

**MINISTRY OF ATTORNEY GENERAL  
JUSTICE SERVICES BRANCH  
BRIEFING NOTE**

**Advice to Attorney General**

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**PURPOSE:** For DECISION of David Eby, QC  
Attorney General

**ISSUE:** Proposal to study judicial decision-making in parenting arrangements cases

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## BACKGROUND:

- The attached proposal seeks to complete a “census of litigated court outcomes in British Columbia from 1 January 2010 to the present”.
- An objective of the census is to establish the frequency of various types of the parenting arrangements ordered by judges, including “rates for shared care”.
- Another objective is to identify how judges make decisions about parenting arrangements and the study intends to “uncover judges’ beliefs and attitudes on what constitutes the ‘best interests of the child’ in contested child custody cases”.
- The proposal’s stated hypothesis is that judges are primarily guided by personal biases in favour of awarding mothers with the primary care of children and do not rely on relevant current social science research.
- The study’s stated research methods include:
  - an analysis of family law court decisions;
  - an examination of family law court files; and
  - judicial interviews
- s.22 is a well-known advocate for father’s rights and has written extensively about his belief that judges use their personal biases in favour of traditional mother/father roles in making decisions rather than current social science about child development and family dynamics.
- s.13 provided feedback about the need for the FLA to have a presumption in favour of equal/shared parenting to offset this judicial bias when the FLA replaced the *Family Relations Act* (FRA) in 2013.
- Although shared and equal parenting is sometimes used interchangeably, they more often mean different things. s.13 defines equal parenting as including equal power, control and opportunity to actively parent as well as equal residential time.<sup>1</sup>
- A key element of equal parenting is that the child spends 50% of their time with each parent. Shared parenting typically means shared responsibility for making decisions about the child and the child residing with each parent for part of the time, but not necessarily 50% of the time. Canada’s Child Support Guidelines define shared custody as at least 40% of the time and other jurisdictions have quantified shared parenting as at least 35% of the time.
- There is no consensus in social science research about the appropriateness of a legislated presumption in favour of equal/shared parenting arrangements. There are numerous studies that support each side of the debate.
- Generally, father’s rights advocates strongly support the use of these presumptions while women’s/victim’s rights advocates strongly oppose their use.

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- Father's rights advocates argue there is a need for an equal/shared parenting presumption to counteract a historic view that mothers should be given primary responsibility for parenting children.
- Women's/victim's rights advocates strongly oppose their use because they believe such presumptions lead to equal/shared parenting arrangements in situations of family violence where the level of cooperation needed to make the arrangements work leads to further family violence, or puts children's safety at risk.
- Currently, no jurisdiction mandates the establishment of equal parenting after separation or presumes that equal parenting arrangements are in a child's best interests, although some American jurisdictions require courts to consider whether such arrangements are in a child's best interests.
- The legislature of Alabama is currently considering a bill that includes a requirement that judges presume that "joint custody" is in the best interests of a child.
- The FLA was enacted in 2013 after significant research and consultation.
- The FLA made significant changes to the way the previous Family Relations Act (FRA) addressed parenting arrangements including changes intended to ensure that parenting arrangement decisions are not influenced by gender issues.
- For example, the FRA did not grant each parent the same responsibility towards a child immediately after separation. Instead, under Section 35 of the FRA, if a child's parents lived apart, only the parent with whom the child usually resided could exercise "custody over the child" unless an agreement or court order indicated otherwise.
- Also, under Section 27 of the FRA, "guardianship of the person of the child" was granted either to the parent with whom the child resided or to the child's mother, dependent on whether the child's parents were married.
- The FLA addressed this issue in Section 39 of the FLA by generally making each parent who has who has ever lived with or regularly cared for their child, a guardian of their child and Section 40(4) of the FLA provides that, in the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child; and explicitly states that allocating parental responsibilities and parenting time equally must not be presumed.
- The issue of adding a presumption of shared parenting to the FLA was canvassed when the FLA was being developed and was not recommended when the Act was introduced.
- For many years in BC, fathers' rights groups have advocated for the FLA to include a provision that equal/shared parenting arrangements are presumed to be in the best interests of a child.
- During a meeting with the Attorney General in October 2017, father's rights advocates again requested that the issue be re-considered.
- As a follow up from that meeting, the attached proposal from<sup>s.13</sup> was received.

## DISCUSSION:

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- If s.13 proposal is a request for government assistance in accessing the information, either he does not need it or government cannot provide it.
- Judicial decisions, including most family law related decisions, are publicly available.
- Access to family court files are governed by court rules and s.13 : would likely require a court order to obtain the type of detailed access suggested by his proposal.
- s.13 requires the cooperation of the judiciary to conduct the interviews contemplated in the proposal. Government has no authority to require judges to submit to such interviews.

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**OTHER MINISTRIES IMPACTED/CONSULTED:**

- None.

**DATE:**

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Richard J. M. Fyfe, QC  
Deputy Attorney General

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**OPTION \_\_\_\_ APPROVED**

**DATE:**

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David Eby, QC  
Attorney General

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**Attachment(s):** s.13

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