

Association of Family  
and Conciliation Courts

AFCC 56th Annual  
Conference

The Future of Family  
Justice: International  
Innovations

May 29 - June 1, 2019  
(Toronto)

**Equal Shared Parenting International  
Innovations: Evaluating Myths and Stereotypes  
Workshop 47 ( May 31, 2019, 0830-1000)**

**Gene C. Colman, B.A., LL.B.**

**George W. Piskor, MASc, SM, LL.M, P.Eng**

# **Equal Shared Parenting International Innovations: Evaluating Myths and Stereotypes**

## **AGENDA**

- **Shared Parenting- Terminology**
- **Shared Parenting – Where are we**
- **Shared Parenting Arguments – Pro & Con**
- **Should There Be A Rebuttable Presumption**
- **Take-Aways**

## A. Shared Parenting- Terminology

- No standard definition currently exists
- For our presentation:
  - Shared Parenting encompasses joint legal custody (JLC) and joint physical custody (JPC) with a minimum of 30-35% parenting time.
  - Equal Shared Parenting (ESP) is defined as:
    - Joint Legal Custody (Joint Parental Responsibility/decision-making) and
    - Joint Physical Custody (Parenting time)
    - With maximum practicable 50:50 child time with each parent
    - Subject to evidence-based consideration of child-safety
    - As the highest embodiment of the best interests of the child standard

## **B. Shared Parenting – Where are we**

- 1. Social Science and Practitioner Consensus Milestones**
- 2. Legislation & Practice – Summary Tour**
  - 2.1 Europe**
  - 2.2 Common Law Countries**
- 3. Shared Parenting Prevalence**
- 4. Shared Parenting Polls- what the public says/wants**
- 5. Shared Parenting Initiatives**
- 6. Perspective/Assessment**

## B.1. Social Science/Practitioner Evolving Consensus

YEAR	MILESTONE
1994	<p><b>Middleburg (sponsored by NICH):</b> 18 convened experts support continuity of parental relationship consensus</p> <p>Parenting time should be distributed so that it would “ensure the involvement of both parents in important aspects of their children’s everyday lives and routines—including bedtime and waking rituals, transition to and from school, extracurricular and recreational activities ‘.</p>
2002	<p><b>Bauserman:</b> First Meta-Analysis (33 studies) found joint custody outcomes superior to sole custody on all measures. Refuted arguments that JPC fosters conflict or Yo-Yo syndrome.</p>
2013	<p><b>AFCC Think Tank:</b> Conservative but significant baseline 12-point consensus of 32 science and family law experts:</p> <ul style="list-style-type: none"><li>• first public recognition of meritorious aspects of shared parenting;</li><li>• historical conceptual leap by recognizing shared parenting constitutes a public health issue transcending legal concerns</li><li>• Shift away from rigid adherence to individualization towards presumptive joint decision-making</li></ul> <p>“There is enough research to conclude that children in families where parents have moderate to low conflict and can make cooperative, developmentally informed decisions about the children would clearly benefit from JPC arrangements”</p>

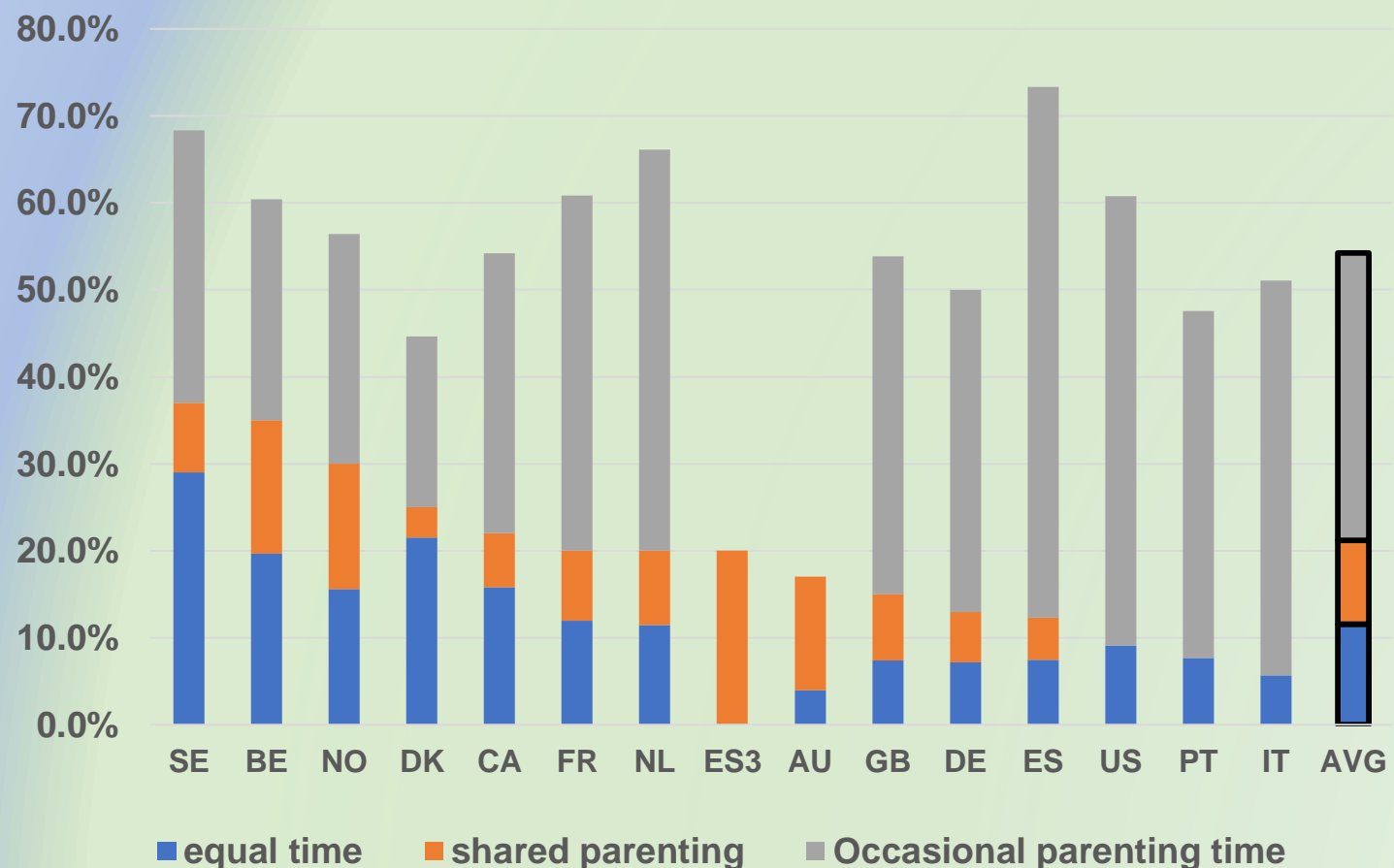
## B.1. Social Science/Practitioner Evolving Consensus (cont'd)

YEAR	MILESTONE
2014	<b>Warshak Consensus:</b> Endorsed by 110 experts, central conclusion is that “shared parenting should be the norm for parenting plans for children of all ages, including young children [recognizing] that some parents and situations are unsuitable for shared parenting”. Contains 7 recommendations providing practical guidance.
2016	<b>Baude, Pearson &amp; Drapeau:</b> Second Meta-Analysis (19 studies) confirms Bauserman. Also found parenting time at higher levels has beneficial development effects.
2018	<b>Nielsen 60-study Summarization:</b> Reconfirms superiority of JPC over SPC and demonstrates JPC superiority remains regardless of parenting factors, family income, or parental conflict as previously hypothesized determining factors
2018	<b>ICSP Consensus by 12 experts:</b> “The evidence is now sufficiently deep and consistent to permit social scientists to provisionally recommend presumptive SP to policy-makers ... these statements are explicitly made guardedly ... We might aptly characterize the current state of the evidence as “the preponderance of the evidence” (i.e., substantially more evidence for the presumption than against it). A great many studies, with various inferential strengths, suggest that SP will bestow benefits on children on average, and few if any studies show that it harms them”.

## **B.2. Legislation and Practice – International Overview (Europe, North America, Australia and New Zealand)**

- Joint Legal Custody is norm with continuing trend to shared parenting
- In broad terms:
  - Northern & Western Europe more oriented to shared parenting; Southern and Eastern Europe starting to shift.
  - North American states/provinces slow but accelerating trend to shared parenting
  - European legislative approach philosophically oriented to continuity of relationships and joint parental authority as default; more prescriptive approach (e.g. preference/presumption) in North America mixed with softer “maximize time”
  - Lesser reliance on court intervention in favour of med/arb and therapeutic support
  - Jurisprudence evolving towards shared parenting with more emphasis on JPC (Joint Physical custody)
  - Increasing trend to self-selection to JLC/JPC

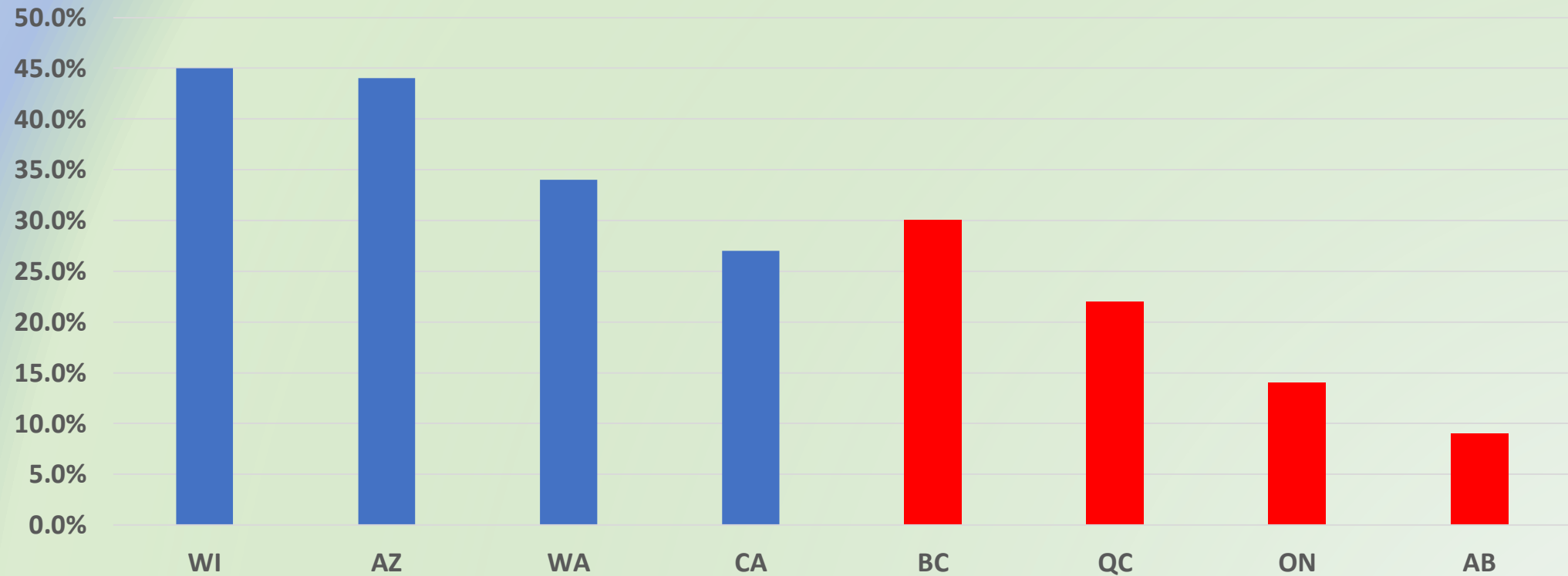
## B.3 Shared Parenting Prevalence- Europe, North America and Australia



- Source: WHO sponsored dataset represents first known consistent survey (540 K children in 38 countries) of parenting time and equal time. We have overlaid known shared parenting stats – combined results are tentative but serve to provide perspective.
- On average, 55% of divorced/separated children have some form of dual residency regardless of custody type.
- Shared parenting = 22% of which about half is equal time.
- Note: No national shared parenting stats for US,PT,IT; no equal time stats for ES3 (3 Spanish regions).



## B.3 Shared Parenting Prevalence – Select North American Jurisdictions

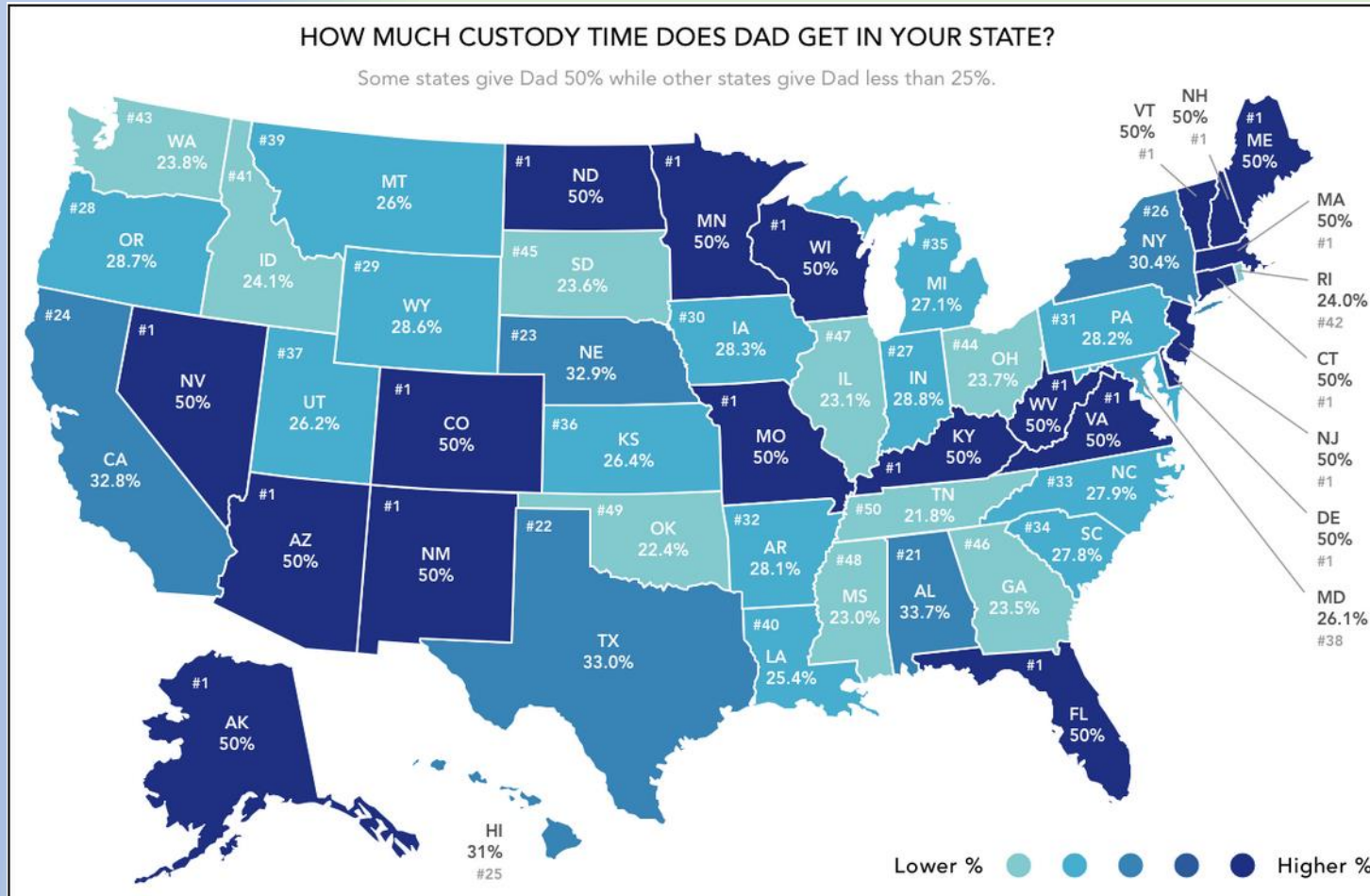


**Source:** reported stats in literature.

**Note:** shared parenting definitions vary by jurisdiction.

## B.3 Consensual Parenting Time Arrangements- US

( Custody Xchange commercial survey)

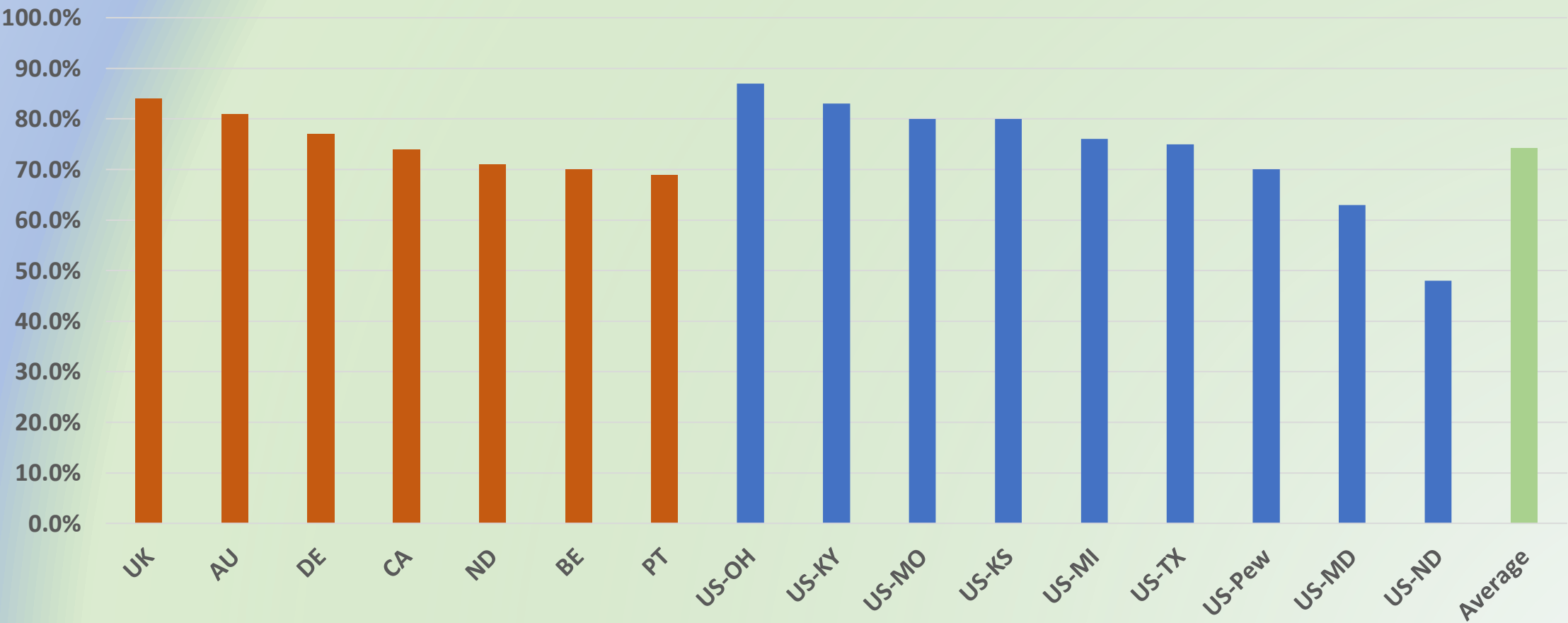


- 35% nationwide average
  - 'Red' States : 32%
  - 'Blue' States : 37%
  - 'Purple' States: 40%
- % states with equal custody as standard:
  - 'Red' States: 22%
  - 'Blue' States: 40%
  - 'Purple' States: 59%
- "Our study shows 40 percent of states aim to give children equal time with each parent"

Ben Coltrin  
Custody Xchange President

# B.4. Shared Parenting –International Polls

74% Average Support (includes undecided)



## B.4....and public supports ESP independent of gender, age, region or political affiliation

CANADA (2007-2017): PRESUMPTIVE SHARED PARENTING POLLS					
QUESTION – Do you strongly support, somewhat support, somewhat oppose or strongly oppose federal and provincial legislation to create a presumption of equal parenting in child custody cases?					
Year	Strongly/Somewhat Support	Strongly/Somewhat Oppose	Unsure	Support among Decided	Ratio Support/Oppose
2007	79.1%	14.1%	6.9%	85.0%	5.6
2009	78.0%	9.7%	12.3%	88.9%	8.0
2017	69.5%	13.2%	17.3%	84.0%	5.3
<b>TOTAL</b>	<b>73.8%</b>	<b>11.5%</b>	<b>14.8%</b>	<b>86.6%</b>	<b>6.4</b>

2014 (Omnipoll)	BY REGION		BY GENDER		BY AGE		BY PARTY VOTED	
	Atlantic	68%	Male	75%	18-34	71%	Liberal	72%
	Quebec	67%	Female	69%	35-54	71%	Conservative	76%
	Ontario	73%			55 plus	74%	NDP	72%
	West	73%					Bloc	61%
							Green	71%
	(undecided)	16%	(undecided)	18%	(undecided)	18%	(undecided)	17%
	CANADA	72%	CANADA	72%	CANADA	72%	CANADA	72%

...not only in Canada, but similar results from ESP polls in KY, OH, KS, TX

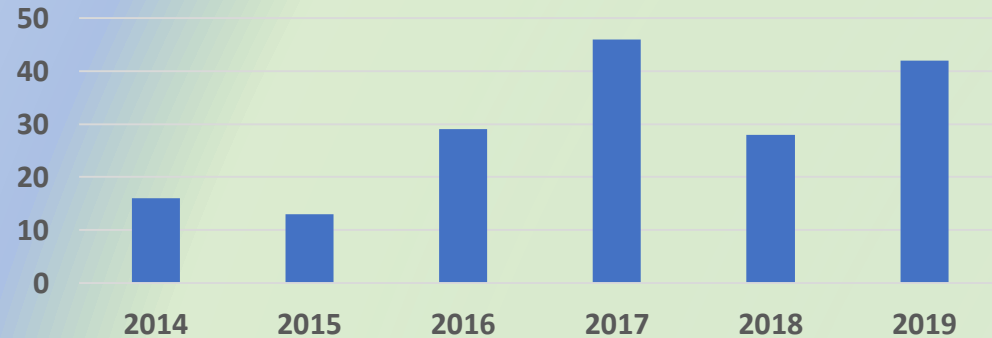
## **B.4. ...and there are growing indications that ESP has implications for politicians who don't support it.**

<b>POLL QUESTION</b>	<b>RESPONSES</b>	<b>KY (2018)</b>	<b>TX 2019</b>	<b>KS (2019)</b>	<b>Average</b>
<b>Would you be more likely or less likely to vote for a candidate who supported equal parenting time for fit parents following a divorce, or would it make a difference?</b>	More Likely	61%	57%	63%	<b>60%</b>
	Less Likely	11%	16%	23%	<b>17%</b>
	Wouldn't make a difference	24%	24%	11%	<b>20%</b>
	Not sure	4%	3%	4%	<b>4%</b>

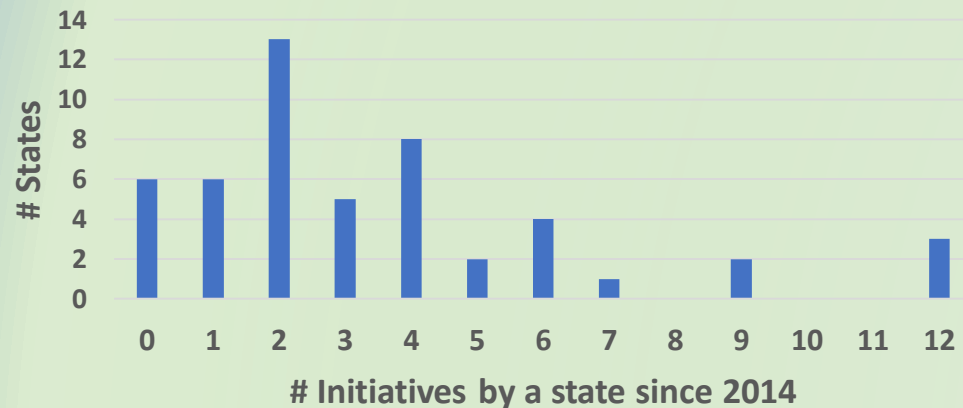
## B.5 Legislative Initiatives – US since 2014

(Increasing pace of initiatives focusing on presumptive/preference shared parenting with main activity in 12 states)  
 ( 27 states with shared parenting initiatives in 2019)

# State Legislative Initiatives (2014-2019 YTD)



Initiative Intensity by US States since 2014



TYPES OF JOINT CUSTODY INITIATIVES		
JOINT CUSTODY	INITIATIVES	
	#	%
Presumption	120	69.0%
Maximizes time	7	4.0%
Preference	24	13.8%
Friendly Parent Rule	4	2.3%
Presump.- Temp. Custody	9	5.2%
Option	10	5.7%
TOTAL	174	100.0%

Shared Parenting "Battleground" States (12 States with at least one initiative per year)	
# Initiatives since 2014	States
12	MN, MO, NY
9	IA, WV
7	MA
6	MD, NJ, SD, VT
5	FL, KY

## B.5. Current/Recent Shared Parenting Legislative Initiatives – International

Country	Initiative
USA	<p>2019 YTD: shared parenting bills in <b>27</b> state legislatures</p> <p>2018 KY becomes first state to adopt rebuttable presumption of equal shared parenting.</p> <p>2018 SD adopts preference for shared parenting</p> <p>2016 FL Governor vetoes shared parenting legislation</p> <p>2016 MO adopts maximum time provisions</p>
Canada	<p>Bill C-78 (2018) with subtle shift from Friendly Parent Rule to encumbered “maximize time” provisions to reportedly “encourage” shared parenting. May die on order paper with upcoming election.</p>
Denmark	<p>As of 2019-04-01, 3-month reflection period replaces same-day divorce/separation process. Joint parental authority and care continues in interim and as default thereafter. Also, primary residence replaced by dual residences of equal status to encourage parental equality and shared parenting.</p>
Italy	<p>“Perfect Co-parenting” proposal (2018) aims for presumptive equal parenting. Private child support being proposed.</p>



## B.5. Current/Recent Shared Parenting Legislative Initiatives – International

Country	Initiative
Israel	<p>Tender years presumption is statutory – up to age 6 to mothers; By 2006 judicial attitudes changed dramatically. By 2019, 60/40 and 50/50 (less frequent) time sharing is common notwithstanding no legislative change. Initiative to reduce automatic maternal custody from age 6 to age 2 not approved.</p>
Australia	<p>Law Reform Commission Report (March 2019) recommends against shared parenting.</p> <ul style="list-style-type: none"> <li>• Recommendation 7 : “...amended to replace the presumption of ‘equal shared parental responsibility’ with a presumption of ‘joint decision making”</li> <li>• Recommendation 8: “consider, in certain circumstances, the possibility of the child spending equal time, or substantial and significant time with each parent, should be repealed.”</li> </ul> <p>Rationale:</p> <ol style="list-style-type: none"> <li>a) Presumption of equal shared parental responsibility interpreted by many as presumption of equal shared care</li> <li>b) Law apparently “practically impenetrable for the average person and presents serious challenges to any lawyer”</li> <li>c) Judicial omission of “multifarious factors” in decision renders it susceptible to appeal.</li> </ol> <p>Alternatives: None considered including clarifying legislative text. Social science research selectively ignored.</p>



## **B.6. Shared Parenting- Perspective on International Trends**

- Strong international public support in polls reflected in increasing private shared parenting or hi-visitation time arrangements
- Joint Legal Custody remains norm but distinctive and continuing trend towards increased parenting time and legislated shared parenting
- Steady and mildly accelerating pace of legislative initiatives with similar pro/con forces in each country:
  - PRO - Public, Family Rights Groups
  - CON - DV groups, Select Women's Groups, Bar Associations

## C. Shared Parenting Arguments – Pro & Con

Shared Parenting debate may be visualized in terms of three overlapping waves:

- **WAVE 1:** Primary Parent Presumption – deny/denigrate shared parenting
- **WAVE 2:** “Yes, but it’s not safe” Phase - DV and Conflict
- **WAVE 3:** “ Well, OK, maybe...but no presumptions”

### Gandhi View on Social Change

First they ignore you,  
then they laugh at you,  
then they fight you,  
then you win.

*Mahatma Gandhi*

## **C. WAVE 1: Primary Parent Presumption – deny/denigrate shared parenting**

**1.1 Attachment Theory**

**1.2 Infant/Toddler Applicability**

**1.3 Yo-Yo Argument**

**1.4 It's only a Father's Rights Issue**

**1.5 It's only a ruse to reduce child support**

# Wave 1: 1.1 Attachment Theory

## CON

- Bowlby's Single Attachment theory of primary "psychological parent" used to minimize need for second parent.
- Single attachment Theory argues that secondary attachment threatens psychological stability and induces stress and reduces primary attachment.
- Anti-SP advocates continue to frame their arguments in terms of traditional single attachment theory.

## PRO

- Multiple Attachment Theory as generally accepted successor recognized not only that children form multiple strong attachments at early age, but that multiple-attachments reinforce rather than detract stability and parental attachment.
- Pro-SP advocates rely on Multiple Attachment Theory to argue shared parenting.
- Bowlby himself agreed his theory was too limited and accepted multiple attachment theory as superior.

## Wave 1: 1.2 Infant/Toddler Applicability

### CON

- Bowlby's Single Attachment theory of primary "psychological parent" used to minimize need for second parent
- In any case, young children can not tolerate stress and instability

### PRO

- Subject to considerations of knowledgeable care-giving, social science has confirmed young children generally have superior or equal outcomes with paternal involvement and care

## WAVE 1: 1.3 Yo-Yo Argument

### CON

- As extension of single attachment theory, shuttling between two households or “living out of a suitcase” creates attachment issues, instability and stress. Ergo, shared parenting is inappropriate.

### PRO

- Numerous empirical studies have shown children are resilient and that dual residency is not a major factor.
- Any issues are more than offset by nurturing benefits of both parents.

# **WAVE 1: 1.4 Shared Parenting...it's only a Father's Rights Issue (Gender Wars)**

## **CON**

- **Fathers Rights Groups are often negatively framed as “basement-dwelling” “angry white men”, anti-feminist or misogynist organizations out of touch with mainstream seeking to regain patriarchal society to retain “power balance”.**
- **Fathers Rights Groups portrayed as being in denial of asserted epidemic of “gender-based” violence.**
- **Ergo, Fathers Rights Groups position should be discounted.**
- **More recent literature has softened views.**

## **PRO**

- **Some truth to this in 1970-80 timeframe as groups were reacting to gender feminist views supplanting traditional equality feminism.**
- **Fathers Rights have since transitioned to Family Rights Movement (FRM) with broader support base around core issues:**
  - **Equal Shared Parenting = Best interests standard**
  - **Gender equality**
  - **DV is a genderless issue**
  - **Human Rights focus for child/parent issues**
- **FRM views are consistent with social science, international laws, and public opinion.**
- **Au contraire, the FRM is the mainstream.**



# WAVE 1: 1.5 It's only a ruse to reduce child support

CON	PRO
<ul style="list-style-type: none"> <li>• Unsupported assertions that fathers seek shared parenting only to reduce child support</li> <li>• Cite decreased child support payments under shared parenting as only fact</li> </ul>	<ul style="list-style-type: none"> <li>• CON side raises 2 issues: underlying paternal motivation and assertion of economic savings</li> <li>• Multiple researchers have confirmed fathers are motivated to play active role in child's life independent of economic issues</li> <li>• Unsupported rebuttal that child support payments are half the equation ignoring the reality of additional direct expenses to maintain child in shared parenting relationship</li> </ul>
<ul style="list-style-type: none"> <li>• <b><u>Neither side</u> has ever presented a quantitative analysis of the merits of their position...<u>so we did our own.</u></b></li> <li>• <b>Our analysis ( based on dominant Income Shares model) shows the following:</b> <ul style="list-style-type: none"> <li>• Out-of-pocket (OOP) expenses ( child support Plus direct child expenditures) are never less and typically more under shared parenting due to the fixed costs of the second residence for the child. Reduction in child support is typically more than offset by direct child expenses- i.e. <b>no financial incentives for payer</b></li> <li>• In fact, <b>shared parenting is generally more expensive option for <u>both</u> parents</b> as parents contribute towards OOP relative to earnings and total child costs increase under shared parenting.</li> <li>• BUT, if parent(s) choose to maintain child at lower ( but still adequate) standard of living (SOL), then <b>cost 'savings' promote perverse economic incentive for <u>both</u> parents to pursue sole custody to maximize savings.</b> This reflects <b>flawed public policy</b> of setting an unreasonably high Guideline SOL relative to parental expectations which promotes litigation conflict.</li> </ul> </li> </ul>	



# ANALYSIS: Is Shared Parenting merely a ruse by fathers to reduce child support obligations? Let's check it out via scenario analysis.

Scenario	Conditions		Results		
	Actual child expenditures conform to Guideline SOL	Guidelines include 50% child cost increase for 2nd residence	Payer Child Support decreases	Out-of-Pocket (OOP) expenses increase for <u>both</u> parents	Relative OOP contributions conform to earnings
1	Y	Y	Y	Y	Y
2		N	Y	same	Y
3	N	Y	Y	Y	<b>N</b>
4		N	same trend as scenario 3		

**SUMMARY:** Assertion is mischaracterization that selectively ignores other child costs. Any economic incentives apply equally to both parents, not just payer.

1. While child support does indeed decrease under shared parenting, this is offset by increase in direct child costs in 2nd residence. Where actual child expenditures conform to SOL Guidelines, OOP increases for both parents and otherwise remains the same. Shared Parenting is generally more expensive than sole custody and hence does not provide financial incentives as alleged.

2. However, if parents opt to maintain child below perceived inflated Guideline SOL levels, the resulting saving ( or even profit) serves as perverse economic incentive for both parents to litigate for sole custody.

# Tutorial Review of Income Shares Model of Child Support

**Fundamental Principle:** Parents contribute to total out-of-pocket (OOP) child expenses relative to earnings,  $E_i$

OOP consists of direct child expenditures,  $C_i$ , and child support transfer paid/received,  $T_i$

Proportionality equation for parents 1 & 2:

$$(C_1 + T_1)/E_1 = (C_2 - T_1)/E_2$$

Solve for Child support transfer:

$$T_1 = (E_1/E)C_2 - (E_2/E)C_1 = (E_1/E)C - C_1$$

Child support as fraction of total child cost:

$$T_1/C = E_1/E - C_1/C = \text{relative earnings- relative child costs}$$

For special case of 0/50/100% parenting time used in calculations: relative child costs = relative parenting time.

In following scenarios, we have assumed:

- Parental earnings ratio- 70:30
- Shared Parenting increases child cost by 50% to cover fixed cost of second residence

Most Income Shares Guidelines include increased costs of dual residency and some assume unchanged cost is split between two residences. We will address both cases.

## SCENARIO 1: NORMAL CASE

Parent actual child expenditures match Guideline recommendations and Guidelines specify 50% increase in child costs for shared parenting to cover fixed cost of second residence

Item	Row	Calculation	Sole Custody		Shared Parenting	
Guideline Child SOL	(1)		10,000		15,000	
Actual Child Expenditures	(2)		10,000		15,000	
Parent	(3)		1	2	1	2
Earnings Split	(4)		70%	30%	70%	30%
Parenting Time Split	(5)		0%	100%	50%	50%
Net	(6)	$=(4)-(5)$	70%	-70%	20%	-20%
Child Support Transfer, T	(7)	$=(6)*(1)$	7,000	-7,000	3,000	-3,000
Direct Child Costs, C	(8)	$=(5)*(2)$	0	10,000	7,500	7,500
Out-of-Pocket Costs, OOP	(9)	$=(6)+(7)$	7,000	3,000	10,500	4,500
% of total actual child expenditures	(10)	$=(9)/(2)$	70%	30%	70%	30%

RESULTS: Child Support obligations decrease but total OOP expenses increase by 50% for both parents reflecting increased costs of shared parenting. Relative 70:30 contribution split remains the same.

## SCENARIO 2: GUIDELINES DO NOT ADDRESS SECOND RESIDENCE COSTS

Parent child expenditures match Guideline recommendations but Guidelines make no extra cost provisions for second residence in shared parenting.

Item	Row	Calculation	Sole Custody		Shared Parenting	
Guideline Child SOL	(1)		10,000		10,000	
Actual Child Expenditures	(2)		10,000		10,000	
Parent	(3)		1	2	1	2
Earnings Split	(4)		70%	30%	70%	30%
Parenting Time Split	(5)		0%	100%	50%	50%
Net	(6)	$=(4)-(5)$	70%	-70%	20%	-20%
Child Support Transfer, T	(7)	$=(6)*(1)$	7,000	-7,000	2,000	-2,000
Direct Child Costs, C	(8)	$=(5)*(2)$	0	10,000	5,000	5,000
Out-of-Pocket Costs, OOP	(9)	$=(6)+(7)$	<b>7,000</b>	<b>3,000</b>	<b>7,000</b>	<b>3,000</b>
% of total actual child expenditures	(10)	$=(9)/(2)$	70%	30%	70%	30%

RESULTS: As total child costs remain the same under shared parenting, total parental costs and relative 70:30 contribution ratio remains unchanged. Note that changes in child support are directly offset by direct child expenditures.

### SCENARIO 3: COST SAVING

Parent direct child expenditures are reasonable but 60% of Guideline levels. Guidelines factor in 50% increase in child costs in shared parenting for fixed costs of second residence

Item	Row	Calculation	Sole Custody		Shared Parenting	
Guideline Child SOL	(1)		10,000		15,000	
Actual Child Expenditures	(2)		6,000		9,000	
Parent	(3)		1	2	1	2
Earnings Split	(4)		70%	30%	70%	30%
Parenting Time Split	(5)		0%	100%	50%	50%
Net	(6)	= (4)-(5)	70%	-70%	20%	-20%
Child Support Transfer, T	(7)	= (6)*(1)	7,000	-7,000	3,000	-3,000
Direct Child Costs, C	(8)	= (5)*(2)	0	6,000	4,500	4,500
Out-of-Pocket Costs, OOP	(9)	= (6)+(7)	7,000	-1,000	7,500	1,500
% of total actual child expenditures	(10)	= (9)/(2)	117%	-17%	83%	17%

**RESULTS:** Child Support transfers remain same as Scenario 1 but direct child expenditures drop by 60% thereby lowering both OOP and relative contributions to total child cost. Parent 1(payer) now sees a disproportionately higher contribution while parent 2 (payee) sees cost savings ( and even profit) through lower relative contributions. In situations where Guideline child costs do not align with parental expectations of reasonable child SOL, both parents have financial incentives to litigate for sole custody to maximize economic savings.

## **D. WAVE 2: “Yes, but it’s not safe” Phase - DV/Conflict Preclude Shared Parenting**

**2.1 DV**

**2.2 Hi-Conflict**

**2.3 Only if both Parents Agree**

**2.4 Shared Parenting Promotes Litigation**

**2.5 Shared Parenting- Tried and rolled back?**

## WAVE 2: 2.1 DV

### CON

- Shared Parenting is not appropriate in situations of DV.
- Some adopt position that any form of DV precludes shared parenting; others acknowledge that types of DV must be differentiated.
- Many argue DV is gender-based phenomenon limiting consideration of fathers.

### PRO

- Agreed. No researcher or advocate of shared parenting disagrees.
- Proponents of Shared Parenting don't impose the implied requisite of a "perfect" parent and emphasize the need to differentiate types of DV and offer therapeutic intervention where appropriate.
- DV is a genderless phenomenon. Emphasis needs to be not on gender but on type and severity of DV.

## **WAVE 2: 2.2 Not Appropriate in Conflict Situations**

### **CON**

- **Conflict of any intensity constitutes DV precluding consideration of shared parenting.**
- **More recently, position refined to not necessarily preclude low to intermediate conflict, but hi-conflict situations precluded.**

### **PRO**

- **Children in JPC in hi-conflict, benefit at least as much as SPC.**
- **Shared Parenting often reduces conflict and promotes co-operation.**
- **Shared Parenting not appropriate under severe and sustained conflict situations.**



## **WAVE 2: 2.3 Only When Both Parents Agree ( Co-operating Parents Prerequisite)**

### **CON**

- **Variation of Conflict argument.**
- **Shared Parenting requires joint agreement, otherwise it promotes conflict and litigation.**

### **PRO**

- **Consensual agreement indeed preferable.**
- **JPC with non-cooperating parents still has superior or equal outcomes to SPC.**

## **WAVE 2: 2.4 Shared Parenting Promotes Litigation**

### **CON**

- **As extension of DV/Conflict line of argumentation, opponents assert shared parenting promotes litigation.**

### **PRO**

- **Empirical data in shared parenting jurisdictions indicates significant and sustained drops in litigation and reliance on court.**
- **Drop in litigation may be partially attributable to:**
  - **Adoption of med/arb**
  - **introduction of parental coordinators**
  - **Improved public health/social support as part of reforms that extend beyond legal domain**

## WAVE 2: 2.5 Shared Parenting- Tried but rolled back?

### CON

- Claims made that shared parenting legislation has been rolled back or revisited in various jurisdictions:
  - California
  - Australia
  - Denmark
  - Israel

### PRO

Allowing for semantic nuances and recognition that all legislation evolves, shared parenting remains intact in all cases and stronger in some:

- California (1988) – legislation amended to remove unintended rank-ordered preferences (i.e. corrective legal drafting).
- Australia (2011) - Change placed “greater weight” on DV but did not change 2006 shared parenting text. Law Reform Commission Report March 2019 would roll back shared parenting.
- Denmark (2012) - clarification that equal parenting an option, not to be construed as right. In 2015, shared parenting strengthened with anti-gatekeeping provisions.
- Israel (~2016) – Proposal to change existing default maternal custody preference from age 6 to age 2 shelved.

## **E. WAVE 3: “ Well, OK, maybe...but no presumptions”**

**3.1 Individualization & One-Size-Fits-All**

**3.2 Not in the Best Interests?**

**3.3 Parental Rights vs Children’s Rights**

**3.4 Effect Size- Does Size Matter?**

## WAVE 3: 3.1 Individualization & One-Size-Fits-All

### CON

- Shared parenting reduces judicial discretion for individualized tailoring.
- Shared parenting needlessly imposes rigid “one-size-fits-all” model (e.g. 50:50 parenting time).
- No empirical evidence offered.

### PRO

- Au contraire, “standard” Sole Custody model is best example of one-size-fits-all.
- Individualization is empty argument as every case must be individually assessed as basic precept of law.
- Empirical data from numerous jurisdictions shows great variety in parenting time splits with 50:50 not being the dominant mode.

## **WAVE 3: 3.2 Not in the Best Interests?**

### **CON**

- **Shared parenting is not in the best interests of the child, or does not conform to the best interest standard.**

### **PRO**

- **Since the best interests standard is devoid of legal meaning, the assertion is an empty emotional argument.**
- **Social Science, UN CRC and public opinion all agree continuity of parental and family relationships is the best arrangement.**
- **Ergo, we have now arrived at a point where we can safely define shared parenting as being the core criteria to define the heretofore vague and indeterminate best interests standard.**

## WAVE 3: 3.3 Parental Rights vs Children's Rights

### CON

- Shared parenting privileges parental rights over children's rights and the paramountcy principle
- No substantiation provided.
- Assumes *parens patriae* has largely unfettered scope

### PRO

- Argument wrongly assumes parental and children's rights are mutually exclusive (i.e. zero sum game) which contradicts UN CRC- i.e. argument is brilliant deflection resting on false premise
- Children's Rights are indeed paramount but inextricably interwoven with parental rights.
- *Parens patriae* doctrine has had overly broad interpretation in modern era trenching on pre-constitutional family rights for "fit" families. This means that parental authority/responsibility is not provisionally terminated at divorce/separation as often assumed by modern courts, more so in North America.



## WAVE 3: 3.4 Effect Size- Does Size Matter?

Effect size is subjective statistical measure of the standardized difference in means (e.g. JPC vs SPC well-being)

### CON

- Since effect size values are typically small for JPC vs SPC comparisons, then JPC is not especially beneficial relative to SPC so why all the fuss about JPC and shared parenting – i.e. making mountains out of molehills

### PRO

- Small effect sizes are typical in social and medical sciences and often have disproportionate impacts, especially under lifetime compounding or situations of threshold discontinuities.
- Apples and oranges: Old scientific assessment challenge- don't confuse the size of the difference with the real issue of the resulting impact/outcome – separate questions
- “best interests” is the *prima facie* standard, not “2<sup>nd</sup> best” or “detrimental” standard as underlying CON premise.



### **3.4 Effect Size: Example- small effect size (SPC vs JPC) vs large impact**

**According to Centers for Disease Control, the U.S. Department of Justice and the U.S. Census Bureau, children raised by single parents account for:**

- 63% of teen suicides;**
- 70% of juveniles in state-operated institutions;**
- 71% of high school drop-outs;**
- 75% of children in chemical abuse centers;**
- 85% of those in prison;**
- 85% of children who exhibit behavioral disorders; and**
- 90% of homeless and runaway children.**

**Note: This does not mean sole custody is causative, rather correlative.  
But, as Doris Day famously sang:” Little things mean a Lot”**

## F. Should there be a Rebuttable Presumption?

### 1. What is it?

- “ an inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence”  
Black’s Law Dictionary (9<sup>th</sup> ed)
- Constitutes a legal starting point or shortcut for assumption of facts placing onus on party opposing facts
- Presumptions vary by type:
  - Presumption of law - Inference of fact must be made until disproven or fact pattern changes
  - Presumption of Fact - Strength of assumption left to judicial discretion
  - Mixed Presumption – Combination of presumption of law and Fact

## F. Should there be a Rebuttable Presumption?

### 2. Why use it?

- **Legal shortcut** to economize on court and litigant resources by assuming given set of legislative or social facts.
- Sends **social normative signal** (i.e. bargaining in the shadow of the law).
- Sends **policy signal** to judiciary:
  - Codification of general practice ( i.e. consistency)
  - Corrective signal if jurisprudence veering away from policy intent
  - Underscore shift/importance of social policy direction
  - Facilitates rapid adoption of policy intent/paradigm
- Strongest form of policy directive along continuum of option/preference/presumption.

## F. Should there be a Rebuttable Presumption?

### 3. Different Presumptive Strengths Can be Applied to Shared Parenting

- Softer Presumption- presumptive shared parenting

**“presumption that it is in the best interests of the children to have frequent and predictable contact with both parents, on a schedule that accords with the child’s developmental needs, unless it can be demonstrated that such involvement poses a significant risk to the child’s physical or emotional well-being”**

**Bala & Miklas (1993)**

- Implicit Presumption – equal shared parenting (AZ)

**“Consistent with the child's best interests ..., 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.”**

**AZ 25-403.02 (2013)**

- Stronger Presumption- presumptive equal shared parenting (KY)

**“... presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent with ensuring the child's welfare. “**

**KRS 403.270 (2) (2018)**

## F. Should there be a Rebuttable Presumption?

### CON

- Hard Core- Shared parenting is bad; presumption makes it worse.
- Rear Guard Action- Shared parenting is being adopted organically; presumptions are unnecessary.
- Exacerbates risk
  - Abusive parents will “reign terror” on spouse and children
  - Will increase litigation
  - Creates power imbalance
  - Privileges parental over child rights
- Unsubstantiated assertions
  - “problematic”
  - Not in the “best interests”

### PRO

- Empirical evidence in shared parenting jurisdictions refutes CON assertions and shows shared parenting is working fine and has popular support.
- Limited empirical data from presumptive jurisdictions like AZ also indicated support, including by legal community.
- Social Science and Popular opinion support presumption.
- Presumption necessary to send strong social and legal signal to reset entrenched paradigm.
- The scientific and social consensus is sufficiently strong that onus should now fall on opponents to make their case.

## F. Should there be a Rebuttable Presumption?- Closing Argument

“Much as it may be desirable, we may really not know how to properly individualize, tailor, or custom-fit parenting plans to achieve the best possible outcomes in each case. So, the effort and expense and time and trouble taken in the futile pursuit of case-specific decisions come with little corresponding benefits. Better to have a starting place that covers the majority of cases and families, with, of course, the ability to deviate when the fit is obviously bad. The general public strongly believes that shared parenting is that starting place and that any other position is biased. The second cost is that vagueness and ambivalence will ultimately be iatrogenic for families by leading to greater conflict. Various proposals under consideration differently incentivize parents to engage in that conflict. Presumptions, of any flavor, generally minimize such incentives. **A shared parenting presumption would minimize that incentive most of all [ bold added].**”

Sanford Braver (2014)



## G. Take-Aways

- **DEFINITION:** How we define our terms could have an effect on the nature of the discussion.
- **CONSENSUS:**
  - Emerging social science consensus on benefits of Shared Parenting.
  - Social science research can be interpreted to mandate policy of rebuttable presumption for equal parenting time.
- **POPULARITY:**
  - Worldwide trends - adoption of some form of Shared Parenting.
  - Polling data - exceptionally strong public support.
- **CANARDS AGAINST REBUTTABLE PRESUMPTION - e.g.**
  - Tarnish the pro elements with “fathers’ rights” appellations = sufficient ground to discount all “pro” discussion.
  - Pro elements only want to pay less child support.
  - Pro elements want to promote conflict & litigation.
  - BIOC = current system.
- **IT WORKS**
  - Better adjusted children
  - False claims of rollbacks



# THANK YOU

Gene C. Colman ( [gene@complexfamilylaw.com](mailto:gene@complexfamilylaw.com) )

George W. Piskor ( [gwpiskor@gmail.com](mailto:gwpiskor@gmail.com) )

# QUESTIONS?

**NOTE:** Sources/ references included in accompanying handout paper

# BACKUP MATERIAL

## ENACTED LEGISLATION SINCE 2014 ( 9 states)

State	Abbreviation	Year	Bill	Status	Joint Custody
Florida	FL	2017	HB 590	Enacted	Option
Kentucky	KY	2017	HB 492	Enacted	Presump.- Temp. Custody
Kentucky	KY	2018	HB 528	Enacted	Presumption
Minnesota	MN	2017	HB 3295	Enacted	Friendly Parent Rule
Missouri	MO	2016	<a href="#">HB 1550</a>	<a href="#">Enacted</a>	<a href="#">Maximizes time</a>
Nevada	NV	2015	<a href="#">AB 263</a>	Enacted	Friendly Parent Rule
South Dakota	SD	2014	<a href="#">SB 74</a>	Enacted	Preference
South Dakota	SD	2018	<a href="#">SB 167</a>	Enacted	Preference
South Dakota	SD	2018	<a href="#">SB 140</a>	Enacted	Presump.- Temp. Custody
Utah	UT	2015	<a href="#">HB 35</a>	Enacted	<a href="#">Maximizes time</a>
Utah	UT	2018	<a href="#">HB 35</a>	Enacted	Option
Virginia	VA	2018	<a href="#">HB 1351</a>	Enacted	Option
Wyoming	WY	2018	SB 20	Enacted	Option

JPC vs SPC:		SUMMARY (Nielsen,2018)		
Control Factor	JPC:SPC			
	JPC Favourable	No difference	SPC Favourable	
None - aggregate result	90%	10%	0%	
Parental quality -P	100%	0%	0%	
Income-I	96%	4%	0%	
Parental conflict- C	84%	11%	5%	
Note: a) JPC Favourable reflects all five assessed categories better or equal with at most only 1 worse, b) 2. No difference based on equal assessed outcomes, c) SPC Favourable is worse outcome than JPC				

## Extract from Fabricius (2019): “*Equal Parenting Time: The Case for a Legal Presumption*” in Oxford Handbook of Children and the Law

“As Joan Kelly has pointed out, the current child custody statutes were written in the absence of evidence of how well they promoted children’s well-being.<sup>56</sup> **The evidence that is now available is compelling that failure to enact presumptions of equal parenting time risks unnecessary harm to children’s emotional security with their parents, and consequently unnecessary harm to public health in the form of long-term stress-related mental and physical health problems among children of divorce.**”