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**Family**

# Focusing on children in post-separation parenting | Nicholas Bala and Rachel Birnbaum

By **Nicholas Bala and Rachel Birnbaum**

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(April 27, 2022, 11:43 AM EDT) -- A new legislative scheme for the making of post-separation parenting plans (Bill C-78) has been in effect for just over a year, and in recent columns in *The Lawyer's Daily* there are calls for more reforms. Gene C. Colman ("Equal shared parenting has huge support"), who advertises himself as a fathers' rights lawyer, renews proposals that he made before the enactment of recent reforms to have a rebuttable presumption of shared parenting, while feminist lawyer Pamela Cross ("'No' to shared parenting") advocates for mandatory judicial education about domestic violence.

While there is some validity to the concerns that each of them raises about the present family justice process, their proposals will not properly address the underlying problems and fail to take account of the perspectives of children.

Reflecting changing attitudes to gender roles in Canada, fathers are having greater involvement with child care when parents live together, and there has been a marked increase in use of shared parenting in the event that they separate (at least 40 per cent of child's time in the care of each parent.) These social trends are reflected in the opinion polls that Colman cites.

When parents can co-operate, each has adequate parenting skills and there are no ongoing concerns about family violence, such an arrangement often promotes the long-term interests of children, especially if implemented for pre-school and school age children. In cases of high conflict or with a history of family violence, however, children may be at greater risk when such arrangements are made.

Colman proposes that Canada should enact a presumption of shared parenting to establish a regime that is "more just and fair" to fathers, arguing that this will result in less litigation. Australia adopted such a reform in 2006, but abandoned it in 2012, as it resulted in increased litigation and endangered children. As in Canada, a majority of parents in Australia settle their cases, and many make plans for shared parenting. But having a presumption in favour of shared parenting actually seemed to inflame the high conflict cases and cause more litigation. The problem with a legal presumption of shared parenting is that the cases where this is most relevant, those which are litigated, are atypical higher conflict cases.

Colman accuses family justice professionals who oppose his proposals of acting out of economic self-interest in wanting to promote family litigation. This is a serious, and in our view unwarranted, criticism. While more needs to be done to promote a child-focused dispute resolution culture among family justice professionals, in our experience, it is usually the lawyers, mediators and judges who are trying to persuade parents in higher conflict cases to make a child-focused settlement rather than litigate.

Colman ignores the views of children about post-separation parenting arrangements. Research suggests that most children appreciate having significant, continuing involvement with both parents,

but that many resent the rigidity of parents who insist on "equal" parenting arrangements. Children want flexibility, especially when they reach adolescence. Most teenagers want a role in making arrangements that meet their evolving needs. Many adolescents want a significant relationship with both parents, but prefer having a "home base" rather than a division of their time in a way that parents might consider "fair."

Cross, with her experience in helping victims of family violence, argues strongly against enactment of presumption of shared parenting time, while advocating enactment of Keira's Law, which would make judicial education about family violence mandatory.

We certainly support increased education for judges, and lawyers, about domestic violence and coercive control. However, we believe that this education needs to be set in a broader context of learning to deal more effectively with the often conflicting evidence and competing claims that arise in the context of high conflict separations, including addressing intimate partner violence and coercive control, but also parental alienation, poor parental communication and parental mental health and substance use.

While a lack of judicial education and understanding may sometimes result in judicial decisions that endanger the safety and welfare of children, in our view, it is more often a lack of timely evidence being placed before the courts that endangers children and victims of family violence. Judges are often required to make high stakes decisions based on incomplete and conflicting evidence about dynamic situations.

There need to be major improvements in the efficiency of the family justice system, to ensure that timely judicial decisions can be made about complex and often evolving situations involving children. Better evidence needs to be brought before the courts. Education and support for lawyers involved in these high conflict cases will have a role in effecting change, but the courts also need independent evidence about the needs and views of children in high conflict cases. This will require greater resources and co-ordination for child protection agencies and child advocacy agencies, like Ontario's Office of the Children's Lawyer. In appropriate cases, there need to be judicial meetings with those whose lives are most affected: the children involved.

A concern about the positions advocated by Colman, and to a lesser extent Cross, is the emphasis on enactment of legislation to address complex family justice issues. Enacting legislation often appeals to politicians looking for simplistic and inexpensive "solutions" to challenging problems. While more research about how to improve the family justice system is needed, there is ample research to support many changes.

We need to expand Unified Family Courts, with a core of dedicated, specialized judges, and single judge case management for high conflict cases. We need to increase the use of technology in the family justice system, while ensuring that this is done without compromising access to justice. We also need to support the use of shared parenting, in appropriate cases, including improving access to mediation and other non-judicial means of dispute resolution.

The perspectives and preferences of children always need to be considered by decision-makers, including judges, but also by parents who, appropriately, most often make plans for their children without a judicial decision.

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