shared parenting arrangement, and to ensure that the child-related expenses are fairly apportioned between the parents based on their incomes. The court can verify that the set-off accounts for this cost or can vary the set-off to apportion the costs fairly if necessary. In this analysis, judges require significant and specific direct evidence of the parents' actual costs attributed to parenting. The following cases show a handful of situations where the court accepted or rejected parents' submissions on the increased costs of shared parenting.

Often, the court examined the parties' submissions on section 9(b) and dismissed the claim for increased costs. For example, in *E. (C.A.) v. C. (S.W.)*, the mother claimed that despite the shared parenting she primarily bore the costs of the children's clothing, food, school supplies (which were expensive due to the children's learning disabilities), and extracurricular costs.[84] Saunders J. found "scant evidence"[85] to support this, and determined that the straight set-off amount met the children's needs.[86] Similarly, in *M. (J.R.) v. H. (K.J.)*, Doulis Prov. J. found no increased costs from shared parenting that merited departing from the set-off.[87] This was despite accepting that childcare costs were greater now that both parties were working to pay their separate housing costs, and that the 20 to 25 minute drive to transport the child between houses was "not trivial."[88] In *McCrate v. McCrate*, the parties did not specifically address the

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79 *Contino*, *supra* note 4 at para. 52.

80 *Ibid.*

81 *Ibid* at paras. 52-53.

82 *Ibid* at para. 78.

83 *Ibid* at para. 52.

84 *E. (C.A.) v. C. (S.W.)*, 2017 BCSC 534, 2017 CarswellBC 892 (B.C. S.C.) at paras. 17-18 [*C.A.E. v. S.W.C.*].

85 *Ibid* at para. 17.

86 *Ibid* at para. 31.

87 *M. (J.R.) v. H. (K.J.)*, *supra* note 48 at para. 82.

88 *Ibid* at paras. 65, 68, 69.

increased costs of shared parenting in their financial disclosure. Jollimore J. determined that each parent paid the girls' expenses when they were in that parent's care, which did not warrant any departure from the set-off.[89]

In *L. (G.J.) v. L. (M.J.)*, Schultes J. ordered the father pay the straight set-off after a detailed accounting of the increased costs of shared parenting outlined in the parties' detailed monthly budgets.[90] The court determined that there were increased costs due to the shared parenting arrangement, but the court did not accept all the parties' claims. For example, the father claimed homeowner insurance, strata fees and utilities as increased costs from the children, but did not show how these would be any lower if the children did not live with him half of the time.[91] The court found that the children's total monthly expenses equaled $3,664.[92] The parents' income ratio was 75:25, and based on this the father would pay $2,748 of these expenses and the mother would pay $916.[93] The difference between those amounts was $1,832, or $207 higher than the straight set-off.[94] However, the court declined to depart from the straight set-off because there was no real disparity in the standards of living in each home and the mother was already benefiting slightly more than the father from their sharing of the children's common expenses.[95]

Masuhara J. accepted in the case of *K. (O.) v. K. (V.)* that the father had incurred additional costs from the shared parenting arrangement, because he was ordered to vacate the family home and find a residence that could accommodate not just him but the two children as well.[96] Although the father claimed these costs, including "new beds, computers, clothing, and moving expenses," the judge found that the sum proposed as additional costs due to shared parenting ($12,000) was an overstatement and set the actual cost under section 9(b) at $4,000.[97] The court therefore determined that the father should pay the set-off, minus $83 per month which amounts to his $4,000 set-up costs amortized over 48 months.[98]

(c) Section 9(c)

Section 9(c) gives the court wide discretion to vary the set-off amount after considering 1) the ability of each parent to bear the increased costs of shared

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89 *McCrate v. McCrate*, *supra* note 19 at para. 81.

90 *L. (G.J.) v. L. (M.J.)*, 2017 BCSC 688, 2017 CarswellBC 1134 (B.C. S.C.) at para. 140, additional reasons 2017 CarswellBC 3799 (B.C. S.C.) [*G.J.L. v. M.J.L.*].

91 *Ibid* at para. 144

92 *Ibid* at para. 149.

93 *Ibid.*

94 *Ibid* at para. 155.

95 *Ibid.*

96 *K. (O.) v. K. (V.)*, *supra* note 14 at para. 96.

97 *Ibid* at para. 97.

98 *Ibid* at para. 101.

custody, and 2) the standard of living for the child(ren) in each of the parents' households.[99] The analysis under this section therefore has two separate focuses: the resources of the parents and the needs of the child(ren). First, the court looks at the parents' circumstances—including their assets, liabilities, and income disparities—to ensure they are each making a fair contribution to the child(ren)'s standard of support.[100] Then the court looks to see whether the parents' circumstances create different standards of living for the child(ren) in the two houses, as *Contino* did not intend for children to suffer a noticeable decline in their standard of living depending on which parent has the child in their care.[101] Thompson suggests that each parent's net disposable income (NDI) per month serves as an appropriate measure of the standard of living in each home, and a 50/50 split of the parents' combined NDIs is fair.[102] Of course, this calculation only applies in bi-nuclear cases, where there are no new spouses, and all the children being supported share their time between homes.[103] The circumstances the court considered significant under section 9(c) included the parties' household incomes, support of other dependents, new spouses and their financial contribution, assets, debts, discretionary spending, employment costs, and income disparities.

(i) No Change to the Set-Off

In *L. (G.J.) v. L. (M.J.)*, Schultes J. found that despite the father's higher income, the parents' standards of living were not disparate: the mother's home was a higher value and her mortgage smaller due to her partner's contribution, the father's vehicle was more valuable, the father had more liquid assets, and the mother's pensions and RRSP totals were somewhat higher.[104] The mother's ability to take the children on vacation was due to her good financial planning, not a reflection of a significantly higher standard of living under her care.[105] Based on these factors, the judge determined that the standards of living would equalize where the father paid the set-off amount in child support.[106]

The court found clear differences in the parties' lifestyles in *E. (C.A.) v. C. (S.W.)*, but still ordered the straight set-off.[107] The mother and her new spouse made a combined income of $95,000, but the court agreed with the father that there was a greater-than-expected standard of living in this household because of co-mingling with the new spouse's corporate accounts for his family business.[108]

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[99] *Contino*, *supra* note 4 at para. 69.

[100] *Ibid* at para. 68.

[101] *Ibid* at para. 51.

[102] Thompson, *supra* note 5.

[103] *Ibid.*

[104] *L. (G.J.) v. L. (M.J.)*, *supra* note 91 at paras. 152-153.

[105] *Ibid* at para. 153.

[106] *Ibid* at para. 155.

[107] *E. (C.A.) v. C. (S.W.)*, *supra* note 85 at paras. 28, 31.

Their home was leveraged by debt but valued at $810,000 before they undertook at $100,000 renovation, and they shared part ownership of a vacation home with a boat.[109] The father and his new partner had a combined income of $200,000, but they maintained separate finances.[110] They lived in a trailer on a 10-acre rural property valued at $512,000, complete with a riding area, barn, and animals the children helped care for.[111] Saunders J. found that one could not conclude that one standard of living was superior to the other, or that the differences were even capable of being quantified and equalized through reapportionment of child support under section 9.[112]

In *M. (J.R.) v. H. (K.J.)*, Doulis Prov. J. considered several factors under section 9(c), but nevertheless concluded that the straight set-off amount "is not going to result in a figure which is unrealistic or undermines the *Guideline* goal of ensuring a consistent standard of living for [the child] across both households."[113] The judge determined that the parties' incomes, expenses, education, and lifestyles were modest but similar, that they paid for childcare equally, that the father bore most of the transportation costs between homes, and that the mother had continued to receive child benefits.[114] In addition, both had recently struggled financially: the mother had lost her job but still had more assets and less debt than the father, while the father had fallen ill, relied on employment insurance and social assistance, and recently declared bankruptcy.[115]

The court found in *Kimmerly v. Hensche* that there was a slight difference in the parties' standards of living, but not enough to warrant varying the set-off amount under section 9(c).[116] The father's combined household income with his new spouse was $124,000, while the mother's was $132,000.[117] Ross J. agreed that there was a slightly higher standard of living at the mother's home, both in income and because the father had three new dependents.[118] However, this slight difference was offset by the mother's debts from a failed business venture, and the judge dismissed the father's claim for undue hardship and a decrease to the set-off founded on the difference in standards of living.[119]

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[108] *Ibid* at para. 25.

[109] *Ibid* at para. 27.

[110] *Ibid* at para. 26.

[111] *Ibid* at para. 27.

[112] *Ibid* at para. 28.

[113] *M. (J.R.) v. H. (K.J.)*, *supra* note 48 at para. 82.

[114] *Ibid.*

[115] *Ibid.*

[116] *Kimmerly v. Henschel*, 2016 ABQB 540, 2016 CarswellAlta 1849 (Alta. Q.B.) at para. 26 [*Kimmerly v. Henschel*].

[117] *Ibid* at para. 19.

[118] *Ibid* at para. 21.

[119] *Ibid* at para. 25.

In *Simms v. Brown*, Robertson J. found the section 9(c) factors did not merit varying the set-off amount.[120] This was partially because the father refused to file satisfactory financial disclosure. While the judge could find that the household incomes were relatively similar, she could not determine how much of the father's new spouse's income satisfied their household expenses, nor how much of the father's income was spent on his new step-child who lived with him.[121]

(ii) Increase from Set-Off

Doulis Prov. J considered factors under section 9(c) in *S. (C.M.) v. W. (J.R.)*, when evaluating whether a retroactive variation award was appropriate for the now-20-year-old son of the relationship who had transitioned to a shared parenting arrangement in his teens.[122] The father had continued to pay the table amount based on his reported income ($187 per month).[123] With regard to the section 9(c) factors, the judge considered that the mother's income had steadily increased while the father's income had steadily decreased as he focused on his partnership with his new spouse that acquired, renovated, and rented residential properties, which provided little income at present but promised to be a lucrative asset in the future.[124] Furthermore, neither parent's household expenses were unreasonable, although the father's were slightly higher because he had four children and childcare expenses, while the mother had three children and no childcare expenses.[125] The judge concluded that the father should have been paying $269 per month based on his imputed income, such that the difference between the support the father was owed from the mother due to section 9 considerations and the support he had paid was nominal.[126] A retroactive award to the father was not appropriate.[127]

In *V. (R.A.) v. M. (J.M.)*, Arnold-Bailey J. ordered the father to pay a higher amount than the set-off because the child enjoyed a "slightly enhanced" standard of living at his father's home.[128] The father's income had increased over the last four years from $150,000 to $330,000, while the mother's had only increased from $86,000 to $93,000.[129] The judge determined that the mother

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[120] *Simms v. Brown*, 2016 ONSC 6125, 2016 CarswellOnt 15437 (Ont. S.C.J.) at para. 125 [*Simms v. Brown*].

[121] *Ibid* at paras. 120-121.

[122] *S. (C.M.) v. W. (J.R.)*, 2016 BCPC 425, 2016 CarswellBC 3695 (B.C. Prov. Ct.) at para. 108 [*C.M.S. v. J.R.W.*].

[123] *Ibid* at para. 87.

[124] *Ibid* at para. 102.

[125] *Ibid.*

[126] *Ibid* at para. 107.

[127] *Ibid* at para. 108.

[128] *V. (R.A.) v. M. (J.M.)*, 2016 BCSC 1377, 2016 CarswellBC 2064 (B.C. S.C.) at paras. 107-108, additional reasons 2017 CarswellBC 1002 (B.C. S.C.) [*R.A.V. v. J.M.M.*].

[129] *Ibid* at paras. 18-19.

received a small financial benefit from financial contributions from her new partner, but their finances remained largely separate and did not directly contribute to the child's support.[130] Her home was valued at $919,400 and was mortgaged for $424,162, and apart from RRSPs in the amount of approximately $145,000, she had no other assets, with some credit card debt.[131] The father, however, owned a house valued at $1,250,000 with a $710,989 mortgage, and his other assets included multiple expensive vehicles and RRSPs amounting to approximately $1,963,000, and his debts totaled $720,000.[132] The judge found the father's greater financial resources were "likely to translate into an appreciably enhanced lifestyle for the Child when he is with his father," resulting in a higher standard of living.[133] The father was ordered to pay $900 per month rather than the set-off of $600 per month to equalize the standard of living between the parents' homes.[134]

Jollimore J. used section 9(c) to increase the father's support obligation from the set-off amount in *McCrate v. McCrate*.[135] The father's income ($112,374) was more than double the mother's income ($49,363), and the mother assumed more costs for the children's medical and dental costs, clothing purchases, and extra-curricular expenses.[136] The father's budget showed he was spending more than the mother could afford on groceries and clothing, and his budget provided for twice as much toward entertainment and vacations.[137] Both parents were searching for new houses, having just sold the matrimonial home, so it was unknown how this would affect the children's standards of living.[138] However, the father had retained ownership of the cottage, with an above-ground pool and bunkhouse for the children's enjoyment.[139] The judge found that while the set-off amount compensated the mother for direct parenting costs she alone bore for the children, it would not allow her to maintain a similar level of comfort for the children.[140] Therefore, the court ordered the father to pay support in the amount of $1,700 per month rather than the set-off amount of $1,153.[141]

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[130] *Ibid* at para. 96.

[131] *Ibid* at para. 98.

[132] *Ibid* at para. 105.

[133] *Ibid* at para. 107.

[134] *Ibid* at para. 108.

[135] *McCrate v. McCrate*, *supra* note 19 at para. 95.

[136] *Ibid* at paras. 88, 91.

[137] *Ibid* at para. 90.

[138] *Ibid* at para. 89.

[139] *Ibid.*

[140] *Ibid* at para. 95.

[141] *Ibid.*

(iii) Decrease from Set-Off

In *Aguirre v. Aguirre*, Doyle J. relied largely on section 9(c) to find no child support payable.[142] While the mother's income was higher ($45,000) than the father's ($28,000), which should have resulted in a support obligation, the judge acknowledged that the father received benefits from his family that supplemented his income, while the mother was supporting three children from a previous relationship without support from the other children's father.[143] Therefore, a decrease to the set-off was appropriate to adjust the mother's monthly obligation.

The court decreased the set-off amount in *McKale v. McKale*, because of section 9(b) and section 9(c) considered together.[144] Under section 9(c), Johnston J. found that both parties were struggling financially.[145] However, the father's struggle was temporary and due to re-training to find employment in the social work field.[146] By contrast, the mother's struggle was not temporary and she was having difficulty paying the mortgage, utilities, and household expenses required for the children's standard of living.[147] The mother was also supporting an adult daughter from a previous relationship who was unable to support herself while pursuing post-secondary education, so the judge had to balance her obligation to other children along with this child.[148] Therefore, the court reduced the mother's child support obligation from $788 per month to $750 per month.[149]

(d) Complete section 9 Analysis

The Alberta case of *Walker v. Walker* illustrates a complete section 9 analysis. This is a complex case both due to the variation (creating concerns about a "cliff effect") and due to the father's high income (implicating section 4 considerations). The case shows how the section 9 factors work together in the court's analysis of the appropriate child support amount. Here, the parties shared custody and parenting time of their 14-year-old son.[150] The father applied to vary his child support obligation, which was based on a consent order that required him to pay the table amount as if the child lived primarily with the mother (currently $6,367 per month) and set to increase incrementally based on

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[142] *Aguirre v. Aguirre*, 2016 ONSC 4650, 2016 CarswellOnt 11459 (Ont. S.C.J.) at para. 170, additional reasons 2016 CarswellOnt 13680 (Ont. S.C.J.) [*Aguirre v. Aguirre*].

[143] *Ibid* at para. 169.

[144] *McKale v. McKale*, 2016 ONSC 1518, 2016 CarswellOnt 3049 (Ont. S.C.J.) at para. 29 [*McKale v. McKale*].

[145] *Ibid.*

[146] *Ibid.*

[147] *Ibid.*

[148] *Ibid* at paras. 25-26.

[149] *Ibid* at para. 30.

[150] *Walker v. Walker*, 2016 ABQB 181, 2016 CarswellAlta 993 (Alta. Q.B.) at para. 2 [*Walker v. Walker*].

his projected income per year.[151] However, his income had not increased as expected and he sought to vary his obligation based on section 9.[152]

First, under section 9(a) McCarthy J. determined the father's current income was $712,720, while the mother's income was only $47,700, which resulted in the father's set-off obligation of $5,983 per month.[153]

Under section 9(b), the judge then relied on the parents' expense reports to determine that they spent a combined $6,285 per month on the child.[154] McCarthy J. then found that based on their income ratios, where the father made 94.73% of the parties' combined income, the father should pay 95% of the child's expenses, or $5,971.[155] Since the father already paid $1,886 while the child was in his care, this meant that he should be paying the mother $4,085 to cover the remainder of his share of the child's expenses.[156] The judge then verified the actual costs the parents were expending on the child: the father was currently contributing $8,253 per month ($6,367 in child support paid to the mother plus $1,886 in child costs paid directly), much more than his table obligation or the child's actual expenses in a month.[157]

Under section 9(c), McCarthy J. first examined the circumstances of each parent. The mother's budget was not "entirely unreasonable" because it was based on her expectation of receiving full table support from the father, and the judge acknowledged her fixed costs and debt payments from lines of credit she took out to support the child in the past.[158] The high amount the father was paying for the child's support had to be examined in the context that he had greater ability to absorb the increased costs of shared parenting than the mother, but that he also had a new spouse and dependents to support.[159] In addition, the judge was not satisfied the child experienced a significant variation in standard of living between his parents' homes.[160]

Based on fairness and flexibility, McCarthy J. fixed the father's support obligation at $5,000 per month, which still exceeded the child's actual needs and discretionary expenses.[161] This case illustrates how difficult it is to examine one factor of section 9 in isolation of the others.

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[151] *Ibid* at para. 4.

[152] *Ibid.*

[153] *Ibid* at para. 37.

[154] *Ibid* at para. 39.

[155] *Ibid* at para. 41.

[156] *Ibid* at para. 42.

[157] *Ibid.*

[158] *Ibid* at para. 45.

[159] *Ibid.*

[160] *Ibid* at para. 46.

[161] *Ibid* at para. 53.

4. RESULTING QUANTUM OF SUPPORT

When it came to awarding the quantum of child support payable, the majority of cases (85%) awarded the straight set-off amount, with no adjustment based on the section 9(b) or section 9(c) criteria. A small percentage (6%) awarded an amount higher than the set-off, and a slightly larger percentage (9%) awarded an amount lower than the set-off, based on the section 9 factors.

Table 4: Of the 45 non-hybrid cases that engaged section 9 and determined a quantum in relation to the set-off amount, what quantum of support was prospectively awarded by the court for the children in a shared parenting arrangement?

Province or Territory	Straight Set-off	Higher than set-off	Lower than set-off
British Columbia	16	2	1
Alberta	4	0	1
Saskatchewan	3	0	0
Ontario	10	1	2
New Brunswick	1	0	0
Nova Scotia	3	0	0
Newfoundland & Labrador	1	0	0
TOTAL (Number)	**38**	**3**	**4**
TOTAL (Percentage)	**85%**	**6%**	**9%**

(a) Straight Set-Off

In 38 (85%) of the cases, the judge ultimately ordered the parents to pay the straight set-off amount after considering section 9, with varying degrees of attention to each subsection. It is significant that the vast majority of cases resolve with this resulting quantum, as will be further explored in Part VI of this paper. In the majority of these cases (79%), the court determined the straight set-off amount was appropriate by considering section 9, with varying degrees of attention to each subsection.[162] In a minority of these straight set-off cases (21%), the court ordered the straight set-off amount because the parties agreed to it, whether overtly[163] or by declining to lead evidence for the court to weigh the section 9(b) and section 9(c) factors.[164] Sometimes, the parents suggested this

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[162] See e.g. *Yeung v. Silva*, 2016 BCSC 1682, 2016 CarswellBC 2530 (B.C. S.C.) at para. 88 [*Yeung v. Silva*].

[163] See e.g. *Jackson v. Jackson*, 2017 ONSC 1566, 2017 CarswellOnt 5929 (Ont. S.C.J.), additional reasons 2017 CarswellOnt 11837 (Ont. S.C.J.).

was the appropriate amount payable,[165] often to avoid the cost and time of putting forth evidence on the additional section 9 factors.[166] Sometimes the parents agreed to the straight set-off in in a previous separation agreement or court order and the court concluded this amount was still appropriate.[167] In the following two cases, the straight set-off resulted in zero support payable.

In *Nderitu v. Kamoji*, the parties' incomes were too similar to warrant a prospective child support order. Shelston J. determined that for the current year, the mother's income was $72,762 and the father's income was $72,000.[168] Since both parties had approximately the same income, no child support was payable under the set-off.[169] Additionally, the court found the set-off amount for the two previous years left the father in arrears in the amount of $1,614, which the father would pay in a lump sum following this order to end their financial relationship and minimize conflict between the parties.[170]

Cole J. found that the parties' incomes for support purposes were relatively equal and did not merit a support order in *MacDonald v. Burnett*. The father had applied to vary child support set out in the parties' separation agreement, as he alleged the children's standard of living at the mother's home was greater.[171] The judge determined the mother's income was $77,518, while the father's reported income was only $31,926 because he had been laid off from his company and begun working as a self-employed electrician rather than earning his previous salary which was approximately equal to the mother's.[172] However, the judge imputed income of $70,000 to the father because his unwillingness to travel outside of his home county to jobs available within an hour's drive was unreasonable, even if it was based on good intentions to be available to pick the children up from school.[173] He still had a responsibility to provide for them financially, and if he widened his work area, his income would increase to approximately the same level as before.[174] Based on that imputed income, the

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[164] See e.g. *Fawcett v. Fawcett*, 2016 ONSC 5331, 2016 CarswellOnt 21893 (Ont. S.C.J.), affirmed 2018 CarswellOnt 2201 (Ont. C.A.).

[165] See e.g. *S. (J.A.) v. S. (A.C.)*, *supra* note 17 at para. 55.

[166] See e.g. *S. (T.N.) v. G. (T.L.)*, 2016 BCSC 2312, 2016 CarswellBC 3538 (B.C. S.C.) at para. 298 [*T.N.S. v. T.L.G.*].

[167] See e.g. *Forliti v. Forliti*, 2016 BCSC 743, 2016 CarswellBC 1140 (B.C. S.C.) at para. 316 [*Forliti v. Forliti*].

[168] *Nderitu v. Kamoji*, 2017 ONSC 2617, 2017 CarswellOnt 8107 (Ont. S.C.J.) at para. 96, additional reasons 2017 CarswellOnt 11077 (Ont. S.C.J.) [*Nderitu v. Kamoji*].

[169] *Ibid* at para. 110.

[170] *Ibid* at para. 114.

[171] *MacDonald v. Burnett*, 2016 BCSC 2229, 2016 CarswellBC 3364 (B.C. S.C.) at para. 2 [*MacDonald v. Burnett*].

[172] *Ibid* at paras. 7, 21.

[173] *Ibid* at para. 23.

[174] *Ibid.*

relevant set-off was $0 based on section 9(a), and the parties had not submitted financial disclosure to vary that.[175]

(b) Higher than Set-Off

In three (6%) of these non-hybrid cases, the court used its discretion under section 9(b) and section 9(c) to order an amount payable higher than the straight set-off determined under section 9(a). In these cases, the court's reasons for ordering a higher amount of child support included high income payors, status quo, and equalizing standards of living in both parents' homes.

In *Van Heighten v. Catarino*, Clay J. varied the parenting arrangement set out in the parties' separation agreement. Under the new arrangement, the parties still shared nearly equal time with their son, but the mother had him in her care on most school nights in order to provide the child with greater consistency.[176] The father's income was $69,200 and the mother's modest income from accident insurance was $13,411.[177] Under section 9(c), the judge found that the income disparity required the father to pay the set-off amount plus an additional $100[178] per month to address the increased costs of shared custody.[179] Clay J. specified that in the future, the parties should determine the set-off amount based on their income tax returns, and then add $100 per month to the amount payable, so the parties could easily re-calculate prospective child support themselves in the future without returning to court.[180]

Pearlman J. granted the father's application for shared parenting in *S. (E.L.) v. S. (C.A.)*, since his new work schedule allowed him to care for the children more days per week.[181] When the parties had first separated, the father's work schedule meant that the two children resided primarily with the mother, so the father paid her the table amount in child support.[182] At variation, the father's imputed income for support purposes (due to rental income) was $92,506 and the mother's income was $83,919, creating table support obligations of $1,378 and $1,264, respectively.[183] Despite the change in parenting time, after considering the factors under section 9(b) and section 9(c), Pearlman J. found that reducing the father's support payments to the set-off amount of $114 "would undermine [the mother's] ability to bear the costs required to maintain the modest but comfortable standard of living the children enjoy while in her care."[184]

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[175] *Ibid* at para. 26.

[176] *Van Heighten v. Catarino*, *supra* note 38 at para. 106.

[177] *Ibid* at para. 113.

[178] The court does not give additional reasons for this figure.

[179] *Ibid* at para. 115.

[180] *Ibid* at para. 116.

[181] *S. (E.L.) v. S. (C.A.)*, *supra* note 31 at para. 6.

[182] *Ibid* at para. 5.

[183] *Ibid* at para. 96.

[184] *Ibid* at para. 108.

Therefore, the father was ordered to continue paying the full table amount of $1,378, despite the shared parenting arrangement.[185]

In *V. (R.A.) v. M. (J.M.)*, the parties had previously agreed that the father would pay $400 per month in support, an amount below the set-off amount of $521 per month.[186] While both parties' incomes had increased, the father's had increased much more (from $150,000 to $330,443) compared to the mother's (from $86,000 to $93,569).[187] The judge took into account the slightly higher standard of living the child would enjoy at his father's home, the parents' increased incomes, the previous agreement, and payments made in the past. Ultimately, Arnold-Bailey J. made a "fair and flexible" determination that the father should pay $900 per month in child support, rather than the set-off amount of $600 per month.[188]

(c) Lower than Set-Off

In four (9%)[189] of these cases, the court ordered child support payable at an amount lower than the straight set-off. In these cases, the reductions from the set-off are very minor and nearly insignificant.

In *S. (M.) v. S. (E.J.)*, the parties shared parenting time of their two teenagers.[190] Murray J. imputed income to both parents and determined that, under the set-off, the father would be responsible for paying the mother $393 per month, based on the mother's imputed income of $72,000 and the father's income of $100,541.[191] However, because of the factors in section 9 (the court did not elaborate), especially the discrepancy in the costs to the parties of maintaining their households, the judge decreased this obligation to $350 per month.[192]

In *Marrello v. Marrello*, the court found that the set-off amount was too minimal to warrant a support order.[193] The set-off yielded a mere $33 per month payable by the mother.[194] Because this nominal amount "will not have a significant financial impact but will give rise to administrative costs and possible

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[185] *Ibid* at para. 111.

[186] *V. (R.A.) v. M. (J.M.)*, *supra* note 129 at paras. 12-13.

[187] *Ibid* at para. 18.

[188] *Ibid* at paras. 107-108.

[189] Two of these cases are outlined below. The third and fourth are *Aguirre v. Aguirre*, *supra* note 143, and *Walker v. Walker*, *supra* note 151.

[190] *S. (M.) v. S. (E.J.)*, 2017 BCSC 564, 2017 CarswellBC 927 (B.C. S.C.) at para. 49 [*M.S. v. E.J.S.*].

[191] *Ibid* at paras. 137, 142, 148.

[192] *Ibid* at paras. 149-150.

[193] *Marrello v. Marrello*, 2016 ONSC 835, 2016 CarswellOnt 1728 (Ont. S.C.J.) at para. 192, additional reasons 2016 CarswellOnt 4097 (Ont. S.C.J.) [*Marrello v. Marrello*].

[194] *Ibid.*

points of conflict between the parties that are not in [the child's] interests", under section 9(c), the court found no support was payable in these circumstances.[195]

(d) Other Amount of Support Ordered

In five additional cases, the court declined to make a finding on the appropriate quantum of support, either by remitting back to the trial court for that finding, or by adjourning the proceedings until the parents provided sufficient disclosure to allow the court to complete a section 9 analysis. In two cases, the court ordered some other amount of support for a shared parenting arrangement, not based on the set-off at all. In the one remaining case, the court made some other arrangement that was so specific to the individual parties that the order was statistically insignificant.[196]

(i) No quantum finding made

In *F. (G.) v. F. (J.A.C.)*, the New Brunswick Court of Appeal determined that the trial court had erred in law by failing to consider the mandatory criteria set out in section 9(b) and section 9(c) before ordering the set-off amount of child support, and remitted the case back to the trial court.[197] The appellate court emphasized that it was mandatory under section 9 to consider "the budgets of the respective parties, the incomes of new partners, to review s. 7 expenses, to compare the households' standards of living, and other financial information that permits for a meaningful analysis."[198]

Similarly, the Newfoundland and Labrador Court of Appeal found in *C. (S.) v. H. (S.)* that the trial court had erred by finding the father did not meet the 40% threshold.[199] Having established that section 9 was engaged, it remitted the case back to the trial court because consideration of the section 9 factors on the evidence "is a matter properly undertaken by the trial judge."[200]

In *Jellis v. Jellis*, Hinckson J. found that the parties' financial disclosure was "so inadequate" and "less than forthcoming" that the judge adjourned the child support portion of the proceedings until the parties could make sufficient disclosure so the court could complete a *Contino* analysis on a proper evidentiary record.[201]

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[195] *Ibid.*

[196] In this final case, the court found that section 9 was no longer applicable. The new order in *Simms v. Brown*, *supra* note 121, changed the parenting arrangement from shared custody to primary residence with the mother due to the parents' continuing hostilities toward each other. The court dismissed the father's claim that he should continue to pay support based on the set-off under section 9. Section 9 was no longer applicable to the parenting arrangement, so the court ordered the father to begin paying full table support for the two children.

[197] *F. (G.) v. F. (J.A.C.)*, *supra* note 71 at para. 12.

[198] *Ibid* at para. 14.

[199] *C. (S.) v. H. (S.)*, *supra* note 33 at para. 11.

[200] *Ibid* at para. 12.

The judge adjourned the child support determination to a later date in *L. (P.) c. D. (M.)*. These parents lived 2.5 hours apart (in Rimouski, Quebec, and Campbelltown, New Brunswick), and Landry J. ordered the child to share equal time with both parents until he started school.[202] The child support issue was complicated by the father claiming an imputed income to the mother and difficulties with improper pleadings.[203] Given these complexities, and since the parties would likely have to come back to court to decide where the child would live primarily when he began school anyway, the judge adjourned the determination of child support until that time.[204]

Similarly, in *Richard v. Welner*, the court postponed determination of the child support quantum until the parties' situation clarified. D'Entremont J. had dismissed the mother's application to relocate with the child. Until she decided whether to stay in the same city as the child and share parenting with the father or relocate by herself without the child, the judge could not know whether to apply section 9 or section 3 to her child support obligation, so there was insufficient evidence to order child support until the mother acted.[205]

(ii) No support payable

Doyle J. determined that the 17-year-old son with severe autism in *Brown v. Rowe* was fully supported by his ODSP benefits, which the parents would share equally to provide him with food, shelter, and clothing, so no additional child support order under section 9 was necessary.[206]

In *S. (C.M.) v. W. (J.R.)*, Doulis Prov. J. was asked to determine retroactive support obligations for a 20-year-old independent child no longer in need of support.[207] He had lived in a shared parenting arrangement in his teens without the parents adjusting the child support payable.[208] Based on the set-off calculation, the father had overpaid the mother in those five years.[209] However, the father had not sought a retroactive child support order and such an order was discretionary, so the judge declined to make such an order.[210] It appears that

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[201] *Jellis v. Jellis*, 2016 BCSC 2270, 2016 CarswellBC 3411 (B.C. S.C.) at para. 30 [*Jellis v. Jellis*].

[202] *L. (P.) c. D. (M.)*, 2017 NBQB 79, 2017 CarswellNB 195, 2017 CarswellNB 227 (N.B. Q.B.) at paras. 1 and 52 [*P.L. v. M.D.*].

[203] *Ibid* at paras. 63-64.

[204] *Ibid* at paras. 65-66.

[205] *Richard v. Welner*, 2016 NBQB 137, 2016 CarswellNB 377 (N.B. Q.B.) at para. 70 [*Richard v. Welner*].

[206] *Brown v. Rowe*, 2016 ONSC 5153, 2016 CarswellOnt 13082 (Ont. S.C.J.) at para. 125 [*Brown v. Rowe*].

[207] *S. (C.M.) v. W. (J.R.)*, *supra* note 123 at para. 6.

[208] *Ibid* at para. 44.

[209] *Ibid* at para. 88.

[210] *Ibid* at para. 108.

Doulis Prov. J. made this decision partly to minimize the parents' further contact (and thus, conflict) with one another.

5. SPECIAL TREATMENT FOR HYBRID PARENTING ARRANGEMENTS

A small number (11%) of these shared parenting cases raised the issue of "hybrid parenting", where one or more children are in a shared parenting arrangement, and one or more children live primarily with only one of the parents, rather than with both.

Table 5: Of the 61 cases that engaged section 9, how many of them involved hybrid parenting arrangements?

Province	**Yes**		**No**	
	Number	**Percentage**	**Number**	**Percentage**
British Columbia	2	8%	22	92%
Alberta	0	0%	5	100%
Saskatchewan	1	25%	3	75%
Ontario	2	12%	15	88%
New Brunswick	0	0%	4	100%
Nova Scotia	1	25%	3	75%
Newfoundland & Labrador	1	33%	2	67%
TOTAL (61 cases)	**8**	**11%**	**54**	**89%**

There are two approaches for calculating support available to the court in this situation: the "economies of scale" approach and the "two-step" approach.[211] Generally, the "economies of scale" approach is favoured in Ontario, British Columbia, New Brunswick, and Newfoundland and Labrador while the "two-step" approach is favoured in Saskatchewan, Yukon, and the Northwest Territories.[212] The recent cases, however, do not always clearly state which method is being used.

(a) "Economies of Scale" Approach

The "economies of scale" approach is based on the concept that economies of scale are built into the *Guidelines*. For example, the table amount payable for two children is less than two times the table amount payable for one child because there are certain expenses that do not change whether there is one child or three. For example, the Ontario table amount payable by a parent with an

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[211] See Thompson, *supra* note 5.

[212] *Harrison v. Falkenham*, *supra* note 18 at para. 30.

income of $50,000 would be $461 per month for one child, but $755 per month for two children, or $294 per month for the second child.

Under this approach, the court applies section 9 using the different table amounts for each parent's situation depending on how many children are in their care. For example, consider a situation where one child lives primarily with the father and the second child lives with both parents equally. The proper support figure would be the mother's table amount for two children and the father's table amount for one child. If the father's income is $50,000 and the mother's income is $70,000, the father's Ontario table amount for one child is $461 and the mother's for two children is $1,067 per month. The mother would therefore owe a set-off of $606 per month. Then the court may adjust the set-off amount payable using section 9(b) and section 9(c) to reach a fair quantum.

In the Ontario case of *Smith v. Smith*, the eldest daughter lived primarily with the mother, while the younger two daughters were in a shared parenting arrangement.[213] Fitzpatrick J. explicitly chose to follow the "economies of scale" approach, because "the guiding objective must be to set child support in an amount that ensures that the children do not suffer markedly different experiences flowing from financial disparities between each parent."[214] The judge then calculated the father's table obligation for three children and the mother's obligation for two children to find the straight set-off amount payable by the father to the mother was $2,251.[215] Combined with the spousal support payable, this meant that the mother's household would have 55% of the family's net disposable income, which was appropriate because the eldest child resided primarily with her, so the straight set-off amount did not need adjustment.[216]

In *McKale v. McKale*, an Ontario court appears to use an adjusted "economies of scale" approach. No support had been payable on separation because both children resided equally with both parties who had similar incomes.[217] However, six months after separation, the older son began living primarily with the father, while the younger son continued to spend equal time with both parents.[218] Johnston J. first determined the straight set-off for the shared child would result in the mother paying the father $788 per month given her obligation of $1,057 (support for two children based on her income of $71,374) and his obligation of $269 (support for one child based on an imputed income of $32,000).[219] The judge then moved on to discuss section 9(b) factors, including the mother's difficulties paying her new mortgage and utilities to keep a

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[213] *Smith v. Smith*, 2016 ONSC 1157, 2016 CarswellOnt 2326 (Ont. S.C.J.) at para. 6 [*Smith v. Smith*].

[214] *Ibid* at para. 118.

[215] *Ibid* at para. 125.

[216] *Ibid.*

[217] *McKale v. McKale*, *supra* note 145 at para. 4.

[218] *Ibid* at para. 11

[219] *Ibid* at para. 21.

home for the children.[220] Then the judge examined section 9(c) factors based on financial statements filed by the parties that demonstrated they had both suffered financial hardship since the separation.[221] The mother was supporting children of a previous relationship, and the father had lost his employment through no fault of his own and was relying on RRSPs and public assistance to meet his financial obligations, although he had been less than forthcoming with his financial disclosure.[222] While both parties had reasonable debt and expenses, the mother was struggling financially more than the father.[223] The judge noted that the straight set-off was inappropriate given the section 9(b) and section 9(c) factors, but that the mother still "must contribute the guideline amount for one child and something towards support of Ryan, because the child requires support."[224] Johnston J. then concluded that the mother should pay $650 per month for the child living primarily with the father, plus an additional $100 for the shared child, so her support obligation for both children was fixed at $750 per month.[225]

In Nova Scotia, Jollimore J. calculated child support in *Harrison v. Falkenham* for a period of time where the youngest daughter lived in a shared parenting arrangement while the son lived primarily with the mother.[226] Jollimore J. specifically employed the "economies of scale" approach: first, she determined the amount of support the father would pay the mother for the daughter and son's support, then she offset this against the amount the mother would pay the father for the daughter in shared custody, and then she completed the section 9 analysis by considering section 9(b) and section 9(c).[227] The court ordered the straight set-off was appropriate, as neither party produced evidence of the increased costs of shared parenting, and their conditions, means, and other circumstances were similar.[228]

In *T. (P.) v. T. (K.)*, a British Columbia judge assessed child support for a short-term hybrid arrangement. The daughter was in the mother's primary care and the son was in a shared parenting arrangement while the daughter received therapy before she hopefully transitioned into a shared parenting arrangement as well.[229] Based on the father's income of $214,000 and the mother's imputed income of $63,797 from underemployment and the proceeds from a damages award she received previously, "the length of the Parties' marriage, their ages, the

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[220] *Ibid* at para. 23.

[221] *Ibid* at paras. 27.

[222] *Ibid* at paras. 27-28.

[223] *Ibid* at para. 27.

[224] *Ibid* at para. 29.

[225] *Ibid* at para. 30.

[226] *Harrison v. Falkenham*, *supra* note 18 at paras. 21-22.

[227] *Ibid* at para. 33.

[228] *Ibid* at paras. 64-66.

[229] *T. (P.) v. T. (K.)*, 2016 BCSC 2367, 2016 CarswellBC 3591 (B.C. S.C.) at para. 217 [*P.T. v. K.T.*].

assumption that A. will, in the short term, be with her mother and that C will spend his time equally with his parents, the various tax credits I have alluded to and other assumptions,"[230] Voith J. determined the father should pay the straight set-off of $2,188 per month for child support.[231] This appears to use the "economies of scale" approach, as only section 9 is considered, not section 3 (as would be mentioned under the "two-step" approach).

In another British Columbia case, Masuhara J. determined child support for two children where the son lived primarily with the mother and the daughter shared her time equally between both parents in *K. (O.) v. K. (V.)*.[232] The judge used the straight set-off amount of the father's table amount payable for two children and the mother's table amount payable for one child to find the set-off payable by the father to the mother was $1,083.[233] Then the court reduced the father's obligation by $83 per month based on increased expenses for setting up a new home to arrive at the child support payment of approximately $1,000 per month prospectively.[234]

(b) "Two-Step" Approach

The "two-step" approach applies a combination of section 3 and section 9 to the parenting arrangement. Under this approach, the court first calculates the full table amount payable for the child(ren) in the other parent's primary care under section 3, then separately determines the set-off amount payable for the child(ren) in a shared arrangement under section 9, using the one-child table amounts again, and then adds these numbers together to determine the total amount payable. For example, if one child lives primarily with the father and the second child lives with both parents equally, the court would first determine the mother's table support obligation for one child living primarily with the father, and then perform the set-off calculation under section 9 for the second child living in a shared arrangement. As above, consider the father's income is $50,000 and the mother's income is $70,000. At step one the court would determine that the mother's obligation to support the first child would be $654 per month. Then at step two the court would determine that the mother's table amount for the second child would be $654 per month (again, the one-child table amount) and the father's would be $461 per month, so the set-off amount for this child would be $193 per month. Assuming no adjustment under the section 9(b) or section 9(c) factors for the second child, the mother's combined support obligation for the two children would therefore be $847 per month. This would be significantly higher than her $606 per month obligation under the "economies of scale" approach.

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[230] *Ibid* at para. 228.

[231] *Ibid.*

[232] *K. (O.) v. K. (V.)*, *supra* note 14 at para. 83.

[233] *Ibid* at para. 101.

[234] *Ibid.*

In *Burgess v. Burgess*, the Newfoundland Court of Appeal used the two-step approach. The parties agreed in a separation agreement that no child support would be payable given similar incomes and equal parenting time; however, the daughter had since begun living primarily with the mother while the son remained in a shared parenting arrangement.[235] The mother applied for child support given the changed custody arrangement and the father's increased income since separation.[236] The province's appellate court found that the trial judge had erred twice: first by finding there was no change in circumstance with regard to the son, so no child support was payable for him based on the separation agreement, and second by finding that child support for the daughter should be calculated using the set-off method under section 9.[237] There had been a material change in circumstances to warrant changing child support payable for the son because of the father's increased income, and calculating the set-off amount would account for the discrepancy in the parents' incomes.[238] Additionally, the daughter was not in a shared parenting arrangement, so section 9 was not applicable to her; instead, the table amount for one child applied to her.[239] Welsh J.A. therefore employed the "two-step" approach in this hybrid parenting arrangement, but remitted the case to the trial judge for re-calculation, so information on the actual quantum of support ordered is not available.

Sitting in Saskatchewan, Goebel J. explicitly utilized the "two-step" approach in *Keast v. Keast*. Here, the older son resided primarily with the father and the younger son shared his time equally between parents.[240] The judge specifically chose the "two-step" approach as more persuasive, not only because of its established use in Saskatchewan, but because "it is the most consistent with the principles and language employed by the *Guidelines*.[241] For example, under section 3 the primary caregiver's income is irrelevant to the determination of support payable for the child, a fundamental characteristic which goes unheeded under the "economies of scale" approach.[242] Based on the mother's income of $125,000, Goebel J. first determined the mother's support payable under section 3 for the son who lived primarily with his father as $1,051 per month.[243] Then, the second step determined the straight set-off between the parents' incomes for

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[235] *Burgess v. Burgess*, 2016 NLCA 11, 2016 CarswellNfld 92 (N.L. C.A.) at para. 3 [*Burgess v. Burgess*].

[236] *Ibid.*

[237] *Ibid* at paras. 12, 14.

[238] *Ibid* at para. 12.

[239] *Ibid* at para. 13.

[240] *Keast v. Keast*, 2016 SKQB 124, 2016 CarswellSask 265 (Sask. Q.B.) at para. 1 [*Keast v. Keast*].

[241] *Ibid* at para. 21.

[242] *Ibid.*

[243] *Ibid* at para. 24.

the second son in a shared parenting arrangement, which given the father's income of $93,700 was $263 per month payable by the mother.[244] Together, the mother would pay the father $1,314 per month.[245] However, due to considerations under section 9(b) and section 9(c), "the *Guidelines*, the tables, the various support scenarios and the evidence filed by both parties," the judge then reduced the obligation to $1,200 per month.[246] The judge noted that the decision was "mindful of the economies of scale built into the table amounts and their impact upon the bottom line standard of living in each home."[247] By contrast, if the judge had utilized the "economies of scale" approach, the father's table obligation for one child would be $804 per month and the mother's table obligation for the two children would be $1,723 per month, so the mother's set-off obligation would be only $919 per month.[248]

In British Columbia, the court used the "two-step" approach in *Younger v. Younger*. The children were aged 21 (in post-secondary education) and 17 (in high-school, living in a shared parenting arrangement).[249] Because the older child lived at school most of the time and was employed during the summers, Grauer J. found it would be inappropriate to calculate child support for him under section 9, and used section 3(2)(b) instead.[250] The father was a very high-income earner, making at least $765,497 per year, and while the mother had no taxable income, the court found her under-employed and imputed an income of $25,000 to her.[251] The judge found that under section 4, the father had not proven that income over $150,000 displaced the presumption that the table amounts should apply.[252] The parties did not lead evidence to allow for a section 9(b) or section 9(c) analysis,[253] but the judge found that given the father's vastly superior resources, it was appropriate to calculate the table support he would pay the mother for two children: $9,859 per month.[254] Grauer J. declined to decrease this amount based on shared parenting of the younger child, and found that any evidence led under section 9(b) or section 9(c) was unlikely to make a difference given the income disparities.[255] However, the judge did decrease the monthly

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[244] *Ibid.*

[245] *Ibid.*

[246] *Ibid* at para. 27.

[247] *Ibid* at para. 25.

[248] Note: these alternative calculations use the current *Guidelines*, which may differ slightly from the 2016 *Guidelines*.

[249] *Younger v. Younger*, 2016 BCSC 990, 2016 CarswellBC 1516 (B.C. S.C.) at paras. 28-29 [*Younger v. Younger*].

[250] *Ibid* at para. 39.

[251] *Ibid* at paras. 40, 46.

[252] *Ibid* at para. 48.

[253] *Ibid* at para. 51.

[254] *Ibid* at para. 49.

[255] *Ibid* at paras. 50-51.

amount payable to $7,359, taking into account the older child's conditions, means, and circumstances under section 3(2)(b), not section 9.[256] By contrast, under the "economies of scale" approach, the father's table obligation for two children would be $9,422 per month and the mother's table obligation for one child would be $209 per month, so the father would pay a set-off amount of $9,213 per month,[257] perhaps decreased due to the older child's conditions, means, and circumstances.

6. ANALYSIS AND SUGGESTED REVISIONS

As evidenced by the general trends found in this survey of 70 cases, section 9 has proven difficult to apply, which has resulted in disparate results across cases and jurisdictions. Epstein has stated that a full *Contino* analysis is beyond the ability of most self-represented litigants, "and frankly, most family law counsel,"[258] and has called for changes to the current impractical approach to section 9. This section of the paper attempts to isolate areas where legislation or appellate courts could step in to clarify or simplify the application of the section.

In making these recommendations, I have particularly taken into account that an increased number of family litigants are now self-represented and require straightforward directions from the court in order to access justice for themselves and their children. I also suggest that the court must keep in mind that children deserve fair support from each of their parents and remind litigants of this overarching goal if the litigants lose sight of it. Theoretically, parents who are able to share custody and significant time with their children should be able to agree that the children deserve support according to each parent's resources for the finite amount of time the children require support. I have also kept in mind the objectives of the *Guidelines* as a whole, as section 9 must continue to fit within the larger scheme.[259]

The Court in *Contino* acknowledged that these objectives create "a palpable tension" with section 9.[260] Bastarache J. stated that in section 9, Parliament deliberately chose to emphasize the objectives of fairness, flexibility, and recognition of the actual conditions, means, needs, and other circumstances of parents and children, often to the detriment of predictability, consistency, and efficiency.[261] This was a response to the "wide range of situations of shared custody depicting the reality of different families."[262] While the goal of adapting

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[256] *Ibid* at paras. 52-53.

[257] Note: these alternative calculations use the current *Guidelines*, which may vary slightly from the 2016 *Guidelines*.

[258] Philip Epstein, "Epstein's This Week in Family Law" (March 25, 2014) Fam. L. Nws. 2014-12.

[259] See *Guidelines*, section 1, *supra* note 3.

[260] *Contino*, *supra* note 4 at para. 33.

[261] *Ibid.*

[262] *Ibid.*

support to the needs of each family is very commendable, the amount of discretion and evidence required to fulfill these requirements has proven too burdensome in practice. Now that the courts have been attempting to apply this framework for over a decade, it seems it is time to re-examine this balance.

Accordingly, I propose four broad adjustments to the interpretation and application of section 9:

1) Lower the degree of scrutiny accorded to the 40% threshold to make it easier for parties to pass the threshold.
2) Create a rebuttable presumption in favour of the straight set-off under section 9(a), with the option but not the requirement to examine the factors under section 9(b) and section 9(c).
3) Make equalizing the net disposable incomes (NDI) of each parent's household the ultimate goal when adjusting the quantum of support under section 9(b) and section 9(c).
4) Clarify that the correct analysis for child support quantum in hybrid parenting arrangements is the "economies of scale" approach, not the "two-step" approach.

(a) 40% Threshold: Making the threshold less insurmountable

When parties seek to invoke section 9, it is mandatory that they pass the 40% threshold. However, it has proven to be a "herculean task" to calculate this threshold consistently and correctly.[263] Where parents do not agree, trial judges are forced to choose between requiring the parties to expend significant time and resources proving that the actual time spent with the children by each parent amounts to 40% or risk an appealable error of law by not performing the full analysis.

I do not submit that the 40% threshold should be changed to a different percentage. There were several policy concerns at play when the federal government instituted the 40% threshold, which included protecting the primary caregiver's economic position, recognizing the direct spending of the other parent, providing an objective method of identification, and minimizing the incentive for opportunistic behaviour by either parent.[264] In choosing 40%, the government chose a fairly strong protection for the primary caregiver's economic position, more so than with a 30% threshold but less than a 50% threshold. It also recognized the direct spending of the other parent, unlike section 3 which does not account for any spending by the payor parent. Many access parents accrue costs during the child's time with them, especially as any overnight access involves keeping an adequate home for the children.[265] While

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[263] Philip Epstein, "This Week in Family Law" (June 14, 2011) Fam. L. Nws. 2011-24.

[264] Thompson, *supra* note 5.

[265] If these access costs are significant, the payor parent may seek relief under section 10(2), but while relief is possible, it is unlikely.

enumerating 40% as a threshold seems like a bright-line rule compared to a vague standard like "substantially equal time,"[266] the 40% threshold has proven less predictable in practice because the *Guidelines* did not specify *how* time was to be counted to reach this threshold, so there is still much room for disagreement and thus litigation. The cost of uncertainty, however, means that the court has significant discretion to forestall opportunistic behaviour, whereas a bright-line rule might allow parents to act strategically just to cross the threshold.[267]

The government chose the "high threshold" option of 40% for child support under shared parenting and rejected several alternatives found in international approaches, including an automatic reduction, a formulaic approach, a pro-rated set-off, and multipliers.[268] This suggests that in Canada, the government has chosen to prioritize the economic status of the recipient parent at a possible cost to the payor parent and the discretion to ensure a fair quantum of support over the efficiency benefits of a bright-line rule. Still, while I do not propose changing the threshold itself, I submit that this balance could be shifted slightly to bring the law on the books in line with the real-world application of section 9.

A significant problem in applying the threshold test stems from the fact that appellate courts have not resolved whether courts should calculate time by days, overnights, or hours. Appellate courts have clouded the question even further by making such statements as "[t]here is no universally accepted method for determining the 40%"[269] and the assessment should "remain flexible . . . [so] the assessment will be more realistic, and more holistic, than a strict mathematical calculation of the time with each parent."[270] While this strategy does allow the court to better take into account the particular circumstances of each family by considering qualitative as well as quantitative factors, it also creates too much uncertainty which breeds litigation, especially in high-conflict separations. To this end, it would be beneficial for the federal government or an appellate court to either specify a method of counting time or, ideally, perhaps allow the party to meet the 40% threshold when any of these methods of counting time reaches 40%.

When choosing a single unit of measurement, counting by days or overnights has the benefit of being easy to apply, but this cruder measurement makes it easier to meet the 40% threshold; whereas counting by hours has the benefit of finer accuracy, but requires more detailed accounting and thus argument over minute details of the parenting arrangement, which is often not a child-focused approach. The United Kingdom, Australia, and New Zealand all use overnights

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[266] The "substantially equal time" would have allowed more discretion and flexibility to account for each family's situation, at the cost of the clarity of a bright-line rule. This standard was contemplated and rejected in earlier drafts of section 9.

[267] Thompson, *supra* note 5.

[268] *Ibid.*

[269] *Froom*, *supra* note 12 at paras. 1-2.

[270] *Mehling v. Mehling*, 2008 MBCA 66, 2008 CarswellMan 240 (Man. C.A.) at paras. 43-44 [*Mehling v. Mehling*].

as the method of counting time.[271] Epstein, on the other hand, supports calculating the time in hours, both when the child is physically under one parent's control and when the child is under neither parent's physical control but is one parent's responsibility, such as during school hours. Epstein finds this method most consistent with the purposes of child support, where the child should benefit from both parents' ability to support him or her in the same way the child would benefit from the parents' relative abilities to contribute to their support if the parents had not separated.[272] If a payor parent spends more time with the child without providing care or undertaking responsibility, the child must still look to the recipient for this, so the child support assists the recipient parent in providing that care and undertaking that responsibility.[273]

In my opinion, the best solution might be to allow the parent to cross the 40% threshold if they can pass it using any method of calculation (which would likely involve counting days or overnights rather than hours, which requires less evidence). Even though this may appear to protect the economic status of the recipient parent less than the *Guidelines* intended, this approach is actually in line with the section and the *Guidelines* as a whole. After all, by not specifying how time is to be counted, the *Guidelines* allow for any method of calculation to meet the threshold. In addition, if the amount of time each parent spends with the child is close enough to 40% for parents to seriously argue over the issue, perhaps ensuring fair support for the child(ren) actually does require some adjustment to the table amount to ensure both parents are supporting the child to the best of their abilities. This shifts the balance slightly in favour of recognizing the payor parent's access costs, but without unduly endangering the recipient parent's economic status. Finally, it is important to remember that 40% is itself an arbitrary amount of time at which to vary child support in the first place.

Furthermore, reducing the conflict at this stage of the inquiry would reduce conflict in the proceedings in general. These benefits outweigh any detriment in making it easier for a parent to cross the 40% threshold, namely the concern that the recipient parent may not receive as much support. However, the stakes of passing the section 9 threshold are low, given the discretion that exists in the remainder of the section to ensure proper support. There is no automatic reduction after crossing the 40% threshold. Therefore, even with the rebuttable presumption of the straight set-off proposed below, any concerns over a "cliff effect" or any evidence that a party is merely seeking 40% time for the financial benefit rather than actually spending more money on the child could be dealt with using the discretion and flexibility reserved in section 9(b) and section 9(c).

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[271] See *Child Support Act 1991* as amended by *Child Support Amendment Act 2013* (NZ); *Child Support (Registration and Collection) Act 1988* and *Child Support (Assessment) Act 1989* (AUS).

[272] Epstein, *supra* note 259.

[273] *Ibid.*

This method would significantly decrease the resources expended by parties and courts in deciding this issue at the beginning of the child support inquiry.

Similarly, in situations where the parties agreed that the 40% threshold was met, I submit that the court should continue to be allowed to accept that conclusion without delving into specific calculations to assure itself the threshold has been met. This aligns with the judicial practice observed in 84% of cases in this survey, where the court accepted the parties' agreement that the 40% threshold was met, without requiring further evidence. While the court should retain some discretion to analyze the parties' parenting time despite their agreement if needed,[274] accepting the parties' agreement on crossing the 40% threshold would be an efficient and beneficial practice because it would minimize conflict between the parties at this stage, minimize cost and time to the parties and the court, and focus the court's energies on the quantum section 9 factors.

(b) Simplifying section 9 application: Utilizing a rebuttable presumption of the straight set-off amount to achieve a fair quantum of support

In its 2002 *Report to Parliament*, the Department of Justice recommended a change to section 9 by using a presumptive set-off formula, but this revision was never made because the *Contino* decision laid out the proper formula in 2005.[275] Although *Contino* states that the section 9(a), (b), and (c) considerations are mandatory in any section 9 analysis, most of the cases in this study do not consider all three factors. Often, the parties did not submit the financial disclosure required for the court to consider section 9(b) or (c).[276] Sometimes, the court stated in the decision that it considered all the section 9 factors without providing details about how they were considered or what information the parties provided so that they could be considered.[277] Yet there are several appellate decisions that reverse trial decisions due to incomplete consideration of

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[274] If the judge has also determined the custody and parenting schedule using the best interests of the children analysis, ordinarily the judge would be able to discern the support obligations that would arise from such a parenting arrangement and be confident that the parenting time sought is not for one parent's financial benefit. However, in high-conflict cases where self-represented parties may have settled the parenting arrangement but put the support question before the judge for adjudication, there is a concern that one parent may be more sophisticated than the other and manufactured a parenting arrangement with the 40% threshold in mind to reduce their own support obligation. The court's discretion would only be necessary in rare cases to address a parent's financial motivation or a serious power imbalance between the parties. Ideally, these issues would have been addressed previously in the parenting issues, but this last-resort discretion would prevent strategic manipulation at the support calculation stage.

[275] Thompson, *supra* note 5.

[276] See, e.g. *Pasquereau v. Pasquereau*, 2017 ONCJ 29, 2017 CarswellOnt 1738, 2017 CarswellOnt 1739 (Ont. C.J.) [*Pasquereau v. Pasquereau*] or *S. (T.N.) v. G. (T.L.)*, *supra* note 167.

[277] See, e.g. *Chomos v. Hamilton*, *supra* note 61.

the mandatory section 9(b) and 9(c) factors.[278] In the time period considered in this paper, only one case was overturned by an appellate court for the trial court's failure to consider all three factors. This was in *F. (G.) v. F. (J.A.C.)*, where the New Brunswick Court of Appeal overturned the trial court's decision because "the mandatory criteria set out in ss. 9 (b) and (c) were not considered and this constitutes an error in law."[279]

Most parties simply cannot afford the time and expense of preparing the necessary financial disclosure required by sections 9(b) and 9(c). If so many cases proceed in this fashion, it seems it is time to recognize that the current framework is too burdensome as applied. This is especially worthy of revision in the family law context where access to justice is already so problematic given the rising number of self-represented litigants, where the stakes are especially high because it is the futures of children that are at stake. As Epstein explains,

> Too many cases and too much time is being taken in trying to do the *Contino* analysis, and if the result is going to be either that the set-off number is the right number, or it is the set-off number plus "a little bit", we are wasting far too many judicial resources and spending too much money on legal fees to find the right result. I appreciate that dealing with cases of shared custody and split custody can often be enormously difficult, but a *Contino* analysis does not work for the vast majority of the population, and it is beyond the ability of persons on the Clapham omnibus to do a *Contino* analysis.[280]

This recent survey of cases confirms that Epstein's concern remains true today, as 85% of cases in this study found that the straight set-off was an appropriate quantum of support. Notably, past surveys similar to this study have shown a trend toward using the straight set-off: from 2006 to 2010, only 45% of cases fixed the quantum of support at the straight set-off, up to 65% of cases from 2012 to 2013, increased to 85% of cases in this study from 2016 to 2017.[281] Where parties can agree on a reasonable quantum of support, they should not be forced to produce additional information at their own expense to provide a proper evidentiary record for the judge so the decision is not at risk of being overturned on appeal.

In light of this fact, I propose that a rebuttable presumption in favour of the set-off amount would be reasonable under a section 9 analysis. It would save time, costs, and confusion for litigants. It would also align with the courts' current *de facto* practice without risking appellate intervention for failing to

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[278] See, e.g. *Woodford v. MacDonald*, 2014 NSCA 31, 2014 CarswellNS 218 (N.S. C.A.); *Conway v. Conway*, 2011 ABCA 137, 2011 CarswellAlta 706 (Alta. C.A.); *Dyck v. Bell*, 2015 BCCA 520, 2015 CarswellBC 3770 (B.C. C.A.); and *Wetsch v. Kuski*, 2017 SKCA 77, 2017 CarswellSask 483 (Sask. C.A.), leave to appeal refused 2018 CarswellSask 291, 2018 CarswellSask 292 (S.C.C.).

[279] *F. (G.) v. F. (J.A.C.)*, *supra* note 71 at para. 12.

[280] Epstein, *supra* note 10.

[281] Thompson, *supra* note 5.

perform the burdensome three-factor analysis. The court would retain discretion to order parties to produce the budgets and disclosure for a full section 9 analysis if it or either party raised the concern that such disclosure was necessary to ensure a fair amount of support, but it would not be required in straightforward cases where the set-off amount clearly meets the child's needs (as in 85% of the analyzed cases) and there are not any indicia of a concerning power imbalance between the parties.

Epstein would disagree with my recommendation, as he believes that it is only in rare circumstances that the simple set-off meets the child's needs.[282] Instead, he has suggested that in his own practice, he splits the difference between the set-off amount and the table amount (although he acknowledges this approach is only for those parties who seek a quick resolution outside of court, as this is not an actual judicial approach), noting that this would achieve the quantum the Supreme Court of Canada ordered in *Contino*.[283] Despite my respect for Epstein's opinion, the vast majority of cases in this study (85%) resulted in a straight set-off order, with the court determining that this was an appropriate quantum for support of the child(ren). Furthermore, the cases that varied the set-off are a distinct minority, and of them only 15% of cases actually ordered higher or lower quantums, as the remaining cases had extenuating circumstances that did not decide quantums at all. This revision would merely bring the law on the books in line with the court's assessment of appropriate quantum of child support in practice.

Any risk from this approach that the straight set-off may not meet the child's needs is adequately dealt with by reserving discretion to the court to require more evidence in certain cases, and by giving the parties the opportunity to attempt to rebut the presumption if they so choose. With a rebuttable presumption in favour of the set-off, if parties seek to vary the set-off amount or the court requires further evidence to ensure the set-off is fairly meeting the child's needs based on each parent's ability to pay, the court would maintain discretion to still require full financial disclosure to perform the *Contino* analysis under section 9(b) and section 9(c). But the presumption would significantly decrease the number of cases where parties would have to provide such cumbersome evidence. Based on this survey, only approximately 15% of cases would require such disclosure, which would save the parties and especially courts valuable time and costs in the majority of cases.

In particular, I submit that the court should require further disclosure in variation situations where one party[284] objects that the set-off creates a "cliff

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[282] Philip Epstein, "Epstein's This Week in Family Law" (November 24, 2014) Fam. L. Nws. 2014-47.

[283] Philip Epstein, "Epstein's This Week in Family Law" (September 25, 2012) Fam. L. Nws. 2012-38.

[284] Or, as discussed above, where the court recognizes an imbalance in power or sophistication between the parties it could raise this concern itself to ensure the goals of the *Guidelines* are being met.

effect" decrease from the higher table support paid prior to variation. Further disclosure may also be required in situations where some of the realities of the parties' situation are not being addressed by simply looking at their respective incomes and time spent with the child, isolated from the other aspects of the parent's and child's circumstances. As recognized by Macdonald and Wilton, some of these realities include when more time spent with the child may not actually increase spending by the parent or significant savings for the other parent (which would suggest a quantum higher than the set-off, closer to the table amount); when a significant disparity of parental incomes exacerbates the differences in standard of living in the two households (which would suggest a higher quantum to provide the child with relatively equal standards of living in both homes); and when shared custody entails more costs in the duplication of services and leaves less money for support (which would suggest the set-off amount or less, depending on the parent's ability to pay).[285] Judges should also be attuned to situations of power imbalances between parties, especially with self-represented litigants, to ensure that the court does not become complicit in an improper support order based on incomplete or untrue disclosure. By retaining the court's discretion to require fuller disclosure in certain cases, it minimizes the risk that a presumption in favour of the set-off might result in a quantum that is not in compliance with the *Guidelines* or the "reasonable arrangements for the children" requirement for consent orders and agreements under the *Divorce Act*. It also ensures similar support under provincial legislation for children of unmarried spouses, which promotes the uniformity goal of the *Guidelines*.

A rebuttable presumption in favour of the set-off would shift the balance of section 9 slightly in favour of efficiency and predictability. With the option for the court to still order production of evidence to vary the set-off based on the factors in section 9(b) and 9(c), this change would not sacrifice the objectives of fairness and flexibility. All of the situations enumerated above could still be adequately dealt with if needed, but the court would not have to waste its resources in the majority of cases where such adjustment was unnecessary. This would create a child-focused approach that also minimizes conflict and increases predictability in child support determinations, with is in line with ensuring fair support for children and access to family justice.

(c) Overall goal: Equalize the Net Disposable Incomes (NDI) of each household

I propose that a fair preliminary method of determining the straight set-off would be to examine the parties' net disposable incomes (NDI) to determine the total family income available for child support purposes and determine support with the goal of sharing this NDI equally. Indeed, a 50/50 NDI split is already a core part of the ranges produced by the *Spousal Support Advisory Guidelines*.

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[285] Macdonald & Wilton, *supra* note 2.

This aligns with one of the prime goals in *Contino* that the child(ren)'s standard of living should be approximately equal in both parents' homes. The NDI calculation would be a useful presumptive tool and act as a simple starting point for adjustment from the set-off in shared parenting cases. If the court were concerned in a particular case that the straight set-off did not meet the child's need for support, the court would maintain the discretion to seek further disclosure to ensure the child's needs were being met by the order.[286] Based on the cases in this study, it is expected that the court would only need to delve further into the section 9(b) and 9(c) factors in the minority of cases, when required by the facts of the specific case. I would note that the NDI tool would not be as useful in shared parenting cases where the parties have new spouses or new children since separation, and it would not apply in hybrid cases.

(d) Hybrid Arrangements: One approach needed

Given the clear division among appellate courts over which method is preferable for calculating support for hybrid parenting arrangements, it would be helpful for the Supreme Court of Canada or the federal government to clarify which approach is appropriate: either the "economies of scale" approach or the "two-step" approach, both of which were explained in Part V of this paper. Until one approach is designated as the correct approach, results for similarly-placed children will continue to vary depending on the method chosen by the appellate courts in their province of residence, which undermines the uniformity goal of the *Guidelines*.

In my opinion, the "economies of scale" approach is the better option, because it allows for more flexibility based on the situation of all the children requiring support as a whole, rather than only allowing flexibility in the case of the shared child(ren). Epstein and Thompson also agree that this is the correct approach, as it recognizes the economies of scale in the recipient parent's home, it acknowledges that full table support under section 3 does not adequately reflect the cost to the payor parent of keeping a home for the shared children, and it accords with the section 9 language where one or both spouses has "physical custody of, a child for not less than 40 percent of the time over the course of a year."[287] Macdonald and Wilton specifically note that section 9 is a "complete regime or system of its own," where only the listed factors decide the appropriate quantum of support, separate from any presumptions of support in other sections.[288] There is no room for section 3 given the completeness of this regime. Using only section 9 rather than a combination of section 3 and section 9 allows for the fairness and flexibility the government intended for shared

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[286] As discussed above, this would normally occur where one party objects to the set-off, but the court should have discretion to raise the concern itself in rare or extreme cases where there are indications of a power imbalance or manipulation by one of the parties that undermines the goals of fair support outlined in the legislation.

[287] Thompson, *supra* note 5; Epstein, *supra* note 264.

[288] Macdonald & Wilton, *supra* note 2.

parenting, which is what the parents are doing even when one child lives primarily with only one of the parents.

The "two-step" approach creates a fiction that the non-shared child(ren) live completely separate from the child(ren) in the shared parenting situation, which is not a realistic portrayal of a hybrid parenting arrangement home. The table amount for three children is not three times the table amount for one child. While the payor usually pays a higher quantum under section 3 than under section 9, section 9 can adequately deal with any loss compared to the section 3 quantum by considering the recipient parent's income and by using the economies of scale built into the table amounts and the inherent discretion to achieve a fair outcome. Furthermore, because section 9 is able to take into account the table amount of support owed for the non-shared child anyway, within the section 9(c) inquiry, a fairer quantum will be reached using this method. The shared and not-shared children's situations are inextricably linked, and the child support calculation under section 9 is better equipped to reach a fair quantum of support based on the actual circumstances of the children than the rigid and presumptive section 3. The "economies of scale" approach is therefore preferable and correct, given how the table formula is constructed.

7. CONCLUSION

As society and courts increasingly recognize the benefits a child reaps from maximum contact with both parents, joint and relatively equal parenting is becoming more common. As a result, section 9 of the *Guidelines* is applied more often than ever. As these 70 cases demonstrate, however, this section is not simple to apply. Throughout this paper, I have suggested areas where *Guidelines* changes or appellate decisions could clarify and simplify the application of this section. These changes would attempt to increase the predictability and consistency of child support orders in shared parenting arrangements in order to decrease parental conflict and litigation without sacrificing fair and adequate support for the children. These revisions also attempt to increase access to family justice in an era where many family law litigants are self-represented and require clear rules to ensure fair results for their children and themselves upon family breakdown. Such revisions would be in the best interests of courts, parties, and most importantly, the children in shared parenting arrangements.

Bill C-78: The 2020 Reforms to the Parenting Provisions of Canada's *Divorce Act*

Nicholas Bala[*]

Since the Report of the Special Parliamentary Committee in 1998,[1] it has been widely acknowledged that the parenting provisions of Canada's *Divorce Act* were in need of reform.[2] After a couple of unsuccessful efforts to enact reforms in the early years of this century, in May 2018 the Liberal government introduced Bill C-78, proposing significant changes to the law governing post-divorce parenting.[3] The Bill had widespread support from family lawyers, judges, and scholars,[4] as well as mediators, and mental health professionals.[5] There was, however, controversy about some parts of Bill C-78 at the Parliamentary Hearings, and minor amendments were made as a result of the Committee process. The Bill was enacted with the support of all political parties and received Royal Assent June 21, 2019. The parenting provisions of Bill C-78 will come into force on July 1, 2020, the first significant changes to the parenting provisions of the *Divorce Act* since they came into force more than three decades ago.[6] The delay beween enactment and coming into force of the reforms gives the federal

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1 Canada, Special Joint Committee on Child Custody and Access, *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access* (December 1998) (Chairs: The Honourable Landon Pearson & Roger Galloway); for a critical commentary on that Report, see Nicholas Bala, "A Report From Canada's Gender War Zone: Reforming the Child-Related Provisions of the Divorce Act" (1999) 16 CanJ Fain L 163.

2 For a discussion of the background to Bill C-78 and previous failed efforts to amend the *Divorce Act,* see N. Bala, Bringing Canada's Divorce Act into the New Millennium: Enacting a Child-Focused Parenting Law (2015) 40 Queen's L J 425.

3 Bill C-78, 1st Session, 42nd Parliament, 3rd Reading, House of Commons, Feb 6, 2019. Enacted as S.C. 2019, c. 16.

4 See e.g. Canadian Bar Association, Brief to Senate Committee on Legal and Constitutional Affairs, submitted June 5, 2019: https://sencanada.ca/content/sen/committee/421/LCJC/Briefs/2019-04-15-LCJC-CBABriefC-78_e.pdf. On July 11, 2018 at the National Family Law Program of the Federation of Law Societies of Canada, with more than 500 family lawyers and judges at the conference, the audience was surveyed at a plenary session using Poll Everywhere about key provisions of Bill C-78; most of the provisions were supported by 85%-93% of respondents; only the relocation provisions resulted in a significant difference of views, with 69% supporting the proposed provision, while 15% were opposed and 16% unsure.

5 The Family Dispute Resolution Institute of Ontario and the Association of Family and Conciliation Courts Ontario, Chapter, both of which have multidisciplinary memberships, each submitted Briefs that were supportive of the reforms.

6 Royal Assent June 21, 2019. The provisions of Bill C-78 related to parenting will come into force July 1, 2020, but some of provisions related to support enforcement will only

and provincial governments, lawyers, and other professionals time to prepare for implementation.[7]

A "presumption of equal parenting" was proposed by fathers' rights advocates at the Parliamentary Hearings,[8] but this proposal was not accepted. While not including a presumption of equal time or joint decision-making, the Bill promotes a post-separation regime of sharing of parental time and decision-making that provides parents with as much time with their children as is consistent with the child's best interests. Although the term does not appear in the Bill, it promotes the widely used social concept of "co-parenting" for cases where this would not pose a significant risk to the child, with both parents spending significant time with the child and a sharing of decision-making.

This article focuses on the most significant reforms in Bill C-78 as they relate to parenting, changes that will:

- modify some of the rules about jurisdiction of courts in Canada to deal with parenting cases that may have arisen in other provinces or territories;
- create duties for parties and their legal advisers to encourage the use of non-court family dispute resolution processes and reduce conflict;
- replace the archaic terms of "custody" and "access" with child-focused terminology, using the concepts of "parenting time" and "parental decision-making;"
- create an expectation that parents will make a "parenting plan" to share decision-making responsibilities and time, but if parents cannot agree, require a judge to make a parenting order;
- identify a non-exhaustive list of factors for the determination of the "best interests of the child," including consideration of the views of children and the willingness of each parent to support the child's relationship to the other parent;
- introduce measures to assist the courts in addressing family violence in the context of parenting disputes, and make protection of the safety and well-being of the child a "primary consideration"; and
- establish a new framework for dealing with relocation of a child.

Bill C-78 will have only limited impact on those Canadian family lawyers and parents who have already adopted child-focused, less litigious approaches to the resolution of family disputes. However, the amendments should have an impact

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come into effect in the next couple of years: https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/01.html.

7 The Department of Justice will be putting making available extensive professional and public educational materials about the Bill C-78 reforms on its website.

8 See e.g. Canadian Equal Parenting Council, Submission to House of Commons Standing Committee on Justice and Human Rights Re: Bill C-78, *Fixing the Divorce Act and Family Courts Accessibility, Effectiveness and Best Interests of the Child* (2018): http://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10207873/br-external/CanadianEqualParentingCouncil02-e.pdf.

on practitioners who have not made that shift, as well as on self-represented litigants who may look to the *Divorce Act* for guidance. Further, the relocation scheme in Bill C-78 will substantially change the law governing this contentious issue.

While the amendments are child-focused and encourage dispute resolution outside the courts, their overall effect will be largely dependent on provincial implementation and resources. Further, for lawyers and judges, the expectations for more detailed orders and agreements dealing with parenting issues may make resolution of higher conflict cases more challenging.

There are other significant provisions of Bill C-78 that will only come into force on some date after July 1, 2020, including reforms to promote international enforcement of parenting and child protection orders, disclosure of income tax information for the purposes of establishing support obligations, enforcement of support orders and use of provincial support calculation agencies. A discussion of these issues is beyond the scope of this article.[9]

1. PROVINCIAL PARENTING REFORMS

There have already been significant statutory changes to the post-separation parenting laws in Alberta,[10] British Columbia,[11] and Nova Scotia,[12] that have encouraged moves towards the use of child-focused concepts used in Bill C-78, such as "parenting plans" and "parenting time," rather than the historic terms "custody orders" and "access."

Those legislative changes have already resulted in significant changes in practice in those provinces. Although in terms of constitutional theory these provincial reforms only applied to parents who were *not* getting a divorce, that is mainly unmarried parents, and the provincial reforms affected practice under the federal *Divorce Act* in those juridictions, with courts commonly using the new terminology.[13] While the implementation of Bill C-78 will have less effect in those provinces, there may well be further legislative reforms in those provinces, in particular so that their statutes are consistent with the new relocation provisions in the *Divorce Act*. As will be discussed in the conclusion to this paper, the coming into force of Bill C-78 is likely to create pressure in all Canadian

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9 See John Paul Boyd (June 2018) A Brief Overview of Bill C-78, Part 2: Amendments Relating to Interjurisdictional Agreements and Treaties.https://afccontario.ca/wp-content/uploads/2018/06/Boyd-Overview-of-Bill-C78-Pt-2-June-2018.pdf. The coming into force of these provisions will be delayed beyond July 1, 2020 as their implementation is more complex.

10 Alberta, *Family Law Act*, S.A. 2003, c. F4.5, in force 2005.

11 British Columbia, *Family Law Act*, SBC 2011, c. 25, in force 2013.

12 Nova Scotia, *Parenting and Support Act*, SNS 2015, c. 44, in force in May 1, 2017.

13 See e.g. Bertrand, Paetsch, Boyd & Bala, *The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program* (Canadian Research Institute for Law & the Family, 2016).

jurisdictions to amend parenting statutes so that they are consistent with the federal law.[14]

2. JURISDICTION

Bill C-78 makes some relatively modest amendments to the jurisdictional provisions of the *Divorce Act*, which are established in s. 3 (divorce), s. 4 (corollary relief), and s. 5 (variation of orders for corollary relief), and allowing for transfer of proceedings under s. 6 where a child is most substantially connected to another province. The most significant amendments related to jurisdiction are that:

a) the Federal Court will no longer have jurisdiction over proceedings where spouses commence proceedings on the same date in different provinces, but instead will determine the court of the province that is the "most appropriate" to hear the matter, based on the habitual residence of any children or the parties' last common habitual residence;[15] and,
b) the "most substantially connected" to the child test for establishing or transferring jurisdiction is replaced by a judicial determination of the province that is the child's "habitual residence," or was the child's last habitual residence before a wrongful removal or retention.[16] The use of the term of "habitual residence" makes the *Divorce Act* jurisdictional regime consistent with the concepts in the *Hague Conventions* on child abduction and child protection.

3. DISPUTE RESOLUTION AND CONFLICT REDUCTION: DUTIES FOR PARENTS AND LEGAL ADVISERS

There are a number of provisions in Bill C-78 that are intended to impress upon parents the harm done to children by exposing them to conflict from the divorce process and that impose duties on lawyers and other legal advisers to encourage parents to consider using non-court-based methods of family dispute resolution. Under section 7.6, parents, whether represented or not, are required to personally certify that they are aware of these duties.

Under the new s. 7.1, parents have a duty to exercise parenting time and decision-making authority in a manner consistent with the best interests of the child. Section 7.2 establishes a duty for parents to use their best efforts to protect

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[14] There have also been appeal cases in other provinces, most notably Ontario, that have encouraged use of concepts other thn custody and access: *M. v. F.*, 2015 ONCA 277, 2015 CarswellOnt 5630 (Ont. C.A.). In Quebec, the *Civil Code* provisions governing parenting, enacted in 1991, have also encouraged a greater use of various forms of joint custody. Discussion of the possible effects of Bill C-78 on practice and law in Quebec is beyond the scope of this article.

[15] Section 3(3).

[16] Sections 6, 6.1 and 6.2

the child from conflict related to the divorce proceeding. These are important exhortational statements for parents about the need to focus on the interests of their children and to increase awareness of the harm that children experience when exposed to parental arguments and conflict (let alone violence).[17] Although higher conflict parents are not likely to be directly influenced by this type of legislative statement, lawyers should also be referencing them when advising their clients. Judges may refer to these duties in conferences and judgements to warn parents that their failure to honour the obligations created in these provisions may affect future decisions of the courts.

Section 7.3 establishes a duty, "to the extent that it is appropriate to do so, [that] the parties to a proceeding shall try to resolve" the matters that may be the subject of an order under the *Divorce Act* through a "family dispute resolution process." The concept of a "family dispute resolution process" is defined in s. 2 as a "process *outside of court* that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law" [emphasis added]. Section 7.3 encourages the use of non-litigious dispute resolution, premised on the view that avoiding an adversarial process is likely to promote better co-operation and less conflict between parents, as well as reduce costs for them and society. This provision, however, recognizes that sometimes it is "appropriate" to use a court-based process, particularly if there are concerns about abuse or family violence, and court protection is needed, or if one party is making unreasonable demands. These provisions are intended to encourage resolution of disputes in a non-adversarial fashion, though it is important to appreciate that many judges who deal with family cases devote considerable time, energy, and skill to family dispute settlement in conferences and interim proceedings. Only a tiny fraction of parenting disputes in Canada are resolved by a judge after a trial. Further, although in some places there are government-subsidized family mediation services, in most places in Canada only the relatively affluent can afford mediation or other non-court services. For many separating parents, family court judges at conferences provide the only "free" non-litigious dispute resolution service, which may be especially important for self-represented litigants.[18] Further, for some litigants, the authority of the court may add to the effectiveness of judicially-led settlement efforts compared to mediation outside the court process.

The new section 7.4 requires everyone who is a party to a proceeding under the *Divorce Act* or who is subject to an order made under the Act to "provide

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[17] Linda Nielsen, Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict (2018), 15 Journal of Child Custody 1.

[18] While from a litigant's perspective, judges may appear to be a "free resource," at least for conferencing, they are expensive medators for society. However, some litigants need the "authority of the sash" to meaningfully engage in a mediative process, and the cost of having judges perform these services is "not visible," while forsome politicians having publicly funded non-court dispute resolution servives seems like a "frill" that should not be funded in times of financial exigency.

complete, accurate and up-to-date information if required to do so under this Act." Rules of procedure in every jurisdiction in Canada have similar provisions, but, like the other duties articulated for parents under Bill C-78, it is helpful, especially for those without legal representation, to provide clarity and reminders.

Section 7.5 states that for "greater certainty, a person who is subject to an order made under this Act shall comply with the order until it is no longer in effect." This of course is exactly what the term "order" means, but family judges not infrequently have to tell parents that a "court order is not a polite suggestion or an invitation,"[19] so it is useful for the statute to inform parents right from the start, if they read the legislation, about their duty to comply with orders. It seems doubtful, however, that this generally worded provision will alter the "great caution" that courts exercised when considering contempt motions in family law proceedings for failing to comply with court orders, such as those governing parenting schedules or communication.[20]

Subsection 7.7(2) requires "every legal adviser" to inform all clients in proceedings under the *Divorce Act* of their "duties under this Act," and s. 7.7(3) requires that legal advisers certify that they have done so. Thus, lawyers will be *obliged* to speak to parents going through a divorce about the parental duties to act in manners consistent with their child's best interests, protect their children from conflict, and try to resolve issues outside of the court process. This requires family lawyers to be "child-focused" advocates for their adult clients,[21] not simply taking instructions, but providing advice about parental conduct that may harm children, such as abusive conduct or alienating behaviour. It is conceivable that there could be professional sanctions for lawyers who fail to carry out their duties to properly advise parents. However, it seems more likely in practice that if parents are not properly advised, or fail to heed settlement or child-focused advice of their legal adviser, this will in consequences be in terms of court decisions about parenting or awarding costs against a litigant.

These provisions are intended to remind parents and their professional advisers of the harm to children from exposure to continuing parental conflict and to encourage resolution of disagreements about parenting and economic issues outside of the adversarial process.[22] Bill C-78 also provides in s. 16.1(6) that a court may make an order directing parties to attend an out-of-court

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19 *Travers v. Travers*, 2014 ONSC 2548, 2014 CarswellOnt 5279 (Ont. S.C.J.) at para. 10, per Gray J.; and *Rahma v. Hassan*, 2019 ONSC 2410, 2019 CarswellOnt 5728 (Ont. S.C.J.).

20 *Hefkey v. Hefkey*, 2013 ONCA 44, 2013 CarswellOnt 2986 (Ont. C.A.); *Bowman v. Bowman*, 2009 CarswellOnt 4143, [2009] O.J. No. 2993 (Ont. S.C.J.), affirmed 2010 CarswellOnt 348 (Ont. C.A.).

21 Bala, Hebert & Birnbaum, Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being a Child-Focused Family Lawyer (2017), 95 Can Bar Rev 557-589.

22 St. George's House Consultation, *Modern Families, Modern Family Justice* (Windsor, UK: 2018).

"family dispute resolution" process, "subject to provincial law."[23] This would, for example, in Ontario give a judge making an interim parenting order the authority to direct that the parties attend an *intake session* for a court-connected mediation program.[24] However, in Ontario and most other provinces, at present an alternative dispute resolution process like mediation cannot be used without the consent of both parties to a parenting dispute. In British Columbia there is a process by which one party to a family dispute can require the other party to attend mediation, subject to exceptions for cases where domestic violence is at issue,[25] but meaningful engagement in mediation cannot be compelled.

4. CONCEPTS: PARENTING PLANS AND PARENTING ORDERS

Outside of Canada, many countries have abandoned the antiquated concepts of "custody" and "access" that are found in our present *Divorce Act*.[26] Further, as noted above, provincial legislation in British Columbia, Alberta, and Nova Scotia has already ceased using those concepts, which have their origin in property law and place an emphasis on the protection of parental rights. The concepts in Bill C-78 promote parenting arrangements that are child-focused and premised on the responsibilities of parents rather than their rights. Many separating parents in Canada already make arrangments for some form of co-parenting, such as "joint legal custody" or "shared custody." However, the fact that the 1986 *Divorce Act* still uses archaic terms that have proprietary connotations is the wrong place to start parents and courts thinking about the process. It leaves the impression that one parent will be the "winner" of custody, and the other is the "loser," afforded only the "access" rights of a "visiting parent." The use of these terms is especially problematic for self-represented individuals who may look to the legislation for guidance, as well as for clients whose professional advisors continue to use such terminology.

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[23] In most provinces, there are limited restrictions on family ADR; in Quebec, family arbitration is not permitted, and in Ontario there are restrictions on the use of family arbitration.

[24] As permitted under *Ontario Family Law Rule* 17(8)(b)(iii).

[25] In British Columbia, the *Family Law Act,* S.B.C. 2011, c. 25, ss. 8-11 allow for one party to a family case to require the other party to attend and attempt mediation, with some exceptions, for example where family violence is a concern.

[26] While orders made after the amendments come into force should use the new terminology, the concept of "custody" will continue to be significant for proceedings under the *Hague Convention on Child Abduction*. Article 5 of the *Convention* provides that for the purposes of proceedings under the *Convention*, the "rights of custody" include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Under Bill C-78, in the absence of an agreement or court order to the contrary, a child cannot be relocated without a court order, in effect providing that both parents have a continuing right to determine the child's residence, and "rights of custody" for proceedings under that the *Convention*.

In his October 2018 decision, not long after the introduction of Bill C-78 in Parliament, an Ontario Superior Court judge, McDermot J., made comments supportive of the new terminology:[27]

> The legal term, "custody" in family matters is close to having had its day. For years now, there have been efforts by legislators to rid statutes of that term, the latest of which are the proposed amendments to the *Divorce Act* which suggest exactly that. There is good reason for this; the term "custody" as it relates to children arises, from the 19th century and implies ownership of children which is, of course, not what any contemporary court order intends. It is also pejorative; the person who has custody feels as though they have "won" something, and the person without custody feels a loss and exclusion. The term is, in itself, the source of much litigation and gets in the way of settlement because of the emotional power behind the language.

These comments were *obiter dicta,* but reflect the judicial support for these reforms. On the the specific facts of *Van v. Palombi*, which involved a very high conflict situation, McDermot J. drastically restricted the role of the father in the lives of his children. The father had inappropriately involved the children in the litigation, defied court-ordered terms regarding visitation and communication, and refused to acknowledge the effect of his conduct on the children or his former wife,. The court ordered ''sole custody" to the mother and a suspension of ''access" to the father until he completed counselling. In such exteme cases, exclusive parenting arrangements will continue to be appropriate and possible under the *Divorce Act* reforms, albeit using different terminology.

Under Bill C-78, courts are to make ''parenting orders" that allocate or schedule ''parenting time," and that allocate or share ''decision-making responsibility."[28] Parents are encouraged to make their own arrangements outside the court process ''to the extent that it is appropriate"[29] and to agree to a ''parenting plan" that addresses issues related to the care the child, including parenting time and decision-making. There is a broad definition of the concept of a ''parenting plan" in s. 16.6(2), which provides that it ''means a document or part of a document that contains the elements relating to parenting time, decision-making responsibility or contact to [non-parents like a grandparent] which the parties agree." It may be a separate document that deals only with

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[27] *Van v. Palombi*, 2018 ONSC 6228, 2018 CarswellOnt 17245 (Ont. S.C.J.) at para. 17, additional reasons 2018 CarswellOnt 20668 (Ont. S.C.J.). This was clearly *obiter dicta,* and consistent with the prior Ontario Court of Appeal decision in *M. v. F.*, 2015 ONCA 277, 2015 CarswellOnt 5630 (Ont. C.A.). It was a significant judicial endorsement of reform, in part because such judicial comments about matters that are before Parliament are not common, and typically only made if there is already a wide-spread view that such reform is needed.

[28] Sections 2(1) and 16.1.

[29] Section 7.3.

parenting issues and might be drafted or amended by the parents, or it could be a part of a separation agreement that also deals with issues like child support.

The federal government already has materials available on the internet to assist parents making a parenting plan.[30] These materials will be updated by the Department before the new law comes into force. The Ontario Chapter of the Association of Family and Conciliation Courts has also prepared a *Parenting Plan Guide* and a *Parenting Plan Template* to assist parents and professionals making these plans.[31]

Parenting plans are normally developed on a consensual basis, either by the parents themselves or with assistance of professionals like mediators or lawyers. Children may have a role in the development of a plan, though they are not parties to any plan or agreement. Bill C-78 provides that a court granting a divorce "shall" incorporate a parenting plan that the parents have agreed to, unless, in the opinion of the court, it is "not in the best interests of the child to do so, in which case the court may make any modifications to the plan that it considers appropriate and include it in the order."[32]

The concept of a "parenting *plan*" suggests that it will be a "living document" that may provide for revision as the children grow older and circumstances change, and there may be possibilities for "trying out" an arrangement for a period of time to see how it works, and then changing it if appropriate.[33] Bill C-78 allows for a court-ordered variation of a parenting order if there is a "change in circumstances." If a parenting plan becomes incorporated in an order, the court order can also provide for "review" under the new s. 16.1(5), without requiring proof of a change in circumstances. In practice, once an initial order is made incorporating a parenting plan, many parents will modify some of the details of the plan, or change its implementation, without returning to court, though if issues of enforcement arise, only a court-endorsed modification can be enforced.

Courts may also include in parenting orders provisions that specify how communication between the parents or between a parent and child is to occur or that prohibit relocation of a child without a court order or the consent of both parents.[34] Such terms are often included in parenting plans.

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[30] See e.g. Justice Canada, *Making plans: A guide to parenting arrangements after separation or divorce* (2017) https://www.justice.gc.ca/eng/fl-df/parent/mp-fdp/index.html; and *Parenting Plan Checklist* (2017) https://www.justice.gc.ca/eng/fl-df/parent/ppc-lvppp/index.html.

[31] https://afccontario.ca/parenting-plan-project/.

[32] Section 16.6.

[33] Francis Catania, Learning from the Process of Decision: The Parenting Plan (2001) 2001 BYU L. Rev. 857; Bruijn, Poortman & van der Lippe, "Do Parenting Plans Work? The Effect of Parenting Plans on Procedural, Family and Child Outcomes" (2018), 32 International Journal of Law, Policy and The Family 394—411.

[34] Section 16.1(4).

Parenting plans may, however, also have provisions that a court will be reluctant to incorporate into a court order, such as some detailed rules about parental conduct, for example, about how to introduce new partners to children, or statements of principle that be useful but very vague, such as the requirement that parents treat one another in a "friendly, respectful way." It may be helpful for parents to have such provisions in their plans, even if not legally enforceable, as just discussing them and undertaking a moral commitment to honour them has value.

A parenting plan may be a distinct document, or can be incorporated into a larger Separation Agreement or Court Order that deals with other issues, in particular property and support issues. There is value in having a parenting plan as a separate document as it emphasizes to parents that issues related to their children are separate from their other economic and legal affairs, and this will also facilitate the almost inevitable review of provisions of the plan as children grow older and circumstances change. The nature of the matters to be resolved by the parents, the nature of the parents' relationship, the stage of the separation process and the role of the family justice professional (e.g. judge, lawyer, or mental health professional) will all influence whether the plan is in a separate document.

Lawyers should consider having the parenting plan as an appendix to a Separation Agreement, with a stipulation that parents may review and amend the plan without affecting the validity of the Separation Agreement. This may encourage timely, child-focused reviews.

The advantage of incorporating a parenting plan into a court order is that it may encourage compliance, as, if necessary, court processes can be used to enforce the plan, or at least major provisions. One of the challenges of incorporation is that a judge may be reluctant to do this if the agreement has provisions that are vague or aspirational. Further, review of the plan will be more expensive and complex if it is expected that the court order will be amended. A plan that is detailed, or has provisions that mention times or places, or has other specific provisions, is almost certain to need to be reviewed as the circumstances of parents and children change.

(a) Decision-making

Bill C-78 allows a parenting plan or order to "allocate" or provide for a "sharing" of parental decision-making. In cases where parents can co-operate and communicate reasonably well, shared decision-making is most likely to help children feel that both parents are fully involved in their lives. However, if parents have difficulty with co-operation and communication, it may be advisable to have a dispute resolution provision, such as referral to mediation, if the parents are likely to be able to access a mediator and compromise. Otherwise, if conflict is higher, it is likely preferable to allocate decision-making for major issues to one parent, with an obligation to consult with the other parent before and communicate after decisions with the other parent. Giving one

parent the final authority to make a decision limits the potential of resorting to the courts to resolve disagreements. In these higher conflict cases, one parent can be responsible for all major decisions, or there may be a division, for example with one parent having responsibility for decision-making about schools and education after consultation with the other parent, and the other parent being responsible for another sphere of decision-making, like religious instruction and observance.

"Parental decision-making responsibility" is defined in s. 2(1) to mean the responsibility for making "significant decisions about a child's well-being, including in respect of: health; education; culture, language, religion and spirituality; and significant extra-curricular activities." This includes decisions about major issues that have continuing effects and that very likely will need to be implemented by both parents, such as about what school the child will attend. Unless a court order or parenting agreement specifies otherwise, under s. 16.2(2) a person with parenting time has the "exclusive authority to make, during that time, day-to-day decisions affecting the child." Day-to-day decisions, also not explicitly defined in the Act, but by implication refer to matters that one parent can implement on their own, such as issues related to a child's meals and bedtimes.[35] It will be useful for the order or agreement to specify which areas of decision-making are to be allocated or shared, as the effect of s. 16.2(2) may be to make the "default" that the parent with care may make decisions that can be implemented in that time. For example, decisions about extra-curricular activities are significant for many children, especially those of school-age or adolescents, if not a specified issue of decision-making, whichever parent has care of a child at a particular time may assert the sole right to decide whether the child will participate in an activity at that time, claiming that this is a "day-to-day" decision. It is, however, preferable for a child to engage in extra-curricular activities that both parents support and that the child can undertake while in the care of each parent.

Bill C-78 also provides that any person who has *any* parenting time or decision-making responsibility is entitled to request information about the child from the other parent, and from third parties, such as schools and doctors, unless the court orders otherwise, even if that parent has no responibility for decision-making about that aspect of the child's life.[36]

(b) Parenting Schedules: NO Presumption of "Equal Parenting"

A number of advocates for "*equal* shared parenting," such as the Canadian Equal Parenting Council,[37] appeared before the Parliamentary Committees

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[35] Section 16.2(2).

[36] Section 16.4.

[37] Canadian Equal Parenting Council, Submission to House of Commons Standing Committee on Justice and Human Rights Re: Bill C-78, *Fixing the Divorce Act and Family Courts Accessibility, Effectiveness and Best Interests of the Child* (2018): http://

considering Bill C-78, to advocate enactment of a statutory presumption that "equal parenting time" is in the best interests of children.[38] Although some Conservative members of the House of Commons Committee supported such an approach,[39] the majority of the Committee rejected a "presumption of equal parenting," and the House of Commons and Senate voted unanimously to enact the Bill without such a presumption.

In most intact families, parents *share* responsibilities, but generally they do not spend *equal* time on child care,[40] so it would have been inappropriate for legislation to specify that such an arrangement would be presumed to be in the interests of a child. In many cases there are logistical and practical constraints to equal parenting time, and this type of arrangement is only likely to be beneficial to children if the parents are able to effectively communicate and co-operate. Today in Canada, while about two-thirds of children whose parents divorce have some form of joint custody, most of them continue to have a "primary residence" with one parent (usually the mother) and only a quarter of children of separated parents have "equal shared custody" (40 to 60% of time with each parent).[41]

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www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10207873/br-external/CanadianEqualParentingCouncil02-e.pdf.

[38] Toronto lawyer Gene Colman (June 13, 2018), who advertises himself as a "dedicated advocate of protecting fathers' rights," proposed revisions to Bill C-78 to create a "presumption of equal parenting time." He also discusses the relationship between the "Fathers' Right Movement" and the "Family Rights Movement;" see Gene Colman, "An Introduction to Fathers' Rights" (2015) www.complexfamilylaw.com.

Another dedicated Canadian advocate of "equal" fathers' rights is Professor Edward Kruk of the University of British Columbia; see e.g. Edward Kruk, *The Equal Parent Presumption: Social Justice in the Legal Determination of Parenting after Divorce* (McGill-Queen's University Press, 2013); and Kruk (2018), Arguments Against a Presumption of Shared Physical Custody in Family Law, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2018.1454201.

The American state of Arizona has legislation that in practice is close to a presumption of equal parenting time. On May 26, 2018, Arizona State University psychology professor William Fabricius presented a Brief at the House of Commons Committee studying Bill C-78 urging that Canada adopt a similar presumption: https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10207867/br-external/FabriciusWilliam-e.pdf.

[39] "MPs urged to enact 'equal shared parenting' in Bill C-78 but organized family law bar tells Ottawa to stay the course", *Lawyers Daily*, Nov. 29, 2018.

[40] See e.g. Statistics Canada, *Changes in parents' participation in domestic tasks and care for children from 1986 to 2015* (2015), which reports that *on average*, fathers in 2015 spent significantly more time on child care than in 1986, but still spent significantly less time than mothers (increasing from 28% of child care to 35% in those three decades). Even in families where both parents were fully employed in paid jobs, fathers in 2015 spent significantly less time on child care than mothers (104 minutes a day versus 143 minutes), though when both parents are employed fathers do more of some household tasks, notably outdoor work and home maintenance. Of course in some families (about 10%), both intact and separated, fathers spend significantly more time on child care than mothers.

A number of research studies from different countries have found that children generally have better outcomes if they are in joint care arrangements that involve significant time with each parent rather than in the sole custody of one parent.[42] However, it is critical to appreciate that these studies are largely based on the experiences of families where the parents have agreed to some form of shared custody, not cases where it is imposed by a court. In other words, there is a correlation between children spending roughly equal time with both parents and positive outcomes for children, but it is *not* established that this is a causal relationship.

Although children in general benefit from significant involvement of both parents in their lives, frequent contact with both parents is most beneficial when conflict is low but can have adverse effects if conflict is high, especially if it is prolonged past the immediate post-separation period.[43] Further, research suggests that equal shared custody generally only benefits a child if there was already substantially equal sharing of parenting before separation.[44] Court-imposed "equal parenting" can be especially stressful for children whose parents have a high conflict separation and are having difficulty co-operating.[45] Experience in jurisdictions that have tried various forms of statutory presumptions about parenting time reveals that such legislative rules tend to promote litigation, especially among high conflict parents, who are not well-suited to this type of arrangement.[46]

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[41] There are actually no complete national (or even provincial) statistics on post-sepataion or post-divorce parenting orders or actual child care arrangements. There is, however, a rough convergence of figures in different data sources; see e.g. Jusice Canada, Justfacts: Child Custody and Access (Nov. 2017); https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/nov02.html; Bala, Birnbaum, Cyr, Poitras, Saini & Leclaire, Shared Parenting in Canada: Increasing Use But Continued Controversy (2017) 55(4) Fam Ct Rev 513; see also Birnbaum, Bala, Saini & Sohani, Shared Parenting: Ontario Case Law and Social Science Research (2016) 35 Can Fam L Q 139-179.

[42] Linda Nielsen, Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict (2018), 15 Journal of Child Custody 1.

[43] Mahrer, O'Hara, Irwin N. Sandler & Sharlene A. Wolchik (2018) Does Shared Parenting Help or Hurt Children in High-Conflict Divorced Families?, Journal of Divorce & Remarriage, 59:4, 324-347, DOI: 10.1080/10502556.2018.1454200.

[44] Poortman, Pre-Divorce Parent-Child Contact and Child Well-Being: The Importance of Predivorce Parental Involvement (2018), 80 Journal of Marriage & Divorce 671-683.

[45] See e.g. Ilana Arje-Goldenthal, Equal Parenting Time in Ontario: Exploring Legislative, Judicial and Social Science Attitudes to the Issue (2018) 37 Can Fam L Q 189-228.

[46] For a discussion of the Australian experience, often cited by proponents of equal parenting but not actually supportive of any statutory presumptions, see Smyth & Chisholm, Shared—Time Parenting After Separation in Australia: Precursors, Prevalence, and Post-reform Patterns (2017), 55 Fam Ct Rev 586; Neoh & Mellor, Shared Parenting: Adding Children's Voices and Their Measures of Adjustment to the Evaluation (2010), 7 Journal of Child Custody 155-175; and Parkinson, (2018) Shared Physical Custody: What Can We Learn From Australian Law Reform? 59 Journal of Divorce & Remarriage 401-413, DOI:10.1080/10502556.2018.145419. Almost no

As discussed further below, Bill C-78 provides some important guidance for the making of parenting orders, schedules, and plans. The Bill wisely follows the approach of provincial reforms and avoids broad statutory presumptions about time-sharing or decision-making.[47] However, while the term is not explicitly used, it is submitted that the *Divorce Act* amendments encourage various forms of *co-parenting*,[48] a broad social concept used by social scientists, family justice professionals, and parents in many countries, premised on both parents being significantly involved in the care of children and co-operatively sharing decision-making. Co-parenting is clearly different from the traditional model of sole custody to one parent and access to the other.[49] Co-parenting includes but is not limited to equal parenting time and fully shared decision-making for all issues. The concept of co-parenting emphasizes the value, in most cases, of parents *sharing* time and responsibilities, with each co-parent involved in a significant but not necessarily in an "equal" way in their children's lives, and has an expectation of parents communicating and co-operating.

(c) Grandparents and Contact Orders

Under Bill C-78 a court will be able to make a "contact order," allowing a grandparent or other person who is not a parent but has an important role in a child's life to have continuing contact.[50] Under s. 16.5(5), the contact may be by

American states have a presumption of equal parenting time: Brinig, Penalty Defaults in Family Law: The Case of Child Custody (2006) 33 Fla St U L Rev 779. For a supportive view of Arizona law, which has a version of a presumption of equal parenting time, see Fabricius, Aaron, Akins, Assini & McElroy, What Happens When There Is Presumptive 50/50 Parenting Time? An Evaluation of Arizona's New Child Custody Statute (2018) 59 Journal of Divorce & Remarriage 414-428, DOI: 10.1080/10502556.2018.1454196.

47 John-Paul Boyd, The case against having default shared custody, *Lawyers Weekly,* Feb. 21, 2014.

48 The term "shared parenting" is also widely used by social scientists to describe arrangements where both parents have significant involvement (at least 25% of the time) and there is shared parental decision-making. The term may be useful for some parents, as it gives an important message about shared rights and responsibilities, but lawyers and judges in Canada may want to be cautious about its use. Under the present version of the *Child Support Guidelines*, s. 9, the term "shared custody" is used for cases where each parent has the child at least 40% of the time. The terminology in the *Guidelines* will be changed when Bill C-78 comes into force, likely using the term "shared parenting time" for cases where s. 9 applies and each parent has the child at least 40% of the time. The term "shared parenting" is already often used to refer to cases where s. 9 applies. For a discussion of the range of definitions and use of "shared parenting", see Marsha Kline Pruett & J. Herbie DiFonzo, Closing the Gap: Research, Policy, Practice, and Shared Parenting (2014) 52 Fam Ct Rev 152; and Bala, Birnbaum, Cyr, Poitras, Saini & Leclaire, Shared Parenting in Canada: Increasing Use But Continued Controversy (2017) 55(4) Fam Ct Rev 513.

49 See Philyaw & Thomas, *Co-parenting 101: Helping Your Kids Thrive in Two Households After Divorce* (2013, Oakland, CA, US: New Harbinger Publications); and Margerum, Price & Windell, *Take Control of Your Divorce: Strategies To Stop Fighting And Start Co-Parenting* (2011, Atascadero, CA, US: Impact Publishers).

visits or interactive communication, like telephone, or other means, such as letters or email. Grandparents are explicitly mentioned in Bill C-78, with "best interests" decisions to take into consideration of the "nature and strength" of a child's relationship to "grandparents and any other person who plays an important role in the child's life."[51] However, there is no presumption that grandparents will have contact with a child, and they must still seek leave of the court to make their own application for contact or parenting time under the *Divorce Act*.[52]

(d) Parenting Orders: Opportunities and Challenges

The abandonment of the archaic concepts of "custody" and "access" is welcome and consistent with developments in many other countries. The concepts of "parenting time," "parental decision-making," and "parenting plans" are more nuanced, and their adoption will generally help parents to make more child-focused parenting arrangements. However, for the highest conflict cases, those most likely to be resolved by judges, using these concepts requires more detailed orders than simply making an award for custody. Judges and lawyers already often need to make detailed orders and agreements for these high conflict cases, and are aware of potential issues of variation and enforcement. The ongoing challenges of high conflict cases will continue under the new law.

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[50] Section 16.5.

[51] Section 16(3)(b).

[52] Section 16.1(1)(b). Similar amendments to Ontario's *Children's Law Reform Act* also specifically named "grandparents" in s. 21 as persons who may apply for custody or access, but the Act has been held *not* to "give grandparents a presumptive right of access to their grandchildren". See *Whitteker v. Legue*, 2018 CarswellOnt 3450 (Ont. S.C.J.); *Botelho v. De Medeiros*, 2017 CarswellOnt 10719 (Ont. C.J.); and *Ninkovic v. Utjesinovic*, 2019 CarswellOnt 1707 (Ont. S.C.J.), additional reasons 2019 CarswellOnt 5662 (Ont. S.C.J.) - L. Madsen J. In *Giansante v. Di Chiara*, 2005 CarswellOnt 3290 (Ont. S.C.J.), Nelson J. held that deference should be given to a custodial parent's decision regarding access unless the following three questions are answered in the affirmative:

1. Does a positive grandparent-grandchild relationship already exist?
2. Has the parent's decision imperilled the positive grandparent-grandchild relationship? and
3. Has the parent acted arbitrarily?

In both *Giansante* and *Ninkovic*, grandparents were awarded access when their own child, the parent, was unable to continue to have a relationship with the child (due to death and imprisonment, respectively).

Under the *Divorce Act* amendements, grandparents who have come to stand in place of a parent, or intend to stand in place of a parent, will not have to seek leave of the court to apply for parenting time or decision-making. Residency, care *and* provision of support for a child are critical elements to the concept of "standing in place of a parent," a standard most grandparents do not meet.

5. BEST INTERESTS OF THE CHILD

The present *Divorce Act* requires that decisions about custody and access are to consider only the "best interests of the child," though the Act presently does not specify what this entails. Broadly consistent with the provisions of most provincial legislation, Bill C-78 sets out a non-exhaustive list of factors that are to be considered in making a parenting order or other "best interests" decision:

> *Factors to be considered*
>
> 16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
>
> (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
>
> (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
>
> (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
>
> (d) the history of care of the child;
>
> (e) the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained;
>
> (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
>
> (g) any plans for the child's care;
>
> (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
>
> (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
>
> (j) any family violence and its impact on, among other things,
>
> (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
>
> (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
>
> (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Although the list in the new s. 16(3) is non-exhaustive and does not establish priorities amoung the factors listed, in making decisions about a child's best interests, s. 16(2) specifies that "the court *shall* give *primary consideration* to the

child's physical, emotional and psychological *safety*, security and *well-being*" [emphasis added]. This subsection establishes that concerns about family violence should generally be given priority. However s. 16(3) also allows consideration of such factors as the emotional well-being of a child by not being unjustifiably alienated from a parent might be a "primary consideration."

(a) Family Violence

Although most provincial and territorial legislation governing post-separation parenting recognizes the significant negative impacts of spousal violence for children, the present *Divorce Act* makes no mention of family violence. Consistent with the growing awareness of the effects of intimate partner violence, not only on the direct victim but also on children who are exposed to this violence, Bill C-78 has a number of procedural and substantive provisions related to "family violence."[53] The concept of "family violence" is broadly defined in the new s. 2 to include acts directed at a child or other family members, including physical abuse, sexual abuse, threats of harm, harassment, psychological abuse, and financial abuse. Family violence is also defined to include intentional harm to pets or destruction of property, such as breaking furniture or plates.

Section 7.8 requires judges dealing with *Divorce Act* proceedings to make inquiries about other proceedings that may involve the parties that are related to family violence or child abuse, in particular civil, child protection or criminal proceedings. Provincial and territorial authorities will need to ensure that court forms require parties to provide this information to the court and should be exploring how to improve information sharing between courts to allow judges making decisions under the *Divorce Act*, especially about children and victims of family violence, to have access to information about other family violence proceedings.[54]

As noted above, s. 16(3) sets out a non-exhaustive list of factors to be taken into account in determining a child's best interests in making a parenting order or contact order, a list which includes "family violence." Paragragh 16(3)(j) requires courts to consider the impact of family violence on the "ability" of a parent to meet the needs of the child and the effects of family violence on "the appropriateness of making an order that would require" the parents "to cooperate on issues affecting the child." Further s. 16(2) specifies that "the court *shall* give *primary consideration* to the child's physical, emotional and psychological *safety*, *security* and well-being" [emphasis added].

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[53] Justice Canada, *Family Violence* (2017) http://www.justice.gc.ca/eng/cj-jp/fv-vf/index.html.

[54] See e.g. Justice Canada, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, Family, Child Protection) A Family Law, Domestic Violence Perspective*, 2nd edit (2013) https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhan-renfo/index.html.

These provisions are clearly intended both to protect children from direct harm and to ensure that victims of intimate partner violence are not coerced into on-going abusive relationships with a former partner as a result of parenting arrangements. However, Bill C-78 recognizes that family violence is multifaceted, requiring a court to consider not only the "impact of family violence," including its seriousness and recency, but also whether it involved isolated incidents or a pattern of "coercive and controlling behaviour." Further, courts are required to take account of any steps taken by the perpetrator to prevent further family violence and improve their ability to care for the child.[55] Bill C-78 reflects an awareness that family violence is a complex and often evolving issue and effectively encourages both victims and perpetrators to seek appropriate assistance to address issues of family violence.[56]

In Canada, many family justice professionals who engage in collaborative and mediation processes are already aware of the need to screen for domestic violence and other power imbalances.[57] However, the enactment of Bill C-78 will serve as an important reminder to all professionals involved in the family justice process of the importance of family violence as a factor in making parenting arrangements. Further, the Bill will help inform those who are self-represented and may not appreciate the significance of harmful effects of family violence on children. The Department of Justice is preparing new materials to educate and assist lawyers in screening for family violence, as well as providing more information for victims of family violence.[58]

As advocates for abused women like the National Association of Women and the Law pointed out at the Parliamentary hearings, the encouragement in the *Divorce Act* amendments to resolve cases outside of the court process could result in victims of family violence accepting unfair settlements or being placed in dangerous situations.[59] These are important concerns, and implementation must be undertaken in a way that ensures the protection for victims of family violence.

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[55] Section 16(4).

[56] See Jaffe, Crooks & Bala, *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices* (Justice Canada, 2006); and Jaffe, Johnston, Crooks & Bala, "Custody Disputes Involving Allegations of Domestic Violence: The Need for Differentiated Approaches to Parenting Plans" (2008) 46 Fam Ct Rev 500.

[57] See e.g. Family Dispute Resolution Institute of Ontario (FDRIO), *Family Mediation, Screening Guidelines*, https://www.fdrio.ca/certifications/mediation/family-mediation-screening-guidelines/.

[58] See e.g. Justice Canada, *What You Don't Know* Can *Hurt You: The Importance of Family Violence Screening Tools For Family Law Practitioners* (2018), https://www.justice.gc.ca/eng/rp-pr/jr/can-peut/toc-tdm.html.

[59] http://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10190233/br-external/NationalAssociationOfWomenAndTheLaw-e.pdf.

(b) Views of the Child

Although not mentioned as a factor in the present *Divorce Act,* there is growing appreciation of the importance of taking account of the perspectives and preferences of children who are the subject of parental disputes, as this promotes better outcomes for children, respects their rights, and often facilitates settlement.[60] Bill C-78 makes the *Divorce Act* consistent with Article 12 of the *United Nations Convention on the Rights of the Child*, to which Canada is a signatory, and with provincial family legislation in Canada, requiring consideration of the child's views as a best interests factor.

The new s. 16(3)(e) specifies that in making a parenting plan or court order, parents, professionals, and the courts "*shall*" consider "the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained." This provision establishes an obligation on both the court making a parenting decision and the parties presenting a case to make reasonable efforts to "ascertain" the views and preferences of children. While children should be consulted, and their views sought, there must be a careful balance so that children are not inappropriately drawn into parental disputes or pressured to "take sides."

In cases that are going through the courts, testimony from parents about what their child told is likely to be heavily discounted unless supported by independent evidence.[61] A Views of the Child Report,[62] a report of an assessment by the mental health professional, or appointment of counsel for a child may be considered as a means of ascertaining the perspectives of children and presenting this evidence to the court. Children in Québec often meet with judges who are dealing with their parents' disputes.[63] Judicial meetings with children have been less common elsewhere in Canada. Although there are limitations to what can be learned by a judge at a single, relatively short meeting, children often appreciate and benefit from meeting with the judge. Further, the judge may gain valuable insights from such a meeting and the practice of judicial interviewing of children

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[60] For a review of developments in a number of jurisdictions regarding children's involvement in family proceedings, see e.g. M. Fernando, Family Law Proceedings and the Child's Right to Be Heard in Australia, the United Kingdom, New Zealand, and Canada (2014) 52 Fam Ct Rev 46. See also e.g. R. Birnbaum & N. Bala, Views of the Child Reports: The Ontario Pilot Project (2017), 31 Intern J Pol L & Fam 344.

[61] See Mamo & Harris, Children's Evidence, Chapter 4 in H. Niman, editor, *Evidence in Family Law Cases* (Aurora, Ont.: Canada Law Book, 2010, updated looseleaf).

[62] Birnbaum & Bala, Views of the Child Reports: The Ontario Pilot Project (2017), 31:3 International Journal of Policy, Law & the Family 344—362. These reports are typically prepared by social workers, and are much less expensive and time-consuming than full assessments by a mental health professional. Bala, "Expert Evidence, Assessments and Judicial Notice: Understanding the Family Context," in H. Niman, editor, *Evidence in Family Law Cases* (Toronto: Canada Law Book, updated 2020).

[63] The *Québec Civil Code, S.Q. 1991*, c. 64, Art 34 provides that the judge ". . .shall give the child an opportunity to be heard if his age and power of discernment permit it." There is no minimum age stipulation, but judges rarely meet children under the age of seven years.

is becoming more common in Canada.[64] Since Bill C-78 imposes a positive obligation on courts to ascertain the views of children, it is likely to encourage more use of judicial interviewing, especially in cases where resources to prepare a report are limited.

An important responsibility for professionals involved in collaborative processes, mediation, and other non-court family dispute resolution processes is to consider how to involve children.[65] In some mediation cases, this may involve a mediator interviewing a child, having a Views of the Child report prepared by a mental health professional, or bringing older children into mediation meetings with the parents. In other mediation cases, for example with pre-school age children or parents who are not in conflict over the children, it may be appropriate for parents to simply report on their conversations with their children to the mediator.

Professionals involved in family dispute resolution must be satisfied that they have appropriate knowledge, resources, and skills to ensure that children are involved in a way that gives them a "voice" without feeling pressured by parents to "take sides."

(c) Heritage

While all the factors in s. 16(3) are reflected in case law under the present *Divorce Act*, and are broadly similar to the non-exhaustive lists in provincial statutes, an interesting addition is s. 16(3)(f) which refers to not just culture, language and religion, but also specifically mentions "Indigenous upbringing and heritage." Unlike provincial child welfare statutes, which generally give some priority to Indigenious placements for a child, Bill C-78 does not give this factor greater weight. Indeed, while most "best interests" defintions in Canadian legislation make some reference to the importance of religion, culture, language and heritage, case law makes clear that judges are also expected to avoid giving preference to one parent's heritage over the other.[66] If parents have a different cultural, ethnic, or linguist heritage, it seems likely s. 16(3)(f) will primarily serve to reinforce the importance for children of having regular involvement with both

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[64] For a discussion of why and how judges can interview children, see Bala, Birnbaum, Cyr & McColley, Children's Voices in Family Court: Guidelines for Judges Meeting Children (2013) 47:3 *Family Law Quarterly* 381—410; and Bala, Birnbaum & Cyr, Judicial Interviews of Children in Canada's Family Courts in Tali Gal & Benedetta Durmay, eds. *International Perspectives and Empirical Findings on Child Participation* (Oxford University Press: New York, 2015) 135-156.

[65] See e.g. Amel Ketani and John Reynolds, Family Mediation in England and Wales: A Focus on Children (June 10, 2019). Wolverhampton Law Journal, Forthcoming. Available at SSRN: https://ssrn.com/abstract=3401908.

[66] *Van de Perre v. Edwards*, 2001 SCC 60, 2001 CarswellBC 1999, 2001 CarswellBC 2000 (S.C.C.); *Wakeling v. Debassige*, 2019 ONSC 4058, 2019 CarswellOnt 10579 (Ont. S.C.J.), additional reasons 2019 CarswellOnt 19777 (Ont. S.C.J.); *Brown v. Kagan (Brown)*, 2019 ONSC 5033, 2019 CarswellOnt 14127 (Ont. S.C.J.), additional reasons 2019 CarswellOnt 17726 (Ont. S.C.J.).

parents and their extended families. There may also be a preference for a primary residence with a parent who is more willing to support the heritage of the other parent.[67]

(d) Support for Relationship with the Other Parent

Section 16(10) of the present *Divorce Act* has a provision with the "marginal note"[68] (sometimes erroneously referred to as a "title"), *Maximum Contact*. The Act presently states:

> 16(10) *Maximum Contact*
>
> In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

In interpreting the present s. 16(10), Justice MacLachlin in 1993 in *Young v. Young* referred to the concept of "maximum contact":[69]

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[67] See e.g. *Cahill v. Anawak-Gamble*, 2016 NLTD(F) 29, 2016 CarswellNfld 378 (N.L. T.D.).

[68] Marginal notes are "the short notations appearing above or beside each section [. . .] of an Act or Regulation" (*Sullivan on the Construction of Statutes*, 6th ed., 2014, §14.59). These notes are intended to help readers identify pertinent provisions in the legislation. The name comes from the fact that they originally appeared in the margins of legislation next to the relevant provisions. Despite appearing in a statute, technically the marginal notes are not actually part of the legislation. However, as Ruth Sullivan observes, they are often influential:

> "Although technically marginal notes are not considered part of legislation, in fact they are physically present and may well constitute the most frequently read component of many Acts and regulations. To ignore whatever light they shed on the meaning of legislation seems artificial and appropriate." (§14.60)

There are cases in which marginal notes have been used for legislative interpretation (e.g. *R. v. H. (A.D.)*, 2013 SCC 28, 2013 CarswellSask 304, 2013 CarswellSask 305 (S.C.C.)) though this is not uniformly the case. For example, in *Imperial Oil Ltd. v. R., Inco Ltd. v. Canada*, 2006 SCC 46, 2006 CarswellNat 3176, 2006 CarswellNat 3177 (S.C.C.), the Supreme Court says (at para. 57) "although marginal notes are not entirely devoid of usefulness, their value is limited for a court that must address a serious problem of statutory interpretation." The Supreme Court in *Young v. Young*, 1993 CarswellBC 264, 1993 CarswellBC 1269, [1993] 4 S.C.R. 3 (S.C.C.) and many later appeal and trial court decisions in family cases have made extensive use of the concept of "maximum contact."

As Sullivan observes, the marginal notes appear in Bills and Acts and are drafted by Legislative Counsel of the Department of Justice, but technically are not enacted as part of the legislation. While in practice alteration of a marginal note generally only occurs if Parliament amends the wording of a provision, for Bill C-78 there can be a change in its marginal note by the administrative direction of the Minister of Justice before final official publication of the Act in the Consolidated Statutes.

[69] *Young v. Young*, 1993 CarswellBC 264, 1993 CarswellBC 1269, [1993] 4 S.C.R. 3 (S.C.C.) at para. 212. Emphasis added.

> s. 16(10) . . .is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But *only* to that extent. Parliament's decision to maintain maximum contact between the child and both parents is *amply supported by the literature*, which suggests that children benefit from continued access. [Emphasis added].

Bill C-78 has provisions that are quite similar to the old s. 16(10). The new s. 16(6) specifies that in "allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child." As recognized by the Supreme Court in *Young*, it is normally in the best interests of children to have significant involvement with both of their parents, absent concerns about safety or a risk to the child's well-being, but it is clear that this provision is *not* intended to establish a presumption of equal parenting time.

As drafted and enacted by Parliament, Bill C-78 had a marginal note to s. 16(6) that referred to this as the "Maximum Parenting Time" provision. This was an adaption of the marginal note of "Maximum Contact" for the old s. 16(10), but was clearly an inaccurate and potentially misleading notation for the new provision. Maximum time for each parent might suggest a presumption that each parent should have equal parenting time.[70] At the Senate hearings on Bill C-78, serious concerns were raised about the "Maximum Parenting Time" marginal note, and the Minister of Justice responded by announcing that the marginal note to s. 16(6) would be revised to read "*Parenting time consistent with the best interests of child*," which much more closely reflects the legislative intent behind this provision and makes clear that there are no presumptions about parenting time.[71] This marginal note, "*Parenting time consistent with the best interests of child*" now appears in Statutory Consolidation of the *Divorce Act* on the official Department of Justice website.[72]

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[70] In Arizona, A.R.S. §25-403.02 provides: "the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time." *In Re Marriage of Barron and Barron*, Ariz C.A., 1st Div. 2018, the Arizona Court of Appeals held that this legislation makes "equal parenting time" that "starting spot" for any judicially imposed parenting plan.

[71] Letter of Minister of Justice to the Senate Committee, June 11, 2019: https://sencanada.ca/content/sen/committee/421/LCJC/Briefs/2019-06-11-LCJC_undertaking_C-78_e.PDF; see also Observations of the Senate Committee, June 17, 2019: https://sencanada.ca/en/committees/report/77759/42-1. As noted above, technically Parliament does not enact the marginal notes, but rather the Legislative Counsel, acting on the direction of the Minister of Justice, is responsible for this revision.

The second part of the present s. 16(10), sometimes called the "friendly parent" provision, is reflected in the new s. 16(3)(i), which states that one of the factors in deciding on the best interests of the child is the "ability and willingness" of each parent "to communicate and cooperate, in particular with one another, on matters affecting the child." It is, however, important to note that s. 16(3)(i) is limited by s. 16.2 which states that the "primary" best interests consideration is the protection of the "safety" and well-being of the child.

Although it is clear that the present *Divorce Act* does not create any "presumptions", many cases cite the short marginal note or concept "maximum contact" to justify at least some contact with a parent whom a child may be reluctant to see,[73] or to justify shared custody or equal parenting time despite parental conflict.[74] It is submitted that, despite the disappearance of the word "maximum" from the marginal notes, since the words of the legislation have not changed materially, and the social science literature continues to recognize the value, *in most cases*, of significant involvement of both parents in the lives of their children after separation, Canadian courts should continue to rely on the precedents under the previous law. Subsection 16(6) and s. 16(3)(i) continue to inform parents, their professional advisers, and the courts that it is generally in the interests of the child's emotional and social development to have significant continuing relationships with both parents. This is a reminder that parents should not be undermining the child's relationship with the other parent or engaging in "alienating parental behaviours."[75] These provisions are consistent with the changes in terminology and concepts, though Bill C-78 also recognizes that in some cases, in particular where there are concerns about family violence or significant parental mental health issues, contact with a parent may need to be restricted or even suspended.

The combined effect of these provisions is to encourage co-parenting, without creating a legal presumption in favour of any particular regime of parenting time or decision-making. In particular, Bill C-78 also recognizes co-

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[72] That change is now reflected on the Justice Laws Website. Since Bill C-78 is not yet in force, it can beseen in the "Amendments Not in Force" document on the Laws site https://laws-lois.justice.gc.ca/eng/acts/D-3.4/nifnev.html and at the end of the PDF version of the *Divorce Act*.

[73] See e.g. *Doncaster v. Field*, 2019 NSCA 61, 2019 CarswellNS 483 (N.S. C.A.); *Rigillo v. Rigillo*, 2019 ONCA 548, 2019 CarswellOnt 10528 (Ont. C.A.), additional reasons 2019 CarswellOnt 12632 (Ont. C.A.); *W. (D.S.) v. W. (D.L.)*, 2009 ABQB 279, 2009 CarswellAlta 702 (Alta. Q.B.); *C.R.L.W. v. S.J.A.*, 2009 ABQB; and *Elliott v. Filipova*, 2019 ONSC 4506, 2019 CarswellOnt 12184 (Ont. S.C.J.).

[74] *Peterson v. Peterson*, 2019 SKCA 76, 2019 CarswellSask 380 (Sask. C.A.); *Gibney v. Conohan*, 2011 NSSC 268, 2011 CarswellNS 551 (N.S. S.C.); *Cole v. Dixon*, 2014 NSSC 348, 2014 CarswellNS 1021 (N.S. S.C.), additional reasons 2016 CarswellNS 54 (N.S. S.C.); *C.M. v. S.K.*, 2017 SKQB 289, 2017 CarswellSask 514 (Sask. Q.B.); *Cory v. Cory*, 2018 ONSC 1273, 2018 CarswellOnt 2831 (Ont. S.C.J.).

[75] See e.g. Bala & Hebert, "Children Resisting Contract: What's a Lawyer to Do?" (2016) 36 Can Fam L Q 1.

parenting is not appropriate if such an arrangement poses a risk to the safety or well-being of a child.

As with the changes in terminology, these provisions contribute to "changing the culture" of professionals and parents about the divorce process. These provisions also affect the courts. Parents who are found to be promoting conflict or undermining their children's relationship with the other parent may see judges limiting their time with their children. Lawyers should be advising clients to reduce conflict and warning them that angry texts and emails to the other parent may be "used against" them in later proceedings.

(e) Court-Ordered Social and Mental Health Services

Section 16.1(6) allows a court to "direct the parties to attend a family dispute resolution process," subject to provincial law. As noted above, in cases that are in the early stages of litigation, this is most commonly likely to be a referral to a parenting education program or mediation services. An important form of response in higher conflict separations that have proceeded to litigation is the possibility of a court order requiring both parents, and often their children as well, to attend counselling services to help them gain a better understanding of their relationship problems, improve communications between the parents, and promote compliance with parenting plans and orders. These services may be especially useful for cases involving problems where children are resisting contact with one parent (which may be alienation or estrangement).[76]

The best approaches to ensuring the continued involvement of both parents in their children's lives in high conflict cases often require collaboration between courts and counselling or social service providers. Court orders to direct attendance of parents and children at counselling services can be an effective response to high conflict cases.[77] Judges may need to receive reports on whether parents are attending and meaningfully engaging in counselling, as this can be critical for ensuring effective responses to some high conflict cases. There has, however, been controversy, especially in Ontario, about the jurisdiction of courts to order counselling under the *Divorce Act* without the consent of all involved.[78]

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[76] See e.g. Bala & Hebert, "Children Resisting Contract: What's a Lawyer to Do?" (2016) 36 Can Fam L Q 1, for a discussion of interventions and strategies to help reduce conflict and promote the interests of children.

[77] See e.g. Fidler & Bala, "Concepts, Controversies and Conundrums of "Alienation": Lessons Learned in a Decade and Reflections on Challenges Ahead" (forthcoming 2020), 58:2 Fam Ct Rev.

[78] See e.g. *Leelaratna v. Leelaratna*, 2018 CarswellOnt 16633 (Ont. S.C.J.) where Audet J. held that she had jurisdiction to make a counselling order for the parents and children, concluding that the court was not constrained by the Ontario *Health Care Consent Act* to seek their consent as the services were not "therapeutic." However, in *Barrett v. Huver*, 2018 ONSC 2322, 2018 CarswellOnt 8757, 9 R.F.L. (8th) 244 (Ont. S.C.J.) the court declined making an order compelling the parties to attend reunification therapy (the multi-day family intervention "Families Moving Forward") on the basis that such reunification therapy was a "treatment" as defined in section 10 of the *Health Care*

In its 2019 decision in *A.M. v. C.H.*, the Ontario Court of Appeal accepted that courts have the authority to make these orders for counselling for all family members as a response to children resisting contact with a parent.[79] Court-mandated use of counselling services aimed at improving communications and relationships can be an important tool in cases of high conflict separation, even without all invoved consenting to the order. However, without some willingness of all concerned to co-operate, an order for counselling cannot be effective. The coming into force of s. 7.2 and s. 16.1(6) of Bill C-78 reinforces the approach of the Court of Appeal, that in appropriate cases courts can make orders for counselling, with the potential consequences of a failure to meaningfully engage in counselling being a court-ordered change in parenting arrangements.[80]

6. RELOCATION

Perhaps the most significant changes in Bill C-78 to the *substantive law* governing post-divorce parenting are the provisions that deal with parental relocation (also known as "mobility" cases). The present *Divorce Act* has no provisions governing relocation, and the 1996 Supreme Court of Canada decision in *Gordon v. Goertz*[81] established a highly discretionary "best interests of the child" test for making decisions about relocation. That decision gives little real direction, and the uncertainty about how courts will resolve these disputes has resulted in frequent litigation about relocation. Further, the fact that courts may give little weight to a non-relocation term in an agreement may have undermined reliance on parenting plans, and may have made their negotiation more difficult.[82]

Bill C-78 establishes a detailed procedural and substantive regime to govern relocation cases.[83] A parent who has rights or responsibilities under the *Divorce Act* will be required to give some notice to the other parent of *any change* in residence.[84] Further, a parent who intends to *relocate* must give at least 60 days

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Consent Act, 1996, S.O. 1996, c.2, Schedule A (the "*HCCA*"), which required the consent of all parties and, presumably, of the child.

79 *A.M. v. C.H.*, 2019 ONCA 764, 2019 CarswellOnt 15391 (Ont. C.A.), additional reasons 2019 CarswellOnt 19664 (Ont. C.A.).

80 See Polak, Altobelli & Popielarczyk, "Responding to Severe Parent-Child Rejection Cases Without A Parentectomy: A Blended Sequential Intervention Model and the Role of the Courts" (forthcoming 2020), 58:2 Fam Ct Rev.

81 *Gordon v. Goertz*, 1996 CarswellSask 199, 1996 CarswellSask 199F, [1996] 2 S.C.R. 27 (S.C.C.).

82 See Bala & Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" (2012) 30 Can Fam L Q 271.

83 For a much fuller discussion of the relocation provisions of Bill C-78, see Rollie Thompson, "Legislating About Relocating: Bill C-78, N.S. & B.C." (2019) 38 Can F. L.Q. 219.

84 Section 16.8.

written notice to the other parent,[85] with relocation defined as "a change in the place of residence of a child. . .that is likely to have a significant impact on the child's relationship" with the other parent.[86] While every parent must in theory give notice of the intent to relocate, whether or not the child spends significant time with that parent, there are only immediate legal consequences for a failure to give notice if a parent actually relocates with a child, significantly impacting the other parent's relationship with the child.

A person intending to "relocate" may make an *ex parte* application to the court to be relieved of the obligation to give notice, in particular if there is a "risk of family violence."[87]

A parent who receives a notice of intention of the other parent to relocate with the child will have 30 days to serve a written notice of objection on the parent proposing to relocate or to make an application to the court objecting to the relocation of the child. If a notice of objection is served on the parent seeking to relocate with the child, that person is obliged to seek court approval for the move. If no notice is served and no application of objection is filed to commence proceedings about this issue, *and* there is no previous *order* prohibiting relocation, the party intending to relocate with the child may do so.

If an application to decide relocation comes before the court, the judge shall make a decision based on an assessment of the "best interests" of the child. In addition to the best interests factors in s. 16 discussed above, the new s. 16.92(1) provides that in deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration:

(a) the reasons for the relocation;
(b) the impact of the relocation on the child;
(c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
(d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
(e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
(f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and

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[85] Section 16.9. Although in theory both parents are required to give notice of a planned relocation, in practice this will only be a legal issue if a parent want to "relocate the child." There is no remedy if a parent relocates without a child.

[86] Section 2(1).

[87] Section 16.9(3)

(g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

This list largely reflects relocation jurisprudence under the *Diovrce Act*, though it is notable that provision of an order or agreement restriciting relocation is now clearly a factor to be considered.[88] The new s. 16.92(2) clarifies that the court dealing with a relocation application is *not* to consider whether the parent seeking to relocate would relocate without the child, effectively preventing the asking of the "double bind" question; this is largely consistent with previous case law in many provinces.[89] Bill C-78 does, however, reverse *Gordon v. Goertz* to the extent that the reasons for relocation will be a factor to consider.[90] This is a welcome reform and is consistent with most relocation case law, which effectively ignored the Supreme Court's *obiter* statement on not considering the reasons for the move.

Most significantly, the new s. 16.93 establishes burdens of proof to apply to relocation cases:

- If the parties have "substantially equal time" with the child, the party seeking to relocate with the child will have the burden of establishing that the relocation of the child is in the best interests of the child.[91]
- If the relocating party has the child for "the vast majority of . . . time,"[92] the onus of establishing that the relocation is not in the best interests of the child will be on the objecting party.

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88 See e.g. *Ligate v. Richardson*, 1997 CarswellOnt 2185, 34 O.R. (3d) 423 (Ont. C.A.) which held that such clauses should be given little or no weight.

89 See e.g. discussion in FAMLNWS 2016-42, October 24, 2016, *Epstein's This Week in Family Law;* and Rollie Thompson, "Legislating About Relocating: Bill C-78, N.S. & B.C." (Feb 13, 2019, Vancouver, Family Law Seminar of National Judicial Institute).

90 Section 16.92(1)(a).

91 There will of course be litigation about the meaning of "substantially equal time," a term that is intentionally somewhat vague and does not use the 40/60 threshold for "shared custody" (or shaed parenting time) under s.9 of the *Child Support Guidleines*. Although the term does not appear in other legislation, it is very similar to the term "substantially equal parenting time" in the relocation scheme in the British Columbia *Family Law Act*. British Columbia judges generally accept that 40% of time satisfies this threshold: see *M. (D.A.) v. M. (E.G.)*, 2014 BCSC 2091, 2014 CarswellBC 3329 (B.C. S.C.). While some BC decisions have accepted 30% of time as "substantialy equal" for this purpose (*B. (C.M.) v. G. (B.D.)*, 2014 BCSC 780, 2014 CarswellBC 1232 (B.C. S.C.)), the courts are likely to want consistency and use 40% as the threshold for the presumption against relocation (see *Hefter v. Hefter*, 2016 BCSC 1504, 2016 CarswellBC 2278 (B.C. S.C.)).

92 The term "vast majority of time" is also vague, but given the policy concerns and desire to promote stability, a threshold of at least 80% seem appropriate. See Bala & Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" (2012) 30 Can Fam L Q 271.

- In any other case, both parties have the burden of proof, and there is no onus or presumption about whether or not relocation should be permitted.

Although many cases will fall in the "grey zone" without a presumption, as a result of the enactment of Bill C-78 legal advisers will always want to consider whether parenting plans or consent orders should have a relocation restriction.[93] If a notice of objection is filed or there is an order prohibiting relocation, one of the factors to be taken into account by the court making a decision about relocation is whether the parenting plan or order has a term that specifies the geographic area in which the child is to reside.[94]

A unilateral parental relocation of a child, either without notice, or relocation after a notice of objection is filed or if there is an order prohibiting relocation, will be held against the relocating parent in court proceedings about relocation.[95] These provisions in the *Divorce Act* should reduce the amount of litigation about relocation, and should help parents to place somewhat greater reliance on parenting agreements that include provisions about relocation; hence parents may be more likely to make agreements. Even before Bill C-78 comes into effect, those who are negotiating agreements or making orders should take into account that a clause restricting relocation may have greater effect after the new law comes into force than it does at present and the law will have this retrospective effect.

While there is no "perfect" scheme for addressing relocation cases, which almost always involve significant disruption for the child, whatever the outcome, the enactment of the scheme of Bill C-78 governing relocation will clearly be an improvement over the present legal quagmire. Having clear, child-focused presumptions about relocation and a clearer process will help to reduce uncertainty and litigation and help planning and settlements, though the new provisions continue to have discretionary elements and some uncertainty will remain in this area.

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[93] In addition to a provision prohibiting relocation with a child, a parent might want to include a term that stipulates that for the purposes of *Hague Convention of Child Abduction,* both parents have "rights of custody," and can use the *Convention* to require return of a child wrongfully removed or retained. However, such a stipulation is not necessary for there to be the right to seek return of a child to Canada under the *Convention*. Article 5 of the *Convention* provides that for the purposes of proceedings under the *Convention,* "rights of custody" means rights "relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Under Bill C-78, a child generally cannot be relocated without a court order or the consent of both parents. So as long as a parent has the right to parenting time, that parent will also have a continuing right to determine the child's residence, and "rights of custody" in proceedings under that the *Convention,* in the absence of an agreement or court order to the contrary.

[94] Section 16.92(1)(e).

[95] Section 16.92(1)(d).

7. TRANSITIONAL PROVISIONS

The parenting provisions of Bill C-78 will come into force July 1, 2020. Proceedings started under the current Act will continue under the new Act, but any decision made after will be governed by the new Act provisions and should use the new terminology.[96] It is already common for agreements and orders to use the concepts of parenting time and parental decision-making reponsibility. The amendments provide the term "custody" used in an order under the present law will mean "parenting time and decision-making responsibility".[97] The term "access" will mean "parenting time."[98]

The legislation makes clear that the coming into force of the *Divorce Act* parenting amendments on July 1, 2020 will *not* constitute a "change in circumstances of the child" and a basis for variation application.[99]

8. CONCLUSION: CHALLENGES OF IMPLEMENTATION

Bill C-78 represents a significant and positive effort at law reform, but it will not be a panacea for the problems faced by divorcing parents and their children, and by Canada's family justice system. There is a clear need for federal and provincial/territorial resources to support professional and public education, and a shift towards less adversarial and more child-focused resolution of family disputes. Implementing the law will create challenges, requiring changes in court rules and processes, and more significantly, will create expectations that governments, courts, and professionals will provide the services and approaches promoted by the new law.

In provinces like Ontario that have not recently amended their parenting legislation and that continue to use the concepts of "custody" and "access", the enactment of Bill C-78 is creating significant pressure for law reform. Inconsistencies between federal and provincial law in this area create confusion and costs for litigants and the justice system.[100] Experience in provinces that have adopted new regimes, such as Alberta, British Columbia, and Nova Scotia, suggests that in practice lawyers and judges in provinces that do not reform their laws will tend to adopt the more child-focused terminology and approaches of Bill C-78. Further, there may be situations, most notably involving relocation, where the failure of a province to undertake legislative

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96 Section 35.3.

97 Section 35.4(a).

98 Section 35.4(b). If it relates to a person who is not a "spouse", such as a grandparent, "access" will be deemed to mean "contact."

99 Section 35.7.

100 A number of provincial governments, including Ontario, have indicated that they will amend statues; see e.g. letter of Ontario Attorney General, Doug Downey of December 12, 2019 sent to family jutice stakeholder groups, stating intention to review the Ontario *Children's Law Reform Act* in light of Bill C-78 coming into effect (Ontario MAG Reference 2019-7604).

reform may result in challenges under the *Charter of Rights* by unmarried parents,[101] which will increase the pressure for reform.

As recommended by the Senate Committee which studied Bill C-78, there needs to be on-going monitoring and research to ensure that the objectives of the reforms are achieved, and if necessary further systemic and legislative reforms are undertaken.[102] Canadians should not have to wait three decades for future reforms if needed.

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[101] See *Coates v. Watson*, 2017 ONCJ 454, 2017 CarswellOnt 10653 (Ont. C.J.), where the court held that differential treatment of an unmarried parent for the purposes of the obligation of support for adult children under Ontario legislation compared to the federal *Divorce Act* violated the *Charter* s. 15 equality provision. Notably,the provincial government did not seek to uphold the law, but amended the statute. However, some cases suggest that this differences in provincial law will not violate the *Charter*; see *Droit de la famille - 139*, 2013 QCCA 15, 2013 CarswellQue 11, 2013 CarswellQue 45, [2013] J.Q. No. 36 (C.A. Que.), leave to appeal refused 2013 CarswellQue 4755, 2013 CarswellQue 4756, [2013] S.C.C.A. No. 113 (S.C.C.).

[102] 34th Report of the Senate of Canada, Committee on Justice and Legal Affairs, June 17, 2019.

Virtual Parent-Child Contact Post-Separation: Hearing from Multiple Perspectives on the Risks and Rewards

Rachel Birnbaum[*]

1. INTRODUCTION

Separation and divorce can be a very emotional process leading some parents to become entrenched in their positions regarding parenting decisions relating to their children. Research has demonstrated that parent-child contact is important to children's well-being post-separation.[1] While much has been written and debated about the amount of parenting "time" and what "types" of parenting arrangements[2] work best for parent-child relationships post-separation, the focus remains on children's best interests—that is, the children's right to a relationship with both parents post-separation as the guiding legal principle across all jurisdictions. Public policy across the globe promotes parent-child contact as

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[1] Paul R Amato, "Reconciling Divergent Perspectives: Judith Wallerstein, Quantitative FamilyResearch and Children of Divorce" (2003) 52 Family Relations 332; Judy Dunn et al, "Children's Perspectives on their Relationships with their Nonresident Fathers: Influences, Outcomes and Implications" (2004) 45:3 J Child Psychology & Psychiatry 553; Joan B Kelly, "Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce: Social Science Applications" in Kathryn Kuehnle & Leslie Drozd, eds, *Parenting Plan Evaluations: Applied Research For The Family Court* (New York: Oxford Press, 2012) 49; Michael Lamb, "Critical Analysis of Research on Parenting Plans and Children's Well-Being" in Leslie Drozd, Michael Saini & Nancy Olesen, eds, *Parenting Plan Evaluations: Applied Research For The Family Court*, 11th ed (New York: Oxford Press, 2016) 170.

[2] Robert Emery, *Two Homes, One Childhood: A Parenting Plan to Last a Lifetime* (New York, NY: Avery, 2016); Marsha Kline Pruett, Rachel Ebling & Glendessa Insabella, "Critical Aspects of Parenting Plans for Young Children: Interjecting Data into the Debate About Overnights" (2004) 42:1 Fam Ct Rev 39; Richard A Warshak, "Stemming the Tide of Misinformation: International Consensus on Shared Parenting and Overnighting" (2017) 30 J American Academy Matrimonial Lawyers 177.

being in the child's best interests—the basis for decision-making in family relationship cases.

There is an increasing focus on the use of virtual technology to promote and facilitate parent-child contact post-separation. For example, texting, instant messaging, videoconferencing, webcams and other related internet tools are used to promote and facilitate contact post-separation. Yet, little is understood and written about whether and how using virtual technology impacts parent-child relationships post-separation, specifically from the perspectives of children and youth, parents, mental health professionals, and lawyers.[3]

In the United States, Utah[4] became the first state in 2004 to introduce legislation that provides for virtual parent-child contact via internet technology (e.g. Skype, FaceTime, WhatsApp, Facebook Messenger).[5] Wisconsin[6] followed in 2006, then Texas[7] and Florida[8] in 2007, then North Carolina[9] and Illinois[10] in 2009.

Often in cases where one parent moves away for economic, educational, or career opportunities, courts may provide for virtual parent-child contact.[11] In Australia,[12] legislation has incorporated virtual, electronic parent-child contact in these relocation cases.

Arizona's *Guide for Parents Living Apart*[13] provides parenting guidelines for separating parents that include virtual parent-child contact post-separation. In Minnesota,[14] the court services branch has written on child-focused parenting

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3 Richard Wolman & Richard Pomerance, "Telepresence Technology in Divorce and Separation" (2012) 4 Open Access J Forensic Psychology 51 [Wolman & Pomerance]; Michael Saini & Shely Polak, "The Benefits, Drawbacks, and Safety Considerations in Digital Parent—Child Relationships: An Exploratory Survey of the Views of Legal and Mental Health Professionals in Family Law" (2018) 56:4 Fam Ct Rev 597 [Saini & Polak].

4 *Utah Code*, 2017, c 3, s 30-3-33.

5 Elizabeth Bach-Van Horn, "Comment, Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?" (2008) 21 J American Academy Matrimonial Lawyers 171; David Welsh, "Virtual Parents: How Virtual Visitation Legislation is Shaping the Future of Custody Law" (2008) 11 JL & Fam Stud 215 [Welsh].

6 *Wisconsin Statutes*, 2019, c 767, s 41.

7 *Texas Family Code*, 2007, c 153, s 153.015.

8 *Florida Statutes*, 2016, c 61, s 13002.

9 *North Carolina General Statutes*, 2018, c. 50, s. 50-13.2.

10 *Illinois Marriage and Dissolution of Marriage Act*, 2019-2020, c. 750, s. 602.9; *Illinois Marriage and Dissolution of Marriage Act*, 2019-2020, c. 750, s. 602.10.

11 Andrea Himel, The Honourable Debra Paulseth & Jessica Cohen, "1-800-Skype-Me" (2016) 54 Fam Ct Rev 457 [Himel, Paulseth & Cohen].

12 Family Law Act, 1975, s. 63C; See also Megan Gollop & Nicola Taylor, "New Zealand Children and Young People's Perspectives on Relocation Following Parental Separation" in Michael Freeman, ed, *Law and Childhood Studies: Current Legal Issues* (Oxford, England: Oxford University Press, 2012) 219 [Gollop & Taylor]

13 Arizona Supreme Court, "Planning for Parenting Time: Arizona's Guide for Parents

time and includes and even encourages virtual parent-child contact. In Canada, the Association of Family and Conciliation Courts-Ontario Chapter (also known as AFCC-O)[15] also developed parenting guidelines for separated families that include virtual parenting time as another means to maintain parent-child contact post-separation.

Increasingly, mental health professionals and lawyers are including some type of virtual contact in parenting agreements post-separation.[16] In Canada, there has been a marked increase from 113 to 205 between the years 2014 to 2018[17] in the number of family court orders that include some form of virtual parent-child contact (e.g. Skype, FaceTime), a steady increase from 2003 to 2012.[18]

Virtual parent-child contact has also increased in child welfare disputes. Yet, similar to parenting disputes, there remains little empirical research or attention to hearing directly from children and young adults about the use and impact of virtual contact and parent-child relationships, despite the focus on the best interests of children.

This lack of attention contrasts with the growing recognition of the importance of hearing from children either directly or indirectly.[19] Lawyers, mental health professionals, and judicial decision-makers rarely seek the input of children and young people about the many aspects of parenting arrangements that affect children's lives post-separation or in child welfare disputes.[20]

Living Apart", online (pdf): <https://www.azcourts.gov/portals/31/parentingTime/PPWguidelines.pdf>.

14 Minnesota Judicial Branch, "Child-Focused Parenting Time Guide" (last modified 22 August 2019), online: <https://www.afccnet.org/Portals/0/Minnesota%20Child%20-Focused%20Parenting%20Time%20Guide.pdf?ver=2019-09-16-115220-577>.

15 Association of Family and Conciliation Courts: Ontario Chapter, "Parenting Plan Project", online: < https://afccontario.ca/parenting-plan-project/>.

16 Himel Paulseth & Cohen, *supra* note 13; Saini & Polak, *supra* note 5.

17 Legal searches on Lexis Nexis legal database across Canada between January 2014 to December 2018.

18 Christine E Doucet, "See You on Skype: Relocation, Access, and Virtual Parenting in the Digital Age" (2011) 27 Can J Fam L 297; Himel, Paulseth & Cohen, *supra* note 13; Saini & Polak, *supra* note 5.

19 *Convention on the Rights of the Child*, 2 September 1990, art 12.

20 Rachel Birnbaum & Nicholas Bala, "Judicial Interviewing with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24:3 Intl JL Pol'y & Fam 300; Rachel Birnbaum, Nicholas Bala & Francine Cyr, "Children's Experiences with Family Justice Professionals and Judges in Ontario and Ohio" (2011) 25:3 Intl JL Pol'y & Fam 398; Judy Cashmore, "Children's Participation in Family Law Matters" in Christine Hallet & Alan Prout, eds, *Hearing the Voices of Children: Social Policy for a New Century* (UK: Routledge/Falmer Press, 2003) 158; Tarji P—s— & Rosi Enroos, "The Representation of Children's Views in Finnish Court Decisions Regarding Care Orders" (2017) 25 Intl J Child Rts 736.

As observed by the former Chief Justice of Canada, Beverly McLachlin, in 1992:

> In order to find out what is in the best interests of children, it seems logical to find out what the children think. How can you assess a child's best interests without hearing from the child.[21]

The purpose of this study was to address this gap in the research. The objectives are threefold: (1) to explore the literature about whether and how children's views are considered when virtual parent-child contact is being considered in parenting post-separation and in child welfare disputes; (2) to explore the views and experiences of lawyers and mental health professionals about their clients' views and experiences with virtual technology to maintain parent-child contact post-separation and in child welfare disputes; and (3) to explore the views and experiences of parents and children between the ages of 4 to 12 in Ontario about the use of virtual contact to maintain parent-child relationships post-separation in parenting disputes.

This exploratory mixed-method study begins with a review of the limited literature on the use of virtual contact in parenting post-separation and in child welfare disputes. This review provides an important context on whether children and young people are consulted about their views on virtual parent-child contact post-separation and in child welfare disputes.

2. LITERATURE REVIEW SPECIFIC TO THE USE OF VIRTUAL TECHNOLOGY AND CHILDREN IN CHILD WELFARE

Children in the care of child welfare agencies benefit from contact with their parents even when there are child protection concerns. Children often suffer considerable distress from the loss of their parents' care and feel that they have no control over their lives.[22] For some children and young people, maintaining contact with their family members through the use of technology can provide much needed emotional support and comfort, providing it is safe for the child.

Yet, to date, the use of technology for the purpose of contact between children and their parents in child welfare has primarily focused on issues of confidentiality, privacy, boundaries, informed consent, policy development as well as documentation.[23] The vast majority of studies have surveyed social

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[21] Madam Justice Beverly McLachlin, "Children and the Legal Process: Changing Rules of Evidence" (1992) 50 Advocate 727.

[22] Elsbeth Neil, Mary Beek & Gillian Schofield, "Thinking About and Managing Contact in Permanent Placements: The Differences and Similarities Between Adoptive Parents and Foster Parents" (2003) 8:3 Clinical Child Psychology & Psychiatry 401; Christine Mullan et al, "Care Just Changes Your Life: Factors Impacting Upon the Mental Health of Children and Young People with Experiences of Care in Northern Ireland" (2007) 13:4 Child Care in Practice 417.

[23] Eileen A Dombo, Lisa Kays & Katelyn Weller, "Clinical Social Work Practice and Technology: Personal, Practical, Regulatory, and Ethical Considerations for the

workers in child welfare agencies, administrators, and foster parents[24] to better understand the risks and benefits of using technology as a means of strengthening parent-child contact.

Only a handful of the studies that have reported on the views of children and young people focus on the use of smartphones as a means of contact with their parents or social workers. In one study, Macdonald et al[25] examined the use of mobile telephone contact in Great Britain by young people in foster care and residential care, policymakers, social workers, foster parents, and residential care staff. The purpose of the study was to explore what impact, if any, the use of mobile telephone contact has on parent-child contact. The majority of young people reported that their only concern with using mobile telephone contact was that their text messages should not be read by anyone other than the person to whom it was sent. Denby-Brinson, Gomez, and Alford[26] explored the use of smartphones in the United States and whether or not it enhanced young people's relationships in foster care with supportive adults (i.e. child welfare workers, parents). Young people expressed that the use of smartphones helped them connect with their family, friends, and workers and allowed them greater opportunities to strengthen their relationships by being able to have more contact through the use of technology. Denby-Brinson, Gomez, and Alford[27] reported that youth in the United States believed that they had a voice as a result of being able to communicate their views and preferences about their ongoing placement needs in child welfare using smartphone technology. Stott, MacEachron, and Gustavsson[28] concluded that the use of technology between

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Twenty-First Century" (2014) 53:9 Social Work Health Care 900; Andrew Quinn, Kris Sage & Peter Tunseth, "An Exploration of Child Welfare Workers' Opinions of Using Video-Assisted Visitation (VAV) in the Family Reunification Process" (2015) 33 J Technology in Human Services 5.

[24] Sarah Breyette & Katharine Hill, "The Impact of Electronic Communication and Social Media on Child Welfare Practice" (2015) 33:4 J Technology in Human Services 283; Jerry Finn, "Supporting Foster Families with Internet and Communications Technology" (2011) Child Welfare & Technology 17 [Finn]; Ruth McRoy, *Do You Facebook or Twitter? Survey Report Findings* (2010) [unpublished, archived at The University of Texas at Austin Center for Social Work Research]; Todd Sage & Melanie Sage, "Social Media Use in Child Welfare Practice" (2016) 17:1 Advances in Social Work 93.

[25] Geraldine Macdonald et al, "Mobile Phones and Contact Arrangements for Children Living in Care" (2017) 47 British J Social Work 828.

[26] Ramona Denby Brinson, Efren Gomez & Keith A Alford, "Promoting Well-Being Through RelationshipBuilding: The Role of Smartphone Technology in Foster Care" (2016) 34 J Technology in Human Services 183.

[27] Ramona Denby Brinson, Efren Gomez & Keith A Alford, "Becoming "Smart" About Relationship Building: Foster Care Youth and the Use of Technology" (2015) 3 Issue Brief Social Services 1.

[28] Tonia C Stott, Ann MacEachron & Nora Gustavsson, "Social Media and Child Welfare: Policy, Training, and the Risks and Benefits from the Administrator's Perspective" (2016) 17:2 Social Media & Child Welfare 221.

children and their parents as well as between children and their significant caregivers in child welfare can increase and enhance their e-literacy and reduce their feelings of loss and isolation.

In the final analysis, while the use of technology can be a positive asset as a means of contact for children and youth in child welfare, much more research needs to take place given the issues of confidentiality, potential for online bullying, need for education of foster parents and social workers on the benefits and risk of technology, and lack of child welfare agency policies around the use of technology for contact between children and their parents.[29]

3. LITERATURE REVIEW SPECIFIC TO USE OF VIRTUAL TECHNOLOGY AND POST-SEPARATION PARENTING

Mental health professionals have increasingly recommended some type of virtual contact post-separation when making parenting recommendations. Yet, there remains a dearth of empirical studies to help guide family justice professionals on the risks and benefits of virtual parent-child contact, specifically in relation to engaging with children and young people regarding their views and experiences.[30]

Yarosh, Chieh, and Abowd[31] interviewed 10 parents and 5 children (ages 7 to 14) to better understand the challenges faced by parents in using technology to maintain parent-child contact. Parents reported dissatisfaction with the use of the telephone as a primary means of maintaining parent-child contact. They also reported that keeping conversations going was difficult at times and that they preferred to share activities with their child. There were also concerns expressed about privacy issues. Castelain-Meunier and Libbrecht[32] found similar results more than a decade earlier with fathers reporting difficulty in maintaining their child's attention when using the telephone as a means of maintaining parent-child contact.

Ganong et al[33] interviewed divorced parents to better understand how they maintained their co-parental relationships through the use of synchronous technology (i.e. both parents being available at the same time such as in

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[29] Tara Black & Laura Schwab-Reese, " Keeping Up With the Technology? Technological Advances and Child Maltreatment Research" (2018) 85 Child Abuse & Neglect 185; Finn, *supra* note 26; Sarah Wilson, "Digital Technologies, Children and Young People's Relationship and Self-Care (2016) 14:3 Children's Geographies 282.

[30] Kenneth Waldron, "A Review of Social Science Research on Post-Divorce Relocation" (2005) 19 J American Academy Matrimonial Lawyers 337; Welsh, *supra* note 7; Wolman & Pomerance, *supra* note 5.

[31] Svetlana Yarosh, Yee Chieh Denise Chew & Gregory Abowd, "Supporting Parent—-Child Communication in Divorced Families" (2009) 67 Intl J Human-Computer Studies 192.

[32] Christine Castelain-Meunier & Liz Libbrecht, "The Paternal Cord: Telephone Relationships Between "Non-Custodian" Fathers and their Children" (1997) 5 French J Communication 160.

telephone or face-face communication) as well as asynchronous technology (i.e. messages sent and received over periods of time such as in emails or phone texts) to communicate with their children. They found that for parents in cooperative co-parenting relationships, technology made it easier to plan activities and make decisions around their children post-separation. However, for the more conflict-driven parents, technology only served as a means to limit, manipulate and withhold information about the children as well as influence the behaviour of the co-parent.

Gollop and Taylor[34] reported on children's and young people's experiences with maintaining parent-child contact through virtual technology. The research was part of a larger three-year study interviewing 100 New Zealand families (i.e. parents and children) in 2010 where one parent sought to relocate. The children and young people reported that irrespective of the type of virtual technology used (i.e. Skype, email, texting, FaceTime), it was difficult and challenging to maintain contact due to interrupted telephone lines that were broken or lost, lack of immediacy with email contact and time differences as a result of geography. Children reported that they preferred face-to-face contact. In their larger study, parents reported that technology could be used as a "weapon" (i.e. surveillance of their children with their other parent, refusal to purchase or connect the equipment) for the sole purpose of frustrating the residential parent and child.[35]

Saini et al[36] reviewed the limited body of literature on virtual parent-child contact within the context of separation and divorce. They cautioned against making any generalizations about children's experiences using virtual technology as a means of parent-child contact based on the limited number of studies. Saini and Polak[37] explored survey results of legal and mental professionals and their views and experiences about the use and impact of virtual technology to maintain parent-child contact post-separation. They found both benefits and challenges to the use of technology, particularly with high conflict separated families (i.e. those with poor problem-solving skills, poor communication skills, and who are conflict-oriented) who could not cooperate or interfered with the other parent's parenting time during parent-child contact. They concluded that there needs to be more assistance provided for high conflict parents; these parents need to be offered guidance and structure (i.e. rules) in parenting plans when virtual technology is being used as a means of contact post-separation and divorce.

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[33] Lawrence Ganong et al, "Communication Technology and Postdivorce Coparenting" (2012) 61 Family Relations 397.

[34] Gollop & Taylor, *supra* note 14.

[35] Nicola Taylor, Megan Gollop & Mark Henaghan, *Relocation Following Parental Separation: The Welfare and Best Interests of Children* (2010) [unpublished, archived at the University of Otago, Dunedin, New Zealand Centre for Research on Children and Families and Faculty of Law].

[36] Michael Saini et al, "Parenting Online: An Exploration of Virtual Parenting Time in the Context of Separation and Divorce" (2013) 10 J Child Custody 120.

[37] Saini & Polak, *supra* note 5.

In summary, while the studies about parental separation and the use of virtual technology to maintain parent-child contact remain limited, a number of observations can be made. While virtual technology has the potential for maintaining parent-child contact post-separation, there needs to be more research that includes the views of children and young people as well as parents about the risks and rewards of virtual parent-child contact. Regardless of the type of virtual technology being used, not all parents and children can afford the technology and not all parents live in areas that have reliable internet services. In addition, not all parents want the added demands of being responsible for organizing virtual parent-child contact, particularly for children who need adult assistance. Family justice professionals need to be mindful not to promote "virtual parenting" as a replacement for actual face-to-face parent-child contact. Finally, children and young people must be consulted when it comes to formulating parenting arrangements using any form of virtual technology to maintain parent-child contact post-separation.

This study is part of a broader research agenda exploring children's participation post-separation. The focus of this paper is on the views and experiences of mental health professionals, lawyers, children and young people, and parents about the challenges and benefits of using virtual technology as a means of parent-child contact post-separation and in child welfare disputes.

4. THE STUDY

(a) Method

There were two separate but interrelated mixed-method studies. The first study was a 37-item online survey sent to mental health professionals and lawyers. This survey consisted of both closed and open-ended questions. The second study was based on telephone interviews with 10 children (ages 4 to 12) and 7 parents (3 parents of the 10 children were interviewed with their child) in Ontario. The parents and children were purposively recruited participants through the use of family justice newsletters, university news, as well as email invitations to interdisciplinary organizations.

The online survey questions for family justice professionals related to: (1) demographics (i.e. age, gender, professional designation, years of practice in family justice, years of practice as a child custody assessor, years of practice in representing children); (2) percentage of practice representing family law clients, child welfare clients, and children; (3) beliefs about the age range of children to use Skype, FaceTime, etc. with the other parent, with and without adult assistance; (4) how often adult clients reported conflicts in using Skype, FaceTime, etc.; and (5) how often child clients reported conflicts in using Skype, FaceTime, etc.

The qualitative interviews were solely focused on separated parents and young people in parenting disputes.[38] Each parent was asked to comment on the

length of the separation, the type of technology used to maintain parent-child contact with the non-resident parent, their views and experiences with virtual technology as a means of parent-child contact with the non-resident parent, as well as the challenges and benefits of virtual technology relating to confidentiality and safety. The final question asked each parent if they had any other comments they wanted to share about the use of technology in the context of virtual parent-child contact. Each child was asked to comment on the type of technology used with their non-resident parent and how often it was used, their views and experiences with virtual technology when used with their non-resident parent to maintain contact, and if they had any other comments they wanted to share about technology in general or about its use with their non-resident parent.

Using a mixed-method study of both quantitative and qualitative methods expands our understanding of exploring virtual technology as a means of parent-child contact with evidence-informed data. Adopting a mixed-methods approach provides greater confidence in a singular conclusion and we can modify interpretations and conclusions accordingly.[39] The qualitative data provides context to better understand the real-world experiences of children, parents, mental health professionals, and lawyers, and provides insight to "make sense of quantitative results and thereby produces a much richer knowledge base."[40]

(b) Data Analyses

For this study qualitative analyses used a grounded theory approach given the limited knowledge in this area.[41] Grounded theory is about constructing meanings/concepts through the gathering of the interview data and analyzing the themes that are being generated by parents and children. The first set of themes are done by open coding (i.e. developing categories of information and reducing the data into concepts), followed by axial coding (i.e. creating a coding structure that portrays the interrelationships between the information obtained) and then conducting selective coding (i.e. telling the story based on the categories and interrelationships found in the data). Quantitative analyses focused on

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[38] The interviews were conducted on the telephone solely by the author and took an average of 25 minutes. Interviews were audio-taped and transcribed verbatim. All quantitative data was downloaded to SPSS 24 to examine frequencies and descriptive data. Research ethics approval for the study was obtained from the author's university research ethics review board.

[39] John W Creswell, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches*, 3rd ed (Thousand Oaks, CA: SAGE, 2013).

[40] Robert F Kelly & Sarah H Ramsey, "Child Custody Guidelines: The Need for Systems-Level Outcome Assessments" (2009) 47:2 Fam Ct Rev 286.

[41] Barney Glaser & Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Mill Valley, CA: Sociology Press, 1967).

descriptive analysis (i.e. telling a story from the perspective of the participants) given the limited knowledge in this area.

(c) Results

The results presented below outline the survey responses from the mental health professionals and lawyers about their adult and child client's experiences with virtual technology as a means of contact in post-separation and child welfare disputes. The qualitative themes generated by the parents' and children's interviews are then highlighted to further expand on their views and experiences in using virtual technology as a means of parent-child contact post-separation.

(i) Demographics

Table 1 describes the demographic profile of the survey participants. The total number of participants was n = 166 (n = 125 females, n = 30 males). Eleven participants chose not to identify their gender or age. The majority of lawyers were over 55 years of age, n = 42 (25%). The majority of lawyers had over 20 years of practice in family justice, n = 50 (35%) and the majority of social workers had less than 5 years of experience preparing parenting assessments in family justice, n = 21 (38%). The majority of lawyers reported that they represented family law clients, (n = 85, 29%), child welfare clients (n = 49, 17%), and children in parenting disputes (n = 77, 26%).[42]

Table 1: Demographic Profile of Professionals Surveyed

		N =
Gender	Males	30 (19%)
	Females	125 (81%)
Ages[43]	25-35 years	12 (7%)
	36-45 years	38 (23%)
	46-55 years	40 (24%)
	Over 55 years	42 (25%)
Professional Designation	Lawyer	77 (48%)
	Psychologist	9 (6%)
	Social Worker	58 (36%)
	Other[44]	17 (11%)

[42] The percentages do not add up to 100 as not all of the participants answered each question.

[43] Two participants preferred not to answer as an option.

[44] Includes supervised access manager, executive director of child and family agency, legal advocate, and family justice counsellor.

		N =
Number of years of practice in family justice (i.e. both lawyers and mental health professionals)	0-5 years	25 (17%)
	6-10 years	23 (16%)
	11-15 years	24 (17%)
	16-20 years	22 (15%)
	Over 20 years	50 (35%)
Number of years being a child custody assessor (i.e. mental health professionals)	0-5 years	21 (38%)
	6-10 years	15 (27%)
	11-15 years	8 (15%)
	16-20 years	4 (7%)
	Over 20 years	7 (13%)
Number of years practicing as a children's lawyer (i.e. lawyers)	0-5 years	26 (37%)
	6-10 years	10 (14%)
	11-15 years	17 (24%)
	16-20 years	10 (14%)
	Over 20 years	8 (11%)

(ii) Professionals Report on Adult and Child Conflicts That Arise as a Result of Virtual Parent-Child Contact

Table 2 describes how often parent and child clients report conflicts over the use of Skype and FaceTime to maintain parent-child contact in parenting disputes. The majority of adult clients report that the greatest conflict is that the other parent is listening, 52% (87/166) and that the child is not being made available at the designated time, 36% (60/166). Comments by parents to the professionals highlighted additional concerns:

> "Undermining of [parental] authority or questioning the residential adult's decisions affecting a child or a child's wishes." (reported to a male lawyer)

> "Allegations of adult information being shared or intensive/intrusive questioning of a child. Also concerns that the parent is using technology to examine the other parent's environment." (reported to a female social worker)

> "Other parent uses it as an opportunity to discuss adult issues with the parent (court, their relationship, arguments), instead of talking to the child." (reported to a female lawyer)

> "Parent alleges that it is an invasion of their privacy and access parent is using this as a way to gain information about them." (reported to a female lawyer)

The majority of child clients reported to the professionals that they are sometimes busy and do not always want to talk to the other parent at that time as they do not have a lot to say to the other parent, 43% (72/166), followed by, sometimes as a result of not having a lot to say to the parent, the parent gets upset with them, 36% (59/166). Comments from child clients to the professionals highlighted additional themes:

> "I have had children say that they don't like having a designated time to speak with the non-access parent. They become 'busy' and feel imposed upon by having to stop to chat with the non-access parent. So, the child acts out and the non-access parent blames the access parent." (reported to a female psychologist)

> "Feeling caught in between parents when the other parent is listening in." (reported to male psychologist)

> "Mom/Dad get mad when I talk to the other parent." (reported to a female lawyer)

> "I have to ask my mum to borrow her phone to call my dad and she does not always look happy for me to call my dad." (reported to a male social worker)

> "Child too afraid and/or not comfortable; not always good flow of staying connected (i.e. freezes)." (reported to a female social worker)

Table 2: Parent and Children's Reports to the Professionals About the Types of Concerns Raised and Level of Conflict In Using Technology for Parent-Child Contact

Parent Reports	**N =**			
	Often	**Sometimes**	**Rarely**	**Never**
Child is not available at designated time.	60 (36%)	73 (44%)	6(4%)	7 (4%)
The other parent is listening.	87 (52%)	49 (30%)	4 (2%)	6 (4%)
The other parent alleges that they do not know how to use the technology or set it up.	6 (4%)	46 (28%)	54 (33%)	38 (23%)
The other parent alleges that the child is busy doing something else at the designated time.	51 (31%)	72 (43%)	15 (9%)	8 (5%)

Parent Reports	**N =**			
The other parent alleges they do not know how to use My Family Wizard.[45]	19 (11%)	41 (25%)	39 (24%)	38 (23%)
Children Reports	**N =**			
	Often	**Sometimes**	**Rarely**	**Never**
I am busy sometimes and do not always want to talk at that time.	22 (13%)	72 (43%)	20 (12%)	17 (10%)
The other parent is listening.	26 (16%)	50 (30%)	34 (21%)	18 (11%)
I do not have a lot to say sometimes and my parent gets upset about it.	35 (21%)	59 (36%)	16 (105)	20 (12%)

(iii) Degree of Change in Your Practice About the Use of Virtual Contact in Parenting and Child Welfare Disputes

The majority of the professionals reported that they have seen a 74% increase in the last 5 years of practice in using Skype, FaceTime and other technologies as a means of parent-child contact in post-separation disputes. They also report a 29% increase in the last 5 years of practice specifically using Skype, FaceTime and other technologies as a means of parent-child contact in child welfare disputes.

(iv) Benefits and Challenges of Using Online Technology in Parenting Disputes

Professionals were asked to comment on their views of the benefits and challenges in using online technology in parenting disputes. The following comments were made:

> "When used to allow increased communication between parent-child: while it may sometimes be difficult to engage the child in those communications, it allows for more frequent contacts than would otherwise be possible. I see mainly benefits in this, despite the scheduling challenges that it sometimes presents. When it comes to litigating child custody disputes, the internet and online technologies have now become a very important source of information and evidence for counsel. Their advantages (when the evidence favours your client) are as important as their disadvantages (when that evidence does not favour your client). Technology can be both useful and deceitful." (female lawyer)

[45] An online tool that each parent uses to communicate/coordinate activities/calendar with one another.

> "Information can easily be manipulated. Difficult to assess legitimacy of who is providing information. Conversely, offers easy access between parents and children." (female lawyer)

> "Benefits: limits direct contact between parents in conflict while maintaining contact with child; challenges: when one parent does not cooperate or if there are technological limitations by one parent (i.e. does not know how to use a computer properly)." (female mediator)

> "It is a source of evidence about the parent's ability to cooperate and whether they can reasonably make decisions about the child's best interests. More rarely, it is also used to establish a prior inconsistent statement. The benefits are significant since the lack of physical presence can assist clients to calm down in high conflict cases. At the same time, some clients incorrectly try to use the medium to set up traps for the other parent or engage in what they see is a strategic maneuver in litigation." (male lawyer)

(v) Benefits and Challenges of Using Online Technology in Child Welfare Disputes

Professionals were also asked to comment about their views on the benefits and challenges of using online technology as a means of parent-child contact in child welfare disputes. Comments raised include:

> "Benefits: more readily accessible and flexible communication tools. Negatives: unsupervised, mis-use, concealed communications, etc." (female social worker)

> "Access to technology; most child welfare families have limited access to technology or if they do have smartphones, can't afford the data to use tech—dependent on free WiFi and it is in public places so no privacy/confidentiality." (female lawyer)

> "Technology is a magnificent tool for lawyers. They have high expectations and high dependency on technology. It cannot replace, however, the skills needed to inquire, listen, focus on facts, isolate reasonable conclusions, advise, encourage, and support children and families within the remit of a lawyer. Technology in litigation, like a car on an open road, is a wonderful and beneficial thing in experienced hands but one moment of inattention or one wrong move and there's damage everywhere." (male lawyer)

5. QUALITATIVE THEMES: VIEWS AND EXPERIENCES OF CHILDREN AND PARENTS ABOUT THE USE OF VIRTUAL TECHNOLOGY FOR PARENT-CHILD CONTACT

In total there were 10 children (6 females and 4 males) ranging in age from 4 to 12 (the average age was 10) and 7 parents who were interviewed[46] (5 mothers and 2 fathers). Of the 7 parents, 3 of the parents were interviewed separately with the children. The parents were separated and/or divorced between 2 to 5 years; 8 of the children lived in the primary custody of their mother, one child with their father and one child lived in a shared care parenting arrangement. Five of the parents had some form of court-ordered virtual parent-child contact using either Skype or FaceTime with the non-resident parent, and the remaining (i.e. including children) reported that they made their own parenting arrangements about using virtual technology as a means of parent-child contact.

(a) Parent Themes

The parents' interviews raised both benefits and challenges of the use of virtual technology as a means of parent-child contact post-separation. The themes and supporting evidence cluster in four major areas that relate to both risks and rewards.

(i) Risks

(1) Feeling that the resident parent is interfering in parent-child contact

A father reported concerns about his child being able to transport the technological device back/forth:

> "She [8-year-old] also has a computer but her mom prevents her from taking her computer back/forth, so, like she has one with me but she [mother] doesn't allow her [child] to take it home, so she can use it as well."

Another father raised a concern of:

> "The constant interruptions from mum, and you know mum will come in, and start waving or making silly faces behind child even though I can see her [mum] as can child."

(2) Concerns about safety and vulnerability

One mother stated:

> "He [non-resident father] set her [daughter] up in a private account and blocked me [mother]."

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[46] Due to the small sample size with children and parents, minor edits [i.e. type of technological device, geographic location] were made to protect the confidentiality of the participants.

Another mother stated she monitored the telephone calls between the child and the other parent because:

> "The children [ages 4 and 10] would often walk around the house with the telephone and show him what was in the house. . . it was uncomfortable for me [resident parent]."

One father reported being accused of manipulating the type of communication:

> "I faced allegations from her [resident parent] that I was manipulating all three kinds of communication for submission to the courts, which isn't the case."

(3) Concerns about privacy and confidentiality

One father reported that:

> "Assessor can pop in and have a look and see correspondence going back/forth, because there are court orders in place that tell you you're not to speak to the other person and there is all kinds, I have been subjected to all kinds of various forms of harassment."

One mother reported that:

> "Not sure I like my child being online and an open communication as there is no real privacy and worry about pictures being taken and then sent somewhere."

(ii) Rewards

(4) Reduced conflict between parents

One mother reported:

> "I mean it cuts down the number of conflicts that can be brought up which tends to happen when you have swaps, you know take this weekend for that weekend [Skype court-ordered for mid-week access as child had every other weekend access]."

One father stated that while they have no agreement for virtual contact:

> "It [FaceTime] has been really helpful for the parental relationship as son just calls when he [son] wants and that is fine."

(5) Allows children to maintain parent-child relationships with both parents

One mother stated:

> "We share custody of the 2 children and Google calendaring as well as FaceTime allows the girls to be able to have access to both of us and they [girls] manage it well. . . just enforcing that either parent can be accessible to the children whenever they need us, lessens their feelings of

> being isolated or being separated from the other parent. . . works well as we [both parents] really work hard at our parenting relationship."

Another father reported:

> "Once we started using this technology [FaceTime], it made all the difference in the world because she can see me, I can see her, we talk. . . if I am away at work, I can show her where I am and make her feel she's there with me."

(b) Children's Themes

The children raised both risks and benefits with virtual parenting time. The following themes emerged:

(1) Feelings of closeness with non-resident parent and reservations at same time

One 10-year-old female [mother interviewed separately as well] stated:

> "Ya, it's pretty awesome, but I would obviously rather be able to see him. . . but online. . . being able to play games with him or see his face is pretty cool."

Another 12-year-old female stated:

> "While it is really great to see my dad, I want to feel him near me as well."

(2) Resident parent interferes with access time and issues of privacy for child

A 10-year-old female stated:

> "My mother is around [listens] as she wants to hear what he [father] says."

Another 12-year-old male reported:

> "My mom is always asking me how it's going and how long will I be online with my dad."

(3) Longing for non-resident parent

One 11-year-old male stated:

> "Well one thing I don't like about this [virtual contact] is I can't actually see him in person. . . it's sad, but good at same time [I can see him, on the screen at least]."

Another 11-year-old male reported:

> "When I am home alone, I want to call him."

(4) Often not available at appointed time

A 10-year-old female and her mother who I also spoke to separately stated:

> "I am supposed to call [FaceTime] on Monday and Wednesday, most of the time I can't really make it, but it creates problems for my dad who gets upset."

Another 10-year-old female reported:

> "I like talking to him but sometimes I am busy, and he gets upset as I want to get off."

6. LIMITATIONS

As with all studies, this study too, had several limitations that need to be highlighted. Given the exploratory nature of this study and the few empirical studies that address the use of virtual technology as a means of parent-child contact, more research is required before any practice or policy determinations can be made. As stated earlier, the majority of parents and children in this study were court-ordered to have virtual contact and lived primarily with their mothers. There were two cases where the non-resident parent lived in another jurisdiction.

The limited sample size and exploratory nature of this study precludes any recommendations. However, court-ordered and voluntary agreements for virtual parent-child contact as well as different types of parenting arrangements are important research topics that need to be addressed in future studies. Additionally, the age range of the children in this study raises questions about the type of technology being used and how much adult assistance is required. This may be of particular concern for those children who have special needs (i.e. cerebral palsy, on the autism spectrum disorder, epilepsy). Future research also needs to explore the impact and use of virtual technology for these children as well as their parents.

Finally, the sample of mental health and legal professionals surveyed and children and parents interviewed was small and exploratory in nature. Therefore, caution must be exercised as the findings cannot be generalized more broadly.

7. DISCUSSION

This is the first study that draws on multiple perspectives about the views and experiences of family justice professionals (i.e. lawyers and mental health professionals), their comments from parent and child clients, as well as comments from children and parents directly about their views and experiences with virtual technology as a means of parent-child contact. Findings reveal a number of risks and benefits based on the different perspectives about virtual parent-child contact. Professionals are seeing a rise in court orders using virtual technology as a means of parent-child contact in both parenting and child welfare disputes despite the lack of empirical studies to help guide practitioners and the courts.

From the perspective of parent reports to lawyers about virtual parent-child contact, a number of concerns were highlighted. One concern related to the resident parent listening in on the conversation between their child and the non-resident parent. The second concern was related to the resident parent being responsible for making sure that the child is available at the specified time. In the parent interviews, the greatest concerns centred on safety and feeling vulnerable during the parent-child virtual contact as well as privacy issues. That is, parents raised concerns about being blocked from accessing the technology being used by the non-resident parent and the child, invasion of privacy and feelings of being monitored (i.e. resident as well as non-resident parents), and the unfettered virtual access to the resident parent's home. This latter theme raises concerns for high conflict parents as well as those where domestic violence is a serious concern.

Having said this, there were also a number of benefits highlighted as a result of virtual parent-child contact in both the parental reports to their lawyers as well as in the parent interviews. These themes are similar to the findings in Wolman and Pomerance.[47] The greatest benefit raised by each parent is that the child can maintain an ongoing parental relationship and that virtual parent-child contact provides reduced hostilities between the parents because they have no contact with one another other than organizing the call if the child requires adult assistance.

While it is important to obtain different perspectives (i.e. children, parents, lawyers, family justice professionals) about the emerging use of parent-child contact via virtual technology, it is also important to acknowledge that more research is needed to unpack any cultural nuances. That is, not all parents and children are comfortable with the use of technology or want to use technology as a means of parent-child communication. In addition, there are barriers to the use of technology (i.e. rural versus urban areas) as well as the relative burdens and costs (i.e. emotional and financial) to parents as the use of virtual parent-child contact moves forward in the age of technology. Moreover, children and young people must be consulted about their views and experiences, particularly depending on their needs as not all children, irrespective of age, want to commit themselves to a particular date and time. It is also very important to examine the safety risks underlying the use of virtual communication tools especially relating to high conflict cases where domestic violence (i.e. stalking) can be an issue.

More importantly, there needs to be a focus on unpacking some of the underlying assumptions about parenting via the virtual world—that is, what does "virtual parenting" mean to children and young people, in particular. As poignantly stated by a 12-year-old female, "While it is great to see my dad, I want to feel him near me as well", and by an 11-year-old male, "I can't really see him in person. . . it's sad, but good at the same time."

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[47] Wolman & Pomerance, *supra* note 5.

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Case Comment: Undermining Children's Rights in *A.M. v. C.H.*

Claire Houston[*]

1. INTRODUCTION

The recent Ontario case of *A.M. v. C.H.*[1] is troubling on multiple levels. The case involved a 14-year-old boy who was resisting contact with his father. The trial judge found that the mother had alienated the child from the father, despite evidence that the boy's resistance was justified. The trial judge transferred custody to the father and suspended access between the child and the mother. The trial judge refused to review the order until the child agreed to "reconciliation therapy" with his father. After the custody transfer, the child assaulted the father, was criminally charged, and—prohibited from contact with the mother—was placed in foster care where he was seriously assaulted.[2] Yet the significance of *A.M. v. C.H.* goes beyond its troubling facts. The trial judge's decision and the Court of Appeal's subsequent endorsement of that decision have implications for children's rights more generally. This comment argues that *A.M. v. C.H.* threatens children's rights in parenting disputes by allowing a judicial finding of alienation to silence children's views, making it easier to reprimand custodial parents by transferring custody of children, and depriving capable children of autonomy to make treatment decisions.

2. PROCEDURAL HISTORY

(a) The Trial Decision

The central issue in the case was the child's contact with his father. The parties had three children. At the time of trial, only the 14-year-old remained the subject of the application.[3] In the summer of 2014, the mother and children moved out of the matrimonial home. In July 2014, an interim order granted the father access to the children every Sunday as well as every Wednesday evening,

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[1] *Malhotra v. Henhoeffer*, 2018 ONSC 6472, 2018 CarswellOnt 18560 (Ont. S.C.J.), additional reasons 2019 ONSC 527, 2019 CarswellOnt 703 (Ont. S.C.J.), affirmed *A.M. v. C.H.*, 2019 ONCA 764, 2019 CarswellOnt 15391 (Ont. C.A.), additional reasons *A.M. v. C.H.*, 2019 CarswellOnt 19664 (Ont. C.A.) [*AM v. CH*].

[2] A recent costs decision says the child has apologized to the father and is now living with him: *A.M. v. C.H.*, 2019 ONCA 939, 2019 CarswellOnt 19664 (Ont. C.A.) [*AM v. CH* costs decision]. I discuss this development further in the Conclusion.

[3] The parties' other children were now 18 and 19 years old, respectively.

and the Ontario Office of the Children's Lawyer ("OCL") was appointed to represent the children. By late 2016, the child was seeing his father for 45 to 60 minutes a week. The child consistently stated that he did not enjoy access visits with his father and did not want the visits to continue. Attempts at "reconciliation therapy" were unsuccessful, and different access arrangements did not change the child's views.

The parties disagreed about the source of the child's views. The father argued that the child's views were a product of the mother's alienating conduct and attitudes. He testified to the mother's attempts to turn the children against him pre-separation,[4] and her false allegations that he abused her and the children. The mother had unilaterally moved the children to a different city following separation and had brought a motion to terminate the father's access. There was evidence that she did not believe the children needed a relationship with their father. While the mother admitted that she exaggerated some of her abuse claims during the proceedings, she argued that the child's views were justified by the father's violence and cruelty. In fact, the father admitted spanking the child and repeatedly calling the child a "donkey" because of the child's learning disability.[5]

The OCL took the position that the child was realistically estranged from his father. The OCL social worker assisting child's counsel agreed that the mother's negative feelings toward the father had contributed to the child's views. However, she believed that the mother's alienating behaviour had dissipated and, more importantly, that the child's views were also shaped by the child's experiences with his father, including his physical discipline and name-calling.[6] The OCL's view was that the child was "not. . . an alienated child."[7] Given the child's age, the independence of his views, and the fact that his views had remained strong and consistent despite various efforts to promote a relationship between the child and his father, the OCL argued that access be terminated, take place at the child's discretion, or be reduced.

The trial judge transferred custody of the child from the mother to the father and suspended access between the mother and child (and between the child and his siblings) for at least six months. Although there was no expert evidence countering the OCL social worker's view, the trial judge found that the child's rejection of his father was *solely* due to the mother's alienating behaviour.[8] According to the trial judge, the father's past conduct played no part in shaping

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4 For example, the father testified that the mother criticized him in front of the children, would lock him out of the house after arguments, and that the mother and the children would not allow him to eat with them: *Malhotra* 2018, *supra* note 1 at paras. 26-27.

5 *Ibid* at para. 42.

6 The OCL also cited instances where the father appeared unannounced during a class field trip and did not immediately leave after the child expressed discomfort, and where the father drove the children against their will to his home and locked them in the car. The OCL also noted that the father had refused to consent to necessary counseling for the child. *Ibid* at para. 78.

7 *Ibid* at para. 85.

the child's views: "This is not a hybrid situation."[9] Having found that the child's rejection of the father was based on the mother's alienating conduct alone, the trial judge explained that the child's views and preferences would not be considered: "I cannot give [the child's] wishes any weight. He has been poisoned against his father and his views are not his own."[10] While the trial judge acknowledged that the child would "initially struggle tremendously" from the change in custody, he reasoned that the child's long-term best interests would be served by facilitating the child's relationship with the father and protecting the child from the mother's alienation, which he described as "emotional abuse."[11] The change was further justified, explained the trial judge, because he "expect[ed] the Respondent Mother and the child may completely disobey any access order I make."[12] Finally, noting that the child was refusing "reconciliation therapy," the trial judge nonetheless directed that the court would not review the custody or access order for six months *and* until the child had participated in such therapy.[13]

(b) Additional Reasons

Less than three months after the trial decision, the parties were back before the trial judge. The transfer of custody had not gone well. Police involvement had been necessary to deliver the child to the father's custody.[14] The child had repeatedly run away from the father's home to the mother's home and the police had been called to return the child to the father. The child had vandalized the father's house. He had also refused to attend "reconciliation therapy." The father sought various orders to compel the child and the mother to comply with the trial decision; the mother asked for some access to the child. The child asked to meet with the judge.

The trial judge made several orders in favour of the father to reinforce the trial decision, refused the mother's request for access, and declined to meet with the child. The trial judge blamed the mother for the child's refusal "to submit to his father's authority."[15] First, her alienating behaviour had caused the child to reject his father: "[u]nbeknowst to [the child], his mother ha[s] been systematically poisoning his mind against his father and thereby emotionally abusing him for many years."[16] Given this brainwashing, it was pointless,

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8 The trial judge found that this "situation" was "a unilateral, deliberate and successful alienation by the Respondent Mother alone." *Ibid* at para. 176.

9 In fact, the trial judge applauded the father for "trying to assert some degree of parental authority over the children." *Ibid* at para. 174.

10 *Ibid* at para. 152.

11 *Ibid* at para. 181.

12 *Ibid* at para. 180.

13 *Ibid* at para. 183.

14 The trial judge had acknowledged in the trial decision that, "[i]n order to ensure compliance with this order, police enforcement will be necessary." *Ibid* at para. 182.

15 *Malhotra* 2019, *supra* note 1 at para. 6.

explained the trial judge, for him to meet with the child "until [the child] has meaningfully engaged in reconciliation counselling and [has begun] to appreciate, through that therapeutic process, that a relationship with his father is in his best interest."[17] Second, the mother's refusal to accept the trial decision, exemplified in part by her appeal of that decision, was causing the child not to comply with its terms. To buttress the trial decision, the trial judge ordered that the child have no contact with his maternal grandparents, that he obey certain rules in his father's home, and that he "accept and attend" "reconciliation therapy" with his father.[18]

(c) Court of Appeal Decision

By the time the case reached the Ontario Court of Appeal ("OCA"), the child was in crisis or, as the OCA put it, "[t]he child has behaved badly."[19] He had continued to run away from the father's home, requiring police assistance for his return. He had assaulted the father and been criminally charged. The charges resulted in a prohibition of contact between the child and the father. Since the child was prohibited from contact with the mother, he was placed in foster care. While in care, the child was seriously assaulted by another youth, requiring plates to be implanted in his face. Moreover, the child was "even more entrenched in his attitude towards his father."[20]

The Court of Appeal upheld the trial decision despite its devastating impact on the child. The mother and the OCL advanced several grounds of appeal, including that the trial judge failed to give effect to the child's wishes and overemphasized the mother's bad conduct; that the transfer of custody was inappropriate; and that the trial judge erred in ordering the child to participate in "reconciliation therapy" without his consent, contrary to the principles governing consent in Ontario's *Health Care Consent Act* ("*HCCA*").[21] The Court of Appeal held that the trial judge had jurisdiction to find that the mother had alienated the child and that this alienation had rendered the children's views meaningless: the trial judge was "entitled to put *no weight* on the child's wishes."[22] The Court also found that the transfer of custody was appropriate to protect the child from the mother and facilitate a relationship between the child and the father. The order was meant to promote the child's "long-term best interests," explained the Court, "not to punish the mother."[23]

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16 *Ibid* at para. 1.

17 *Ibid* at para. 25.

18 *Ibid* at para. 23.

19 *A.M. v. C.H.*, *supra* note 1 at para. 80.

20 *Ibid* at para. 91.

21 *Health Care Consent Act, 1996*, SO 1996, c 2, Sched A [*HCCA*].

22 *A.M. v. C.H.*, *supra* note 1 at para. 27 [emphasis added].

23 *Ibid* at para. 39.

The Court of Appeal also affirmed the trial judge's order that the child attend therapy. Ontario's *HCCA* prohibits health practitioners from administering treatment to a "capable" individual without their consent. The Act presumes that every person, including a child, is capable of consenting to (or refusing) treatment.[24] According to the Court, these provisions do not prevent a court from ordering a non-consenting child to attend therapy pursuant to the *Divorce Act* or *Children's Law Reform Act* ("*CLRA*"). The *Divorce Act* and *CLRA* empower judges to "make orders about almost any aspect of the child's life," including therapy, where the parents cannot agree.[25] The *Divorce Act* and the *CLRA* prioritize a child's "best interests," explained the Court, whereas the *HCCA* promotes autonomy. Moreover, while the *Child, Youth and Family Services Act* ("*CYFSA*"),[26] Ontario's child protection legislation, specifically directs judges to follow the *HCCA*, including when contemplating an order for therapy, the *Divorce Act* and *CLRA* do not mention the *HCCA*. This is not to say a child's views with respect to treatment are irrelevant under the *Divorce Act* or *CLRA*. A child's views and preferences are one factor in considering the child's best interests. Citing the Supreme Court of Canada's decision in *Manitoba (Director of Child & Family Services) v. C. (A.)* ("*AC*"),[27] the Court of Appeal said the significance of the child's treatment wishes would depend on their maturity.

3. UNDERCUTTING CHILDREN'S RIGHTS IN PARENTING DISPUTES

The significance of *A.M. v. C.H.* goes beyond the harm experienced by the individual child. This part explains how *A.M. v. C.H.* undercuts children's rights in parenting disputes by undermining their participation rights, allowing judges to more readily transfer custody of children to censure a custodial parent's denial of access, and removing children's autonomy to make health care decisions where their parents are disputing custody or access.

(a) Undermining Children's Participation Rights

Canadian courts have recognized that children have a right to participate in parenting disputes.[28] Article 12 of the United Nations *Convention on the Rights of the Child* ("*CRC*"), which Canada has ratified, provides that children be heard in all matters affecting them.[29] Legislation in most provinces and territories

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[24] Section 4(1) provides: "A person is capable with respect to a treatment. . . if the person is able to understand the information that is relevant to making a decision about the treatment. . . and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision." *HCCA*, *supra* note 21, s. 4(1).

[25] *A.M. v. C.H.*, *supra* note 1 at para. 51.

[26] *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sched 1 [*CYFSA*].

[27] *Manitoba (Director of Child Family Services) v. C. (A.)*, 2009 SCC 30, 2009 CarswellMan 293, 2009 CarswellMan 294 (S.C.C.).

[28] See *G. (B.J.) v. G. (D.L.)*, 2010 YKSC 44, 2010 CarswellYukon 108 (Y.T. S.C.).

direct judges to consider the child's views and preferences, where possible, when making a parenting order in the child's best interests. The "best interests" test under the federal *Divorce Act* has also been interpreted to include a child's views.[30]

While children have a right to participate in parenting disputes, their views are not necessarily determinative. Article 12 of the *CRC* directs that a child's views be given due weight in accordance with the child's age and maturity.[31] Maturity refers to a child's capacity to express views that are reasonable and independent.[32] In cases involving alienation, courts have questioned the independence of children's views and therefore accorded them less weight.[33]

However, current research on alienation suggests that judges should be careful in finding alienation and discounting children's views on this basis. Mental health professionals increasingly view parent-child contact problems as multi-factorial.[34] They suggest that blaming a child's refusal or resistance to contact with one parent on the other parent's alienating behaviour is generally too simplistic.[35] It is also often unhelpful, since labeling a case one of "alienation" keeps the focus on parental discord and mutual blaming.[36] And it may be harmful, because it forecloses consideration of other factors that may be contributing to a child's resistance, such as abusive parenting.[37] It is also difficult to differentiate these cases, even for clinicians who work with families experiencing parent-child contact problems. For instance, there are no valid

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29 *Convention on the Right of the Child*, 20 November 1989, 1577 UNTS 3, art. 12 (entered into force 2 September 1990) [*CRC*].

30 Nicholas Bala, "Bringing Canada's Divorce Act into the New Millenium: Enacting a Child-Focused Parenting Law" (2015) 40:2 Queen's LJ 425 at 425-482.

31 *CRC*, *supra* note 29, art. 12.

32 UN Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc CRC/C/GC/12 at 11.

33 See *Pettenuzzo-Deschene v. Deschene*, 2007 CarswellOnt 5095 (Ont. S.C.J.).

34 In 2001, Joan Kelly and Janet Johnston proposed a multi-factorial model for understanding parent-child contact problems. Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome* (2001) 39 Fam Ct Rev 249. Other clinicians have since refined this model and it has generally replaced the single-factor model of parental alienation. *See* Shely Polak, Tom Altobelli, and Linda Popielarczyk, *Responding to Severe Parent-Child Rejection Cases Without a Parectectomy: A Blended Sequential Intervention Model and Role of the Courts*, Fam Ct Rev [forthcoming in 2020]; and Janet R. Johnston & Matthew J. Sullivan, "Parental Alienation: In Search of Common Ground For a More Differentiated Theory" Fam Ct Rev [forthcoming in 2020].

35 Johnston and Sullivan, *ibid.*

36 Nicholas Bala & Barbara Jo Fidler, "Concepts, Controversies and Conundrums of 'Alienation': Lessons Learned in a Decade and Reflections on Challenges Ahead," Fam Ct Rev [forthcoming in 2020].

37 Johnston & Sullivan, *supra* note 34.

empirical assessment protocols or tools that can reliably differentiate alienation cases from cases involving realistic or justified estrangement.[38]

A.M. v. C.H. sets a dangerous precedent for children's participation rights in parenting cases by allowing a judicial finding of alienation to silence children's views.[39] While the views and preferences of the child were brought before the trial court, they were given "no weight." This effectively rendered the child's right to participation meaningless: for what is the value of the right to be heard if you are told your views do not matter? As Justice Perkins explained in *L. (N.) v. M. (R.R.)*, "The wishes of an alienated child may be warped and misconceived, but they are nonetheless real."[40] Moreover, the trial judge was able to ignore the child's views based on his own finding of alienation. The trial judge's identification of alienation as the sole cause of the child's resistance to contact with his father is problematic given the multi-factorial nature of parent-child contact problems. In fact, the evidence in this case clearly suggested that multiple factors had contributed to the child's resistance. For example, the OCL social worker testified that the father's conduct had also played a role, evidence the trial judge disregarded and the Court of Appeal failed to mention. *A.M. v. C.H.* thus allows trial judges to make simplistic alienation findings about complex parent-child contact problems and use these findings to disregard children's views.

(b) Transferring Custody to Reprimand Custodial Parents

A transfer of custody can be both a remedy for contempt *and* a parenting order to promote a child's best interests in the absence of a contempt motion.[41] However, there are more restraints on judges making contempt orders than parenting orders. In *Carey v. Laiken*, the Supreme Court of Canada cautioned against the routine use of contempt orders to obtain compliance in civil cases generally, explaining that the contempt power was to be exercised "cautiously and with great restraint" and as a last resort.[42] In *Chong v. Donnelly*,[43] a family law case, the Ontario Court of Appeal held that even where the elements of

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[38] Michael Saini et al, "Empirical Studies of Alienation" in Leslie Drozd, Michael Saini & Nancy Olesen, eds, *Parenting Plan Evaluations* (New York: Oxford University Press, 2016) 374 at 417.

[39] For more discussion of how alienation undermines children's participation rights *see* Fiona Morrison, E. Kay M. Tisdall & Jane E.M. Callaghan, "Manipulation and Domestic Abuse in Contested Contact — Threats to Children's Participation Rights" Fam Ct Rev [forthcoming in 2020].

[40] *L. (N.) v. M. (R.R.)*, 2016 ONSC 809, 2016 CarswellOnt 1639 (Ont. S.C.J.) at para. 140, additional reasons 2016 CarswellOnt 7729 (Ont. S.C.J.), affirmed 2016 ONCA 915, 2016 CarswellOnt 19110 (Ont. C.A.).

[41] See *Starzycka v. Wronski*, 2005 ONCJ 329, 2005 CarswellOnt 7576 (Ont. C.J.), where Justice Wolder transferred custody of the child in response to a contempt finding.

[42] *Carey v. Laiken*, 2015 SCC 17, 2015 CarswellOnt 5237, 2015 CarswellOnt 5238 (S.C.C.) at para. 36.

[43] *Chong v. Donnelly*, 2019 ONCA 799, 2019 CarswellOnt 15935 (Ont. C.A.).

contempt have been established, judges must exercise their discretion to decide whether a contempt finding is appropriate. Specifically, judges must consider whether there are alternatives to finding contempt and, if there are children involved, whether such a finding would be in the best interests of the children. For example, in *Ruffolo v. David*, the Court found that engaging professionals to speak to and work with children refusing access was preferable to finding a custodial parent in contempt.[44]

A.M. v. C.H. raises concerns about trial judges using the "drastic"[45] remedy of transferring custody to punish custodial parents for denying access without having to consider the restrictions around contempt orders. The Court of Appeal described the transfer of custody as promoting the child's best interests, not punishing the mother. However, the trial judge's reasons suggest that holding the mother accountable was a factor in making the order. The trial judge noted that the mother had made it "abundantly clear" that she had no desire to participate in reconciliation therapy,[46] that she was unlikely to comply with any order for therapy or attempts at reconciliation, and that he expected the mother "may completely disobey any access order I make."[47] The trial judge also made orders to reinforce the transfer of custody on the basis that the mother was not supporting the child's compliance with the original order. In using a parenting order to, at least in part, hold the mother accountable for her past—and future—failures to comply with access provisions, the trial judge was able to transfer custody without having to consider alternative remedies that would have been less damaging to the child.[48]

(c) Removing Children's Autonomy to Make Treatment Decisions

In Ontario, children are "capable" of making treatment decisions—either consenting to or refusing treatment—if they understand the information relevant to making the decision and appreciate the reasonably foreseeable consequences of treatment (or lack of treatment).[49] Where a capable child consents to or refuses treatment, a parent cannot override this decision, even where the parent does not believe the decision is in the child's best interests.[50] Parents can only make treatment decisions for children who are *not* capable of making such decisions.

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44 *Ruffolo v. David*, 2019 ONCA 385, 2019 CarswellOnt 7060 (Ont. C.A.).

45 *Williamson v. Williamson*, 2016 BCCA 87, 2016 CarswellBC 433 (B.C. C.A.) at 46.

46 *Malhotra* 2018, *supra* note 1 at para. 180.

47 *Ibid.*

48 See *Boivin v. Butts*, 2019 ONCJ 610, 2019 CarswellOnt 14365 (Ont. C.J.), where Justice Parent carefully considered how to balance a contempt order against an alienating parent with promoting the best interests of the children.

49 *HCCA*, *supra* note 21, ss. 4(1)-(2).

50 See *Hughes Estate v. Hughes*, 2007 ABCA 277, 2007 CarswellAlta 1158 (Alta. C.A.), where a father objected to his daughter's choice to stop receiving blood transfusions.

Nor, in Ontario, may the state, acting in the place of a parent, make treatment decisions for a capable child. Section 111(2) of the *CYFSA* provides that where a child is in "extended society care," a Children's Aid Society may provide consent to treatment on behalf of the child *only* where the child is "incapable of consenting to treatment" under the *HCCA*.[51] In other words, a society, exercising the rights and responsibilities of a parent, *cannot* consent to treatment on behalf of a capable child. Section 110(2) says the same limitation applies to capable children in "interim society care": a society cannot consent to treatment on their behalf.[52]

The Supreme Court of Canada's decision in *A.C.*, on which the Court of Appeal in *A.M. v. C.H.* relies, considered Manitoba's *Child and Family Services Act*,[53] which has different rules respecting the treatment of minors than Ontario's *CYFSA*. The provisions of the Manitoba Act at issue in that case expressly authorized a court to order treatment of a child under 16, even where the child was capable of consenting to treatment, where such treatment was in the child's "best interests." The case involved a challenge by a 14-year-old, who argued that the statutory override was unconstitutional because it prevented capable children under 16 from making treatment decisions. A majority of the Supreme Court held that the statutory override did not violate the *Charter* so long as "best interests" was interpreted to give greater weight to the child's treatment wishes in accordance with the child's maturity. Ontario's *CYFSA* and *HCCA* do not define a statutory age of capacity. Thus, the Supreme Court's "best interests" analysis in *A.C.*, which was based on express statutory authority, does not apply to capable children in Ontario.

The Court of Appeal's decision in *A.M. v. C.H.* suggests that courts can override the treatment decisions of capable children in the specific context of parenting disputes.[54] This is inconsistent with how Ontario law approaches capable children's treatment decisions both under the *HCCA* and *CYFSA*. The decision suggests that while the state cannot make treatment decisions for capable children in intact families or for children who have been removed from

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[51] *CYFSA*, *supra* note 26, s. 111(2). Section 111(1) provides that where a child is in extended society care, "the Crown has the rights and responsibilities of a parent for the purposes of the child's care, custody and control. . ."

[52] *Ibid*, s. 110(2). Section 110(1) says that where a child is in interim society care, the society has the "rights and responsibilities of a parent for the purpose of the child's care, custody and control."

[53] *Child and Family Services Act*, CCSM c C80.

[54] The Court of Appeal did not determine whether the child was capable of refusing therapy: *A.M. v. C.H.*, *supra* note 1 at para. 77. There is an argument that a child refusing counseling who is subjected to a parent's alienating behaviour is not capable of making this treatment decision because they do not understand the information relevant to making the decision or are unable to appreciate the reasonably foreseeable consequences of consenting to or refusing therapy. This argument, similar to the trial judge's finding that the child's alienation rendered his views irrelevant, could also be used to undermine children's autonomy to make health care decisions.

their parents, it can make treatment decisions for capable children where their parents have separated. It also suggests that a judge, acting under the *Divorce Act* or *CLRA*, could make a treatment decision for a capable child that a parent could not, since parents in Ontario can never make treatment decisions for their capable children. Following the Court of Appeal's reasoning, a judge hearing a child protection matter has no power to prevent a capable child from refusing even life-saving treatment while the same judge hearing a child custody matter involving the same child could order the child to receive such treatment.[55] While the latter decision might well be in the child's "best interests," with respect, this is not the appropriate test. It was the test in *A.C.* because the Manitoba Act gave express statutory authority to override a capable child's treatment decision. For capable children in Ontario, children's autonomy in making treatment decisions trumps a judge's assessment, or for that matter a parent's assessment, of what is in the child's "best interests."

4. CONCLUSION

We recently learned that the child in *A.M. v. C.H.* has apologized to his father and is now living with him.[56] While a positive development, it is hard to say the transfer of custody was justified given the trauma and violence the child experienced.[57] The significance of *A.M. v. C.H.*, however, goes beyond thinking how the case might have been better handled. The case also raises concerns about children's participation rights in alienation cases, the ease with which judges may be able to transfer custody to sanction parents for access interference, and children's autonomy to make treatment decisions in the context of parental disputes. Whatever the eventual outcome for the child in *A.M. v. C.H.*, the case should be read as a troubling decision for children's rights generally.

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[55] Whether a health care professional would respect that order is another matter: s. 10(1) of the *HCCA* provides that a health practitioner shall not administer treatment to a capable person without that person's consent. *HCCA*, *supra* note 21, s. 10(1).

[56] *A.M. v. C.H.* costs decision, *supra* note 2 at para. 3.

[57] For a different view see Philip Epstein, "Epstein's This Week in Family Law" (9 December 2019) Fam L Nws 2019-49.