



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
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Bill S-202 – *Shared Parenting Act*

**CANADIAN BAR ASSOCIATION
FAMILY LAW SECTION**

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

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

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Bill S-202 – Shared Parenting Act

I. FOCUS ON BEST INTERESTS OF THE CHILD

The Family Law Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on Bill S-202, *Shared Parenting Act*, a private members' bill sponsored by Senator Anne Cools. The CBA is a national professional association representing over 36,000 lawyers, law students, notaries and academics, with a mandate that includes seeking improvement in the law and the administration of justice. The CBA Section's members are specialists in family law. We assist all family members in restructuring their responsibilities and arrangements following separation and divorce and see these issues from all perspectives.

The best interests of the child should remain the fundamental overriding consideration for determining custody and access.¹ The CBA Section has long opposed any legislated presumption to determine what parenting arrangement is best after a family breakdown. The focus of the *Divorce Act* is on achieving justice in each individual case, and presumptions about parenting detract from that focus.

In 1998, after an in depth study and testimony from many witnesses, the Special Joint Committee on Child Custody and Access (Special Joint Committee) produced *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access*.² While recognizing the benefits of joint parental responsibility, the Special Joint Committee said that;

legislation that imposes or presumes joint custody as the automatic arrangement for divorcing families would ignore that this might not be suitable for all families, especially those with a history of domestic violence or of very disparate parenting roles....

It is our view that the courts must retain the discretion to deal with the unique facts of each case. Relying upon a presumption will not assist, whether the presumption is based upon the status quo prior to separation or based upon assuming that parents are equally willing or capable of meeting the needs of their children.³

¹ See, CBA Resolution 10-04-A.

² For the Sake of the Children: [Report](#) of the Special Joint Committee on Child Custody and Access.

³ *Ibid.* at 42.

The CBA Section recommends that the Bill not move forward. The CBA Section has expressed opposition to other private member's bills that would have imposed a presumption of equal parenting time for both parents. Those bills, like other proposals to amend the *Divorce Act* to change the 'best interests of the child' test, relied on laudable goals like promoting equality between the sexes and more predictability for divorcing families. However, presumptions based on parental rights or other considerations only divert attention from the primary right of children to be in whatever parenting arrangement is best for them at that time.

Presumptions can also mean that families who could otherwise make constructive, amicable arrangements must apply to a court to avoid the presumptive form of parenting arrangements. Presumptions for parenting regimes post-separation, including that parenting should be equally shared unless another schedule is proven to be in the child's best interests, too often result in more difficult and divisive custody litigation. The primary parent pursuing a custodial arrangement otherwise in the child's best interests must show that the other parent is unable to meet the children's needs to rebut the presumption. Custody litigation already promotes high conflict between parents, which is inevitably detrimental to the children involved.⁴ Legislative changes that would further exacerbate this conflict should be avoided.

We oppose putting the focus on parents' rights rather than what is best for children. Currently, there are no 'mother's rights' or 'father's rights' in custody and access determinations, only the right of children to reside in the parenting arrangement that advances their best interests. The CBA Section believes the law should remain focused on this fundamental priority. For some families, an equal, shared parenting schedule may well be in children's best interests, but it is only one of many possible options available.

II. CONCERNS WITH BILL S-202

Bill S-202 seems to attempt a back door approach to what has proven unacceptable through the front door. It assumes that shared and equal parenting is always in the best interests of children. Shared parenting may often be desirable, but it is not always appropriate and must be determined on a case by case basis.

⁴ Justice Canada, *The Early Identification and Streaming of Cases of High Conflict Separation and Divorce: A Review* (Ottawa: Justice Canada, 2015).

Family law must be sufficiently flexible to evolve with society's norms and expectations. In contrast, Bill S-202 would hamper judicial discretion and make case law in this area increasingly stagnant, rather than reflecting current best practices.

Subsection 11(1) of the Divorce Act is amended by adding the following after paragraph (a):

(a.1) to satisfy itself that reasonable arrangements have been made for the parenting of any children of the marriage, having regard to their best interests, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made.

Courts already have obligations similar to those proposed in this paragraph. Section 11(1)(b) of the *Divorce Act* requires a court to satisfy itself that reasonable arrangements have been made for the support of children and the Child Support Guidelines set a reasonable objective standard for the court to measure any proposed arrangement.

However, in determining whether reasonable arrangements have been made for parenting children in their best interests, courts must look deeper, without an objective measurable standard or a simple formula. Each case turns on the specific facts of the family involved and there is no one baseline for the court to ground its analysis.

Resolving custody and access issues can require a lengthy process, including assessments. Wait times for trials may be a few years, depending on jurisdiction. It would be unreasonable to further hold up the divorce when parties disagree about whether arrangements are in place in the best interests of the child. That requires an analysis by the court, which is the function of the trial.

Further, this paragraph refers to 'parenting', but custody and parenting are different concepts. Parenting is not defined in the *Divorce Act* and is only one aspect of custody. For example, in Alberta, the word 'parenting' refers to access to children and parents typically have 'joint custody' rather than 'joint parenting'. Parenting would be only one aspect of a joint custody arrangement.

Section 15 of the Act is replaced by the following:

15. In sections 15.1 to 16.1, "spouse" has the meaning assigned by subsection 2(1), and includes a former spouse.

The Act is amended by adding the following after section 16:

16.1 (1) In this section, "parenting plan" means a plan that sets out, in whole or in part, the responsibilities and authority of each spouse with respect to the care, development and upbringing of a child of the marriage

Bill S-202 does not explain how a 'parenting plan' differs from parenting provisions in separation agreements, which could cause confusion. In a similar vein, the term 'reasonable arrangements' proposed in section 11(1)(a.1) is not defined and may lead to further confusion as it is unclear if a parenting plan [section 16.1(1)] will be required to satisfy the proposed 'reasonable arrangements' test. This could increase unnecessary litigation and conflict for Canadian families who prefer to settle matters with more general unspecified terms of care and control or parenting.

In addition, requiring parties to have parenting plans and asking judges to reject divorce applications without reasonable arrangements made for parenting could create more access to justice problems. The added cost of doing this work, the added layers for unrepresented people to navigate and the delays as a result should not be underestimated.

The terms 'care, development and upbringing' in Bill S-202 are not currently used in laws for determining the best interests of children. They are also not defined, and no explanation is offered on how they differ from the terms 'health, education and welfare' in section 16(5).

Parties already routinely include custody and access, and parenting provisions in agreements. The proposed amendments to section 16.1(1) seem to both impose on and micromanage the parties. It should be deleted.

(a) child's place of residence or residential schedule;

(b) allocation of time spent by the child under the care of each spouse;

These are already included in and form the basis of custody and access agreements between parties. It is unhelpful to dictate or legislate these obligations.

(c) allocation and exercise of decision-making authority relating to the child's education, health, and moral or religious upbringing;

Canadian case law has largely settled the issue of children's religious upbringing, but Bill S-202 could reopen the issue given its apparent inconsistency with current case law. *Young v. Young*⁵, as it has been interpreted and followed, has almost eliminated litigation in this emotionally charged area. Case law has decided the issue of children's religious upbringing specifically based on the 'best interest of the child' test. In *Young v. Young*, the Supreme Court of Canada determined that one parent's view on religion cannot be imposed on the other parent, even as it relates to parenting the children, unless shown not to be in the child's best interests. Bill S-202

⁵ [1993] 4 SCR 3.

appears to contradict that finding, and would reopen settled law around whether one parent can dictate religious upbringing of children when in the care of the other parent.

The word 'moral' in this section of the Bill is ambiguous and subjective, and would lead to more disputes and litigation. Bill S-202's proposal to open up these charged issues is only likely to increase conflict between parties and runs contrary to the best interests of children.

(d) process for resolving disputes between the spouses as to the interpretation or implementation of the plan;

Although provisions for parenting coordinators, mediators, arbitrators and other alternate dispute resolution mechanisms are often included in agreements, most provincial and territorial legislation is clear that mediation and arbitration cannot be imposed.⁶ There is already a process for resolving disputes when parties are unable to agree: variation applications. In our view, it makes sense for parties or the court to determine the appropriate dispute resolution mechanism based on the individual case.

(e) process for revising or updating the plan; or

Section 17 of the *Divorce Act* already provides a process and any other mechanism would be through alternative dispute resolution.

(f) any other matter relating to the child's care, development and upbringing.

The language 'care, development and upbringing' is inconsistent with the language in the *Divorce Act* and provincial and territorial laws. For example, legislation in Ontario and Alberta already lists factors to be taken into consideration.

(2) An application made by either or both spouses under section 16 may include a parenting plan.

This is redundant and some applications already provide parenting plans. As the language is permissive and already included in the current law, this section should be omitted.

(3) The court may approve a parenting plan, with such modifications, if any, as the court considers appropriate, taking into consideration only the best interests of the child, and may incorporate the approved plan into the order it makes under section 16.

Again, this is redundant, as permitted under current legislation and covered by rules of evidence. The court may consider the agreement if relevant to the issue being decided.

⁶ In BC, ADR can be imposed.

This could also be interpreted as imposing an additional duty on the court, in a justice system already strained and lacking in resources.

(4) Subject to subsection (6), a parenting plan should expressly recognize the following principles:

(a) the purpose of the plan is to serve the best interests of the child as determined by reference to the condition, means, needs and other circumstances of the child.

Section 16(8) and (10) of the *Divorce Act* sets out factors for a court to consider. We are concerned about dictating principles to be included in parenting plans, as each case is and should be determined based on individual facts.

(b) the plan shall be interpreted at all times by reference to the best interests of the child, and all decisions and actions of the parents under the plan shall be made or taken in a manner that is consistent with those best interests;

It is unclear that this would add anything to paragraph (a) above. Again, it seems redundant.

(c) the dissolution of the parents' marriage does not alter the fundamental nature of parenting, which remains a shared responsibility, nor does it sever the enduring nature of the parent-child bond;

This language is problematic. There is no definition or explanation of the 'fundamental nature of parenting' and joint parenting may not have occurred during the marriage. All parent-child relationships are not the same and 'shared responsibility' is not always the reality. In some cases, shared parenting would not be in the best interests of the child.

It is dangerous and contrary to the best interests of children to assume shared parenting is always appropriate and should be the starting point for all cases, changing the onus between the parties.⁷

(d) the child has the right to know and be cared for by each parent, including the right to have a personal, meaningful and ongoing relationship with each parent and to maintain direct contact with each parent on a regular basis;

The principle of maximum contact is included in *Divorce Act* section 10. Interestingly, this proposed paragraph omits the specific phrase in that section saying 'that is consistent with the best interest of the child'.

⁷ The Bill appears to dictate 'attachment theory' which, while desirable, is not always the reality. It cannot be dictated but must be determined on a case by case basis. It is only one factor among many to consider.

Simply put, in many cases it is not in the best interest of the child to have a personal, meaningful and ongoing relationship with each parent. This must be determined on a case by case basis.

Further, while not the norm, cases that do not settle and proceed to trial generally involve high conflict or mental health issues. It is especially those types of cases that are more likely to challenge the assumptions underlying this paragraph.

(e) the child has the right to spend time with, and communicate with, other persons with whom the child has a significant relationship, such as grandparents and other relatives;

This paragraph would require the rights of grandparents to be considered in developing a parenting plan. The CBA Section has opposed mandatory consideration of contact between children and grandparents after separation. This requirement would undermine parental authority, giving grandparents more rights to access children after divorce than in families not separated or divorced. Most territorial and provincial legislation gives anyone, including a grandparent, the right to apply for access to children when shown to be in children's best interests.

It is contrary to good public policy for grandparents and other family members to be equipped to sue parents for access to children. Again, the Bill omits reference to the child's best interests in these determinations. Rather, the proposal seems to create an absolute right for third parties where none currently exists. In our experience, it would increase litigation, costs and conflict, all contrary to the best interest of the child and the justice system as a whole.

Further, the proposal risks eroding or eliminating parental rights. In some scenarios, a parent's time with children would be further limited because they would be required to share time with third parties or grandparents.

(f) each parent has the right to make inquiries, and to be given information, as to the health, education and welfare of the child; and

Section 16(5) of the *Divorce Act* already includes a presumption towards access parents having a right to this information, absent a court order to the contrary.

(g) each parent retains authority and responsibility for the care, development and upbringing of the child, including the right to participate in major decisions respecting the child's health, education, and moral or religious upbringing.

Our comments on section 4(c) are relevant here. Again, the word 'retains' assumes that this authority and responsibility was shared during the marriage, which is not always the case.

(5) If a parenting plan does not contain one or more of the principles set out in subsection (4), the court shall inquire as to the reasons for the omission.

(6) The court may approve a parenting plan that does not contain one or more of the principles set out in subsection (4) if the court is satisfied that doing so is in the best interests of the child.

These paragraphs would create a burden on parties that does not exist now, and could act as a further barrier to access to justice. They create another level for courts to manage, when resources are already frayed. Unlike child support, there is no objective baseline for measuring the reasonableness or appropriateness of the agreement as each case must be decided on its own facts.

(7) In the absence of evidence to the contrary, the court may presume that a parenting plan that contains the principles set out in subsection (4) and that is agreed to by both spouses is in the best interests of the child.

If a court can presume that a parenting plan as outlined in subsection (4) is in the best interest of the child, it is unclear how that presumption would apply for any variation or review. This paragraph could also erode court discretion on a critical issue. Custody and access cases are fact driven, and require a case by case analysis to advance the best interests of children.

III. SOME SUGGESTIONS

Bill S-202 would not address the needs of separating Canadian families. However, we offer other suggestions to improve the way that families restructure their parenting arrangements on separation or divorce. *For the Sake of the Children* concluded back in 1998 that “children are not served by legal presumptions in favour of either parent, or any particular parenting arrangement.”⁸ Its recommendations have largely not been implemented, yet continue to be relevant.

1. List Criteria for Determining the Best Interests of Children

The Special Joint Committee recommended that the *Divorce Act* be amended to provide that shared parenting determinations under sections 16 and 17 be made on the basis of the best interests of the child, and that decision makers, including parents and judges, consider a list of criteria in determining the best interests of the child.

⁸ *Supra*, note 2 at 31.

Many witnesses, including the CBA Section, recommended a list of criteria or a definition of the best interests of the child to guide judges and parents applying the test.⁹ Some provinces have enacted legislation setting out factors to consider in determining children's best interests and parental responsibilities that may be shared or divided. Federal law-makers can draw on these examples for best practices in this area.

A non-exhaustive list would improve the predictability of results and encourage consideration of factors important to the well-being of children. It would also assist parents to focus on particularly relevant factors to consider in separation. The CBA Section's list from 1998 included:

- the love, affection and emotional ties between the child and each person seeking custody or access, other members of the child's family residing with him or her, and persons involved in the child's care and upbringing
- the child's views and preferences, if they can reasonably be ascertained
- the length of time the child has lived in a stable home environment;
- the ability of each person seeking custody or access to act as a parent and fulfill the parental responsibilities set out in this Act;
- the ability and willingness of each person seeking custody to provide the child with guidance, education and necessities of life and to meet any special needs of the child;
- any plans proposed for the child's care and upbringing;
- the permanence and stability of the family unit with which it is proposed that the child will live;
- the relationship, by blood or through an adoption order, between the child and each person who is a party to the application or motion;
- the caregiving role assumed by each person applying for custody during the child's life;
- any past history of family violence perpetrated by any party applying for custody or access;
- the child's established cultural ties and religious affiliation; and
- the importance and benefit to the child of having an ongoing relationship with his or her parents.¹⁰

Given current social realities and the development of the law since 1998, we also suggest consideration of factors including:

- the impact on the child of any family violence, including:

⁹ CBA Family Law Section, *Custody and Access Review* (Ottawa: CBA, 1998) at 4.

¹⁰ *Ibid.* at 4-5.

- consideration of the safety of the child and other family and household members who care for the child;
 - the child's general well-being;
 - whether the parent who perpetrated the family violence is able to care for and meet the needs of the child; and
 - the appropriateness of making an order that would require parents to co-operate on issues affecting the child
- the nature and quality of the relationship of the child, their parent, and other significant individuals in the child's extended family (defined as grandparents, aunts, uncles, cousins and non-related individuals who historically have played a key, positive and active role in the child's life);
 - the child's development (physical, psychological, emotional, educational, social and moral) and needs including safety;
 - the willingness and ability of each parent to cooperate and communicate respecting the child and facilitate an appropriate relationship with the other parent according to the best interests of the child;
 - each parent's ability to ensure appropriate supports and resources for a child requiring accommodation to reach their full potential (e.g. children with FASD, ADHD, anxiety, etc);
 - the child's cultural, linguistic, religious and spiritual upbringing and heritage.

2. Clarify parental responsibilities and change terminology

We have previously recommended that the *Divorce Act* state that, unless a court orders otherwise as being in a child's best interests, the responsibility of parents to their children should be set out in the legislation. We support moving from the current terminology of custody and access toward language of parenting roles and responsibilities, including;

- Maintaining a loving, nurturing and supportive relationship with the child;
- Seeing to the daily needs of the child, which include housing, feeding, clothing, physical care and grooming, health care, daycare and supervision, and other activities appropriate to the developmental level of the child and the resources available to the parent;
- Consulting with the other parent regarding major issues in the health, education, religion and welfare of the child;
- Encouraging the child to foster appropriate inter-personal relationships;
- Making the child available to the other parent or spending time with the child as agreed by the parents or ordered by the court and to avoid unnecessary upset to the child, or unnecessary cost and inconvenience to the other parent;
- Exercising appropriate judgment about the child's welfare, consistent with the child's developmental level and the resources available to the parent;
- Providing financial support for the child;

- Ability to protect the child from exposure to, or involvement in parenting conflicts.

3. Guidance on Relocation

Section 16(7) of the *Divorce Act* should be clarified to give more specific direction around relocation. It might also mandate a notice period if either parent plans to relocate, subject only to an exception due to unforeseen circumstances.

4. Training for Police Officers

Selected officers in each police force could receive specialized training and education to enable them to intervene in difficult family situations involving children, including child protection, domestic violence and access enforcement.

5. Parental Education

Concepts of cooperative parenting in the best interests of children could be advanced by requiring separating spouses to attend a government-funded parental education program before commencing litigation for custody and access issues. More resources and better information would better equip parents to promote the best possible outcomes for their children through their post-separation behaviour and decision-making. However, the requirement must not become another barrier to access to justice for people in remote locations.

6. Access to Dispute Resolution

Improving parents' access to dispute resolution strategies outside the court system would have a significant positive effect on families and children. The federal government should dedicate resources immediately for a wide range of services to divert separating spouses from the litigation process when addressing custody and access issues. There are many routes to resolving parenting arrangements in a manner that minimizes stress, cost and impact on families, outside the court process. Too often, families are either unaware or unable to afford these services.

7. Expanded Use of Unified Family Courts

Expanded use of unified family courts would foster expertise and improve services for families, increasing much needed access to justice.

IV. CONCLUSION

The CBA Section believes that Bill S-202 should not proceed in the legislative process. In our view, outcomes in the best interests of children are those that require the courts and parents to focus solely on that consideration in making decisions from the outset.