ABSTRACT. In the first part of the presentation, I will briefly summarize the flaws in the discretionary best interest of the child approach to the legal determination of parenting after divorce in contested cases. Second, I will highlight recent developments in divorce research comparing child and family outcomes in shared parenting versus traditional "primary parent" living arrangements, as well as address some of the common myths and misperceptions surrounding shared parenting, in making the case for a shared parental responsibility presumption as a legal standard. In the third part, I will present a "four pillar" approach to the establishment of shared parenting as a new foundation for family law.

INTRODUCTION

It is generally agreed that both a child-focused and evidence-based approach to divorce practice in both the legal and mental health arenas is the best way to ensure that children’s interests are addressed to the fullest extent possible; this is shared by both stated proponents (Warshak, 2013) and opponents (McIntosh, 2014) of shared parenting as a legal standard. An evidence-based approach requires a body of research evidence that clearly points for factors associated with positive outcomes for children and families of divorce; a child-focused approach requires both an understanding of children’s fundamental needs in the divorce transition, and a corresponding set of parental and societal responsibilities to those needs.

It is also generally agreed that the best laws are those that limit judicial discretion. I will argue that nowhere is this more urgent than in regard to the legal determination of the “best interests of the child” in family law; a new, non-discretionary standard of the “best interests of the child from the perspective of the child” is required, which includes serious consideration of what children themselves have identified as their core needs in the divorce transition. Children are the group most affected by parental divorce, and thus...
the real “experts” on the matter. By their own account, three key factors matter most to children, as identified by Fabricius (2003) and others: autonomy, to be given a voice to identify their own “best interests” in the divorce transition (Fabricius’ research examines the perspective of a large sample of adult children of divorce reflecting upon their experiences as children); being shielded from conflict and violence between their parents; and substantially equal time in their ongoing relationships with each of their parents. We know from a wide array of divorce research studies (see Nielson, 2014; Kruk, 2013, Suenderhauf, 2013, and Bauserman, 2012 for comprehensive reviews of this research) that child well-being is particularly associated with positive and meaningful relationships and living arrangements with both parents.

From over thirty major research studies over the past two decades comparing child and family outcomes in shared versus sole parenting arrangements, we have clear evidence of shared parenting as in the best interests of children of divorce, including in “high conflict” cases. This runs counter to what many family practitioners, policymakers and legislators have assumed. Most children want to be in the shared physical care of their parents after divorce (Fabricius, 2003), and outcome studies support their stated preferences: children in equal or shared parenting arrangements adjust significantly better than those in sole custody arrangements on all general and divorce-specific adjustment measures. At the same time, research has demonstrated that the reduction of parental conflict and increased parental cooperation after divorce, critical to children’s well being, are most likely to be attained via shared parenting arrangements. We have long know that the two key factors associated with children’s best interests are the preservation of children’s primary relationships with both parents, beyond the constraints of traditional
“visiting” and “access” relationships; and the fundamental need to shield children from family violence and ongoing high conflict between parents during and after divorce. Any new framework for the legal determination of parenting after divorce should be examined carefully in regard to the degree to which parent-child relationships are preserved and conflict is reduced between parents.

At the same time, a new approach to parenting after divorce must also attend to the needs of mothers and fathers; although children’s needs are distinct from those of their parents, they are inextricably linked. New legislation must take on board the concerns of parent groups such as the National Organization of Parents in the U.S., which have long weighed in on the matter of parenting after divorce and the inadequacies of the current system. In addition, the concerns of mothers’ advocates regarding family violence, recognizing primary caregiving, and problems with awarding legal joint custody without any corresponding responsibility for child care involvement, must be addressed; as well as fathers’ concerns about their disenfranchisement from children’s lives, the importance of preserving emotional attachments between children and parents, and parental alienation as a form of child and parental abuse. Legislators are thus faced with a huge challenge in regard to family law reform, but I would suggest that it is possible to address the full array of these seemingly contrasting sets of interests.

Finally, divorce and parenting after divorce law reform needs go beyond cosmetic changes such as changing the language of divorce, toward real reform that encourages parental self-determination, takes family law out of the adversarial arena, and takes on board what research and children and families themselves are saying is commensurate with the best interests of children. We need to ensure determinacy and consistency in
decision-making, and limit discretion in those areas in which judges have little or no expertise. The challenge is to develop and establish a legal presumption that enhances determinacy and reduces litigation, while at the same time serving the best interests of the child and taking into account each child and family’s unique circumstances.

A “best interests of the child from the perspective of the child” standard and “responsibility-to-needs” approach to parenting after divorce is the focus of my discussion today. This involves defining precisely what constitutes a child’s “best interests” in divorce; that is, enumerating the core needs of children of divorce.

**FLAWS IN THE DISCRETIONARY BEST INTEREST OF THE CHILD APPROACH**

The current adversarial, discretionary, “winner take all” approach to the legal determination of parenting after divorce in contested cases is in my view the absolute antithesis of a “best interests of the child from the perspective of the child” standard and “responsibility-to-needs” approach. I’d like to ask you to consider two key points in this regard:

*The best laws are those that leave as little as possible to the discretion of the judge.*

– Aristotle

*There is no basis in either psychology or law for choosing one parent over the other as a custodial or residential parent.*

– Joan Kelly & Janet Johnston

The two quotes are from very different sources, but speak to the same issue: the desireability of limiting judicial discretion, reducing inter-parental conflict, and treating
both parents on an equal footing, as equally salient in children’s lives and equally important in their growth and development.

The flaws of the discretionary best interests of the child standard are many, and these are well-documented:

(1) The best-interests-of-the-child standard is vague and indeterminate.

(2) The best-interests-of-the-child standard is based on judges’ idiosyncratic biases, in an area around which they have little or no training or expertise, and thus subject to judicial error. Judges can and routinely do make mistakes.

(3) Best-interests-of-the-child-based decisions reflect a sole custody presumption and judicial bias.


(5) The best-interests-of-the-child standard makes the court dependent on custody evaluations lacking an empirical foundation.

(6) The views of children and parents regarding the best interests of the child, which focus on children’s needs and parents’ responsibilities to those needs, are radically different to the views of the judiciary, which are deficit-based.

(7) With two adequate parents, the court has no basis for determining who is the “primary” parent: no basis for distinguishing one parent as “primary” over the other.

(8) The best-interests-of-the-child standard is perceived as a smokescreen for the underlying issue of the judiciary and the legal system retaining their decision-making power in the child custody realm.
(9) Contrary to the UN Convention on the Rights of the Child, children of divorce are discriminated against on the basis of parental status in regard to the removal of their parents from their lives.

(10) Despite the rhetoric of “children’s best interests,” children’s interests are largely unrepresented in the court proceedings, as a custody contest pits the rights of mothers against the rights of fathers.

As Hillary Rodham wrote so many years ago, “the best interests of the child is merely an empty vessel into which adult prejudices are poured.”

And I would challenge you to consider these questions:

• On what basis do courts justify treating parents unequally (ie, one as the “custodial / residential” parent and the other as “noncustodial / nonresidential” parent), under the guise of the “best interests of the child”? Why are parents with no civil or criminal wrongdoing to their children forced to surrender their responsibility to raise their children?

• On what basis do courts justify discriminating against children of divorce by using the indeterminate “best interests of the child” standard to remove their parent from their lives, as opposed to the more stringent “child is need of protection” standard for children from non-divorced families?

• Is removal of a parent via sole custody/primary residence a form of parental alienation?

• Is removal of a parent via sole custody/primary residence a form of legal abuse of children?

Finally, the key question related to the well-being of children and families of divorce is avoided when we cling to the current dominant discourse surrounding children
and divorce: What are the responsibilities of social institutions such as the family courts and family law system to support parents in the fulfillment of their responsibilities to children’s needs?

CURRENT RESEARCH ON CHILD AND FAMILY OUTCOMES

As I mentioned earlier, there have been over thirty major research studies over the past twenty years comparing child and parent outcomes in shared care versus sole custody arrangements, the overwhelming majority concluding that on every measure of general and divorce-specific adjustment, children in shared parenting arrangements do significantly better than children where one parent is absent from their lives. These studies have been summarized by Linda Nielsen here in the U.S., as well as by Hildegund Suenderhauf in Europe and myself in Canada. Meta-analyses of child and parent outcome research have also been conducted by Robert Bauserman here in the U.S.

I’d like to focus on four key findings that I believe present some key findings that point to shared parenting as the preferred arrangement for children of divorce:

1. Children of divorce want equal time with their parents, and consider shared parenting to be in their best interests. Seventy percent of children of divorce believe that equal amounts of time with each parent is the best living arrangement for children; and children who had shared time arrangements have the best relations with each of their parents after divorce. (Fabricius, *Family Relations*, 2003)

2. Not only do children of divorce want equal time but it is salutary for them. A review of 33 major North American studies comparing sole custody with shared parenting arrangements shows that children in shared parenting fare significantly better on all
adjustment measures (general and divorce-specific) than children who live in sole
custody arrangements. (Bauserman, *J. of Family Psychology*, 2002)

3. Shared parenting reduces conflict and violence. Inter-parental conflict decreases over
time in shared parenting arrangements, and increases in sole custody arrangements.
Inter-parental cooperation increases over time with shared parenting, and decreases in
sole custody arrangements. (Bauserman, *J. of Family Psychology*, 2012)

4. Health Canada research indicates that working mothers and fathers now spend about
the same amount of time caring for their children. On average, mothers devote 11.1
hours per week to child care; fathers devote 10.5 hours. (Higgins & Duxbury, *National

Most of the thirty studies I mentioned earlier have compared child and parent
outcomes in different custodial arrangements. But there have been a broad range of
findings that in a recent article I grouped under sixteen main themes. Each of these
represent arguments in favor of shared parenting, in my view, make a strong case in favor
of adoption of shared parenting as a legal presumption; together, they make it difficult to
argue against establishing shared parenting as the foundation of a new approach to family
law in North America. The arguments are as follows:

1. Shared parenting preserves children’s relationships with both parents.
2. Shared parenting preserves parents’ relationships with their children.
3. Shared parenting decreases parental conflict and prevents family violence.
4. Shared parenting reflects children’s preferences and views about their needs and best
interests.
5. Shared parenting reflects parents’ preferences and views about their children’s needs and best interests.


7. Shared parenting enhances the quality of parent-child relationships.

8. Shared parenting decreases parental focus on “mathematizing time” and reduces litigation.

9. Shared parenting provides an incentive for inter-parental negotiation, mediation and the development of parenting plans.

10. Shared parenting provides a clear and consistent guideline for judicial decision-making.

11. Shared parenting reduces the risk and incidence of parental alienation.

12. Shared parenting enables enforcement of parenting orders, as parents are more likely to abide by a shared parenting order.

13. Shared parenting addresses social justice imperatives regarding protection of children’s rights.

14. Shared parenting addresses social justice imperatives regarding parental authority, autonomy, equality, rights and responsibilities.

15. The discretionary best interests of the child / sole custody model is not empirically supported.

16. A rebuttable legal presumption of shared parenting responsibility is empirically supported.
A FRAMEWORK FOR A LEGAL PRESUMPTION OF SHARED PARENTING

In the final part of my presentation, I’d like to discuss a framework for a legal presumption of shared parenting responsibility, which is consonant with current research. It is also consonant with the European Council’s recommendation that member states adopt shared parenting as the foundation of family law. It is also a framework that is endorsed by the International Council on Shared Parenting, an association of scientists, family professionals and representatives of civil society from around the globe. The purpose of the association is first, the dissemination and advancement of scientific knowledge on the best interests of children whose parents are living apart, and second, to formulate evidence-based recommendations about the legal, judicial and practical implementation of shared parenting.

I would suggest that there are four key considerations for professionals involved with families in conflict over the issue of parenting after divorce:

1. Parents’ desires and specific plans for post-divorce parenting. As parents are most knowledgeable about their children’s needs and interests, in cases where parents are in dispute over post-divorce parenting arrangements, it is important to children’s well-being to establish the nature of parents’ desires regarding and future commitment to raising their children: their specific parenting plans. This would include the degree to which each parent is willing to make accommodations to the needs of the children, and the extent to which each is able to adjust his or her employment and living arrangements to allow sufficient time and energy for their parenting responsibilities.

2. Parents’ relationship history with their children. The time and effort each parent has invested in child caregiving is a second key element in regard to children’s needs and
interests. How involved and available, empathic, and attuned is each parent to his or her children’s needs? In the interests of stability and continuity in children’s lives, a parenting arrangement that approximates existing parent-child relationships as much as possible is important to children’s well-being.

3. Children’s need for both parents actively involved in their lives. Research is clear that an equal parenting arrangement best assures the continued meaningful involvement of both parents in children’s lives, a vital component of children’s well-being after divorce.

4. Children’s need to be shielded from family violence and child abuse. It is vitally important that allegations and reports of family violence and abuse be fully and expeditiously investigated, and children protected from violence and abuse.

A legal shared parenting presumption incorporates these elements. It is also, first and foremost, a child-focused framework that takes on board not only empirical research findings on the needs and best interests of children of divorce, but also the primary concerns of parent organizations. Second, the framework merges a rebuttable legal presumption of shared parenting responsibility with a rebuttable presumption against shared parental responsibility in cases of established family violence and child abuse. Third, it confronts the problem of discrimination against children of divorce on the basis of parental status, as it adopts a “child in need of protection” criterion rather than the discretionary best interests of the child standard to parental removal from children’s lives. Fourth, it transcends the subjectivity of the discretionary best interests of the child standard while at the same time taking into account children and families’ individual and
unique circumstances. In sum, the “four pillars” detailed below operationalize both a “best interests of the child from the perspective of the child” legal criterion and a “responsibility-to-needs” approach to parenting after divorce.

The Four Pillars of Legal Determination of Parenting After Divorce

The framework I would ask you to consider is comprised of four pillars, as follows:

1. **Legal presumption of shared parental responsibility**

2. **Network of family support programs**: Divorce Education, Mediation, and Support/Intervention in High Conflict Cases

3. **Shared parenting public education**

4. **Enforcement**: Judicial Determination in Cases of Established Abuse; Enforcement of Shared Parental Responsibility Orders

**Pillar 1: Legal Presumption of Shared Parental Responsibility**

The first pillar is itself comprised of four stages:

1. **a legal requirement that parents develop a co-parenting plan before any hearing is held on the matter of parenting after divorce.** The role of the court would be to legally sanction the parenting plan or agreement, whether sole or shared time. Parents would have a choice of developing the plan jointly through direct negotiation, legal negotiation, or family mediation; court-based or independent family mediation and family support services would be focused on assisting parents in the development of the plan. Parents would not be required to negotiate face to face, but would be encouraged and supported to negotiate in the future, as any post-divorce parenting arrangement
requires some degree of ongoing communication. This legal expectation would place an onus on parents in dispute to work out their own arrangements, with parents deemed to have the capacity to resolve their own dispute, rather than surrendering decision-making to the court system. Parents would be acknowledged as the experts in regard to their children’s best interests, as they develop a parenting plan tailored to their children’s ages and stages of development, their own schedules, and their children’s unique needs.

Parental autonomy and self-determination in regard to post-divorce parenting arrangements would thus be the cornerstone of family law.

(2) legal application of the “approximation rule” when parents cannot agree on a parenting plan with children spending time with each parent in proportion to the relative amount of time each parent devoted to child care before divorce. In cases of dispute regarding post-divorce parenting arrangements, the approximation rule will be the legal standard, so that the relative proportion of time children spend with each parent after divorce will be equal to the relative proportion of time each parent spent performing child caregiving functions before divorce. As a form of shared parenting, the “approximation rule” is individualized, child-focused and gender neutral. It also provides judges with a clear guideline and avoids the dilemma of judges adjudicating children’s “best interests” in the absence of expertise in this area. Children’s needs regarding maintaining relationships with each parent, and stability and continuity in regard to their routines and living arrangements, would thus be addressed; and parents’ needs for a fair, gender-neutral criterion would also be accommodated. The approximation standard, drafted by the American Law Institute, incorporates feminist concerns regarding parenting after divorce, but also addresses fathers’ concerns regarding the maintenance of
meaningful relationships with children after divorce. Given the gender convergence in regard to division of child care tasks and the emerging norm of shared parental responsibility for child care in two-parent families, the approximation criterion will translate to roughly equal time apportionment in most disputed cases of parenting after divorce.

(3) **legal application of a rebuttable presumption of shared parenting time when both parents were or claim to have been primary caregivers of their children before divorce.** This would apply in cases where both parents were primary caregivers before divorce, or may in dispute over the relative proportion of time each parent spent performing child caregiving functions before divorce. A preoccupation with the amount of time spent with each parent is the Achilles’ heel of the approximation standard, and tracking parental time devoted to children’s care before divorce is a dauntingly complex task. Because some parents will dispute each other’s estimates of past time devoted to child care, with “mathematizing time” a focus of conflict, in the interests of shielding children from ongoing conflict, an shared parenting time division would be the legal norm in cases where both parents were primary caregivers before divorce, or claim to have been primary caregivers. Again, in addition to being child focused and gender neutral, this presumption will provide judges with a clear guideline and will avoid the dilemma of judges adjudicating the relative amount of time each parent spent in caregiving tasks before divorce. A legal presumption of shared parental responsibility establishes an expectation that the former partners are of shared status before the law in regard to their parental rights and responsibilities, and conveys to children the message that their parents are of equal value as parents. *(Note: A presumption of shared parental*
responsibility is thus a much more individualized approach than the “one size fits all” formula of sole custody, a blunt instrument which forcefully removes a parent from the life of a child in contested cases. First, parents are free to make whatever arrangements they wish on their own and second, if they cannot decide, a presumption in which post-divorce parenting arrangements approximate as closely as possible the existing arrangements in the two-parent family would be applied, in the interest of stability for children. Third, it is only in those cases where both parents present as primary caregivers and cannot agree on a parenting plan that a presumption of shared time parenting would apply, in the interests of decreasing conflict and ensuring that each parent remains meaningfully involved in children’s lives. Within a rebuttable shared parenting presumption, established cases of family violence would necessitate a different approach, in which a judicial determination of sole custody would be the likely outcome.)

(4) Presumption Against Shared Parenting Responsibility: Establish a rebuttable legal presumption against shared parenting in cases where it is established that a child is in need of protection from a parent or parents. This presumption would develop clear and consistent guidelines for the legal determination of parenting after divorce in family violence and child abuse cases, consistent with those for children in two-parent families, with the safety of children the paramount consideration. For some families, divorce will solve the problems that contributed to the violence; for others, the risk of abuse will be ongoing. This presumption does not equate to a “presumption of no contact between the perpetrator and child in all cases where domestic violence is alleged”; as in current practice, courts would make protective orders only when allegations are upheld. Shared parenting would be rebuttable only in cases of established family violence and
substantiated child abuse; only with an investigated finding that a child is in need of protection from a parent is a judicial determination of sole custody warranted. In the absence of a child protection finding, a shared parenting presumption ensures that children will have equal time with each parent.

This four-stage process represents an individualized approach to the legal determination of parenting after divorce, taking into account the unique situation and circumstances of each individual child and family.

**Pillar 2: Network of family support programs—Divorce Education, Mediation, and Support/Intervention in High Conflict Cases**

The second pillar is comprised of four components: divorce education, family mediation, parenting coordination, and parallel parenting.

(1) **Divorce Education.** Given the lack of information available to divorcing families about what to do, what to expect, and the services which might be available to them, divorce education programs that make such information available prior to any dispute resolution process are vital. Parents who are oriented to the divorce process and the impact of divorce on family members are better prepared for negotiation, mediation, and other non-adversarial dispute resolution alternatives, and better able to keep the needs of their children at the forefront of their negotiations. Divorce education programs also offer a means to expose divorcing parties to mediation as an alternative mechanism of dispute resolution. Divorce educators with expertise in the expected effects of divorce on children and parents can be instrumental in helping parents to recognize the potential psychological, social and economic consequences of divorce and, on that foundation, promote parenting plans conducive to children maintaining meaningful, positive post-
A primary goal of divorce educations programs is a focus on children’s experiences of divorce, and the disruption to a child’s world that divorce may produce. Although for many adults divorce may herald an optimistic new “beginning,” for children it is more likely to represent an unhappy “ending” of the family they know. When parents have a sound understanding of what the divorce experience means to a child, they will be in a better position to address that child’s needs and support his or her adjustment to the consequences of divorce.

(2) Therapeutic Family Mediation. Mediation, as an alternative method of dispute resolution, has considerable (and as yet largely untapped) potential in establishing shared parenting as the norm, rather than the exception, for divorced families. In the majority of non-violent high conflict cases, both parents are capable and loving caregivers and have at least the potential to minimize their conflict and cooperate with respect to their parenting responsibilities within a shared parenting framework. Mediation has given evidence of its power to settle complex, highly emotional disputes and reach agreements that are durable in post-divorce conflict, and there is strong empirical support for the use of mediation in this arena. In public and private sectors, in voluntary and mandatory services, and when provided both early and late in the natural course of these disputes, family mediation has been consistently successful in resolving conflicts related to child custody and post-divorce parenting. With a legal presumption of shared parental responsibility as the cornerstone, mediation could become the instrument whereby parents could be assisted in the development of a child-focused parenting plan. An educative approach should be an integral part of such a mediation process, with a primary focus on children’s needs during and after the divorce process. A number of therapeutic family mediation models have been specifically developed for high conflict couples.
(3) **Parenting Coordination.** A relatively new intervention for high conflict parents unable to agree on parenting practices is that of parenting or dispute resolution coordination, which assists parents to settle post-divorce disputes, facilitates compliance with co-parenting plans and orders, and provides counselling, case management services, parent education, coaching, mediation, and arbitration of child-related conflicts as they arise. For example, a parenting coordinator may help parents to separate their previous marital hostilities from their ongoing parenting responsibilities. If striving for consistency in children’s routines and in parenting styles escalates conflict, a parenting coordinator may focus parents on establishing consistent practices in one’s own home rather than engaging in repetitive unproductive negotiation.

(4) **Parallel Parenting.** For intractable high conflict situations, the option of parallel parenting exists, in which parents remain disengaged from each other as co-parents, and may assume decision-making responsibility in different domains (such as one parent being responsible for medical decisions and the other for education). Parallel parenting protects children from parental conflict while protecting their relationships with both parents. Such arrangements call for a high degree of specificity in the initial parenting plan, pre-empting the need for parents to communicate directly once the plan is in place. Many parents achieve cooperative parenting from a place of initial disengagement.

**Pillar 3: Shared Parenting Public Education**

Shared parenting education within the high school system, in marriage preparation courses, and upon divorce is an essential component of a more comprehensive program of parent education and support. Public education about various models of shared
parenting is especially important, including models for high conflict couples. Such programs are just beginning to be established, with an emphasis on including parents who have not traditionally been engaged by parenting support programs and services.

**Pillar 4: Enforcement–Judicial Determination in Cases of Established Abuse; Enforcement of Shared Parental Responsibility Orders**

The final pillar directly addresses the question of violence and abuse in family relationships, and enables sanctions to be imposed where there is non-compliance or repeated breaches of parenting orders. The recommendations of the 2007 Wingspread Conference on Domestic Violence and Family Courts are instructive in this regard. The Wingspread Conference determined that when it comes to questions of family violence, children’s and parents’ safety must always be the primary consideration. Children’s safety is best assured by addressing family violence as a criminal matter and child abuse as a child protection issue. Thus abuse and violence allegations must be fully investigated by child protection authorities and also prosecuted via criminal proceedings. At the same time, in criminal court it is important that innocence is presumed unless allegations are proved beyond a reasonable doubt. This is not always in line, however, with the practice of family courts, which often proceed as if alleged abuse has occurred even when not proved in criminal court, and in the absence of a child protection investigation. The allegation of conflict or violence is a powerful tool in the adversarial system, often resulting in the reduction of contact between an accused parent and his or her children, which may place children at risk if the allegation is false.
I would like to end my presentation by harkening back to the two quotes that I used to begin my presentation: “The best laws should be constructed so as to leave as little as possible to the discretion of the judge”; and, “There is no basis in either law or psychology for choosing one parent over the other as a custodial or residential parent.”

The family law system as it stands is broken. We all have a duty of care to support children and families. The research tells us that the need for reform of family law is urgent, and a legal presumption of shared parenting is the way forward in that regard.