

Examining How Requests for Shared Parenting Are Adjudicated The Interplay of Law, Science and Legislative Reform

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MEN AND FAMILIES CONFERENCE

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Barbados

AGENDA AND HANDOUTS

1. Inconsistency and Unpredictability of the Law
 - A. The maximum contact principle of Canadian legislation
 - B. Handout: Application for leave to appeal to the Supreme Court of Canada 2019
2. The Current Picture of Shared Parenting Litigation in Canada, the United States and the UK
 - A. Handout: Shared Parenting Litigation Jurisprudence Research Memo
3. Introducing Science Into Family Law Adjudications
 - A. The Court as Gatekeeper For Opinion Evidence – Mohan/Daubert/Frye Tests
 - B. Introducing Peer-Review Journal And Experiential Research Through a Qualified Expert
 - C. Example: Memory Science
 - D. Example: Parental Alienation
 - E. Example: Shared Parenting Science

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What is Normative Parenting?

No science being applied by Courts and evaluators

Debate in Recent Books: *“The Collapse of Parenting”* and *“All Joy and No Fun – The Paradox of Modern Parenthood”* and *“Discipline Without Damage”*; *Boundaries* is *“the race to the bottom of permissive Parenting”*

University Level Family Studies Texts and the “Normative Parenting Project”

Formal evidence-based parenting inventories

Interest, attitude, aptitude, flexibility

Personal qualities of the parent: general level of adjustment; adequacy of coping skills; interpersonal accessibility; able to model behaviours they have to teach, including resilience

Emotional Intelligence/Social Intelligence

Transitory Issues and the But-For test

Learn, consult, apply and ask for a corresponding relational move

Be calm in the face of the storm and prove you are the opposite of what is being depicted

The Maximum Contact Principle as an Example of Inconsistency and Unpredictability

1. Why are consistency and predictability important attributes of a family justice system?

- Settlements and case commitment and strategies; risk-aversion; litigation resources

2. The maximum contact principle has 37 years of experience in Canadian jurisprudence

3. We think we know what it means – however it is applied inconsistently and sometimes referred to “check the box” without it having any meaningful impact

4. Observations from an unsuccessful application for leave to appeal from a Saskatchewan Court of Appeal Decision

- Influence of Judges’ personal experiences, predilections and prejudices vs science and social values
- Differences between provinces in application of Federal legislation and differences amongst intra-provincial decisions
- Can you solve logistical issues through the use of extended family and/or childcare providers and/or before/after school programming and still achieve equal parenting?
- Does the Court have to explain why a parent is good enough for 37.2% of the time but not 50%?
- Can parenting education and study and coaching satisfy perceived parenting deficiencies?
- What if a child will grow out of the issue?
- Can a parent’s relative strengths counterbalance any perceived deficiencies?

Other Questions Arising From Maximum Contact Jurisprudence

1. Is ESP the starting point for the analysis or at least a mandatory check-in prior to synthesizing a decision? Why do Courts seem to be searching for a “primary parent”?
2. To what extent is a pre-separation division of family responsibilities relevant or can parents step up their game and make changes to their work/life balance after separation? Think of the implications for our children who want to pursue professional careers
3. Circular logic to define its meaning in terms of “best interests” – then the clause adds nothing to the balance of the legislation
4. Conflict may make joint decision-making unfeasible but not ESP (week-about with transfer at school)
5. There is a presumption that maximum contact is beneficial but not to the point of ESP, yet there is a burden of proof/onus on the parent proposing a marginalized parenting plan and the burden is steep the more marginalized the proposed plan.
6. Is a “compelling reason” required to depart from ESP?
7. Does the Maximum contact principle evolve over time as social values and scientific understanding of child development and parenting evolve?

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2023 ESP JURISPRUDENCE SUMMARY FOR CANADA, CERTAIN US STATES AND UK

1. Continued uncertainty
2. Lists of factors
3. Unclear starting point
4. Yet statistical trends towards more ESP
5. Quebec – culturally more acceptable – viewed as progressive
6. Kentucky – rebuttable presumption brought in through two stages
7. Ohio - list of factors
8. Arizona – legislative change has led to significant trend toward ESP
9. UK – presumption of benefit from two parents being involved and no longer a poor communication bar

POSSIBLE BREAKTHROUGH CASE - ONTARIO CANADA 2024

In a case successfully argued by the presenter for an Ontario father, the Court found, on the basis of the extensive jurisprudence submitted:

“However, I also agree with the Applicant father's submission that the caselaw and the Social Science support the proposition that shared parenting is now the norm and not the exception. Absent evidence that a shared parenting regime is not in the child's best interests, it is still the starting point in the majority of cases involving separated parents”.

SUPERIOR COURT OF JUSTICE, Family Court 55 Munsee Street North, Cayuga, Ontario

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INTRODUCING SCIENCE INTO FAMILY LAW ADJUDICATIONS - 1

1. The Court as Gatekeeper for Opinion Evidence

- Mohan (Canada) and Daubert/Frey (US) principles
- Mohan requires four criteria to be met: (1) necessity in assisting the trier of fact; (2) relevance; (3) a qualified expert; and (4) the absence of an applicable exclusionary rule. The key requirement for expert evidence is that the expert "possesses special knowledge and experience going beyond that of the trier of fact". As long as the court is satisfied that the witness is sufficiently experienced he should be qualified. Any deficiencies of the knowledge or opinion simply goes to weight.
- Under Daubert's progeny, scientific expert testimony is admissible when the testimony meets the following three-part test: (I) the proffered witness must be an expert; (II) the expert must testify about matters requiring scientific, technical, or specialized knowledge; and (III) the expert's testimony must assist the trier of fact.
- You can either have the particular expert clinician/researcher testify as to their own academic and clinical understanding or have someone who is an expert qualify peer-review literature where expert opinion is expressed.

INTRODUCING SCIENCE INTO FAMILY LAW ADJUDICATIONS - 2

1. Example 1: Memory science and false allegations of abuse

The jurisprudence on memory science is quite fascinating [once again see Schedule “3”. Understanding that memory is a reconstructive process and not a recall process is essential to understanding the frailties of memory. Memory science as a discipline exploded in interest after the false memory scandals of the 1970s and 1980s, the history of which can be found on the website of the False Memory Syndrome Foundation. The work of Elizabeth Loftus [author of *The Myth of Repressed Memory*, *Witness for the Defence* and many other books and scientific papers] has resulted in several generations of academic and clinical study. A more recent accessible book on the point is *The Memory Illusion: Remembering, Forgetting, and the Science of False Memory* by Dr. Julia Shaw, originally published in June 2016, referred in the attached jurisprudence.

So, do you need a memory science expert in every case of false allegations of sexual abuse?

Answer: Some cases take judicial notice and therefor refuse to accept expert evidence on the point, some allow the expert to testify and some recognize special situations such as involving children or other factors and allow experts there.

See: [Guidelines on Memory and the Law](#) (The British Psychological Society Research Board 2008)

INTRODUCING SCIENCE INTO FAMILY LAW ADJUDICATIONS - 3

Example 2: Parental Alienation

- 1. What does it mean?**
- 2. Do you need an expert?**
- 3. Do you need an expert to assist the Court with remedies?**
- 4. Even if you don't, is there social science research you need to introduce through an expert otherwise involved, such as a therapist who was trying to assist the family?**
- 5. Can you rely on expert advice given in other cases?**
- 6. Can you rely on lists of criteria and judicial findings of available remedies?**

WHAT IS PARENTAL ALIENATION FROM A LEGAL PERSPECTIVE

- Do you need to prove out a recognized model even in the absence of a universally adopted model?
- Examples from: PASG (the 5-factor model), Dr. Childress (California psychologist), Clawar/Rivlin (Children Held Hostage, 2nd ed.), Karen/Nick Woodall (The Family Separation Clinic and The International Academy of Practice with Alienated Children)
- Do you need a mental health expert or is this just a factual inquiry into causality and homeostasis?
- What about other jurisprudence from around the world?
- Can you rely on an expert giving non-case specific advice in another reported case?
- Is the concept so well accepted now that Courts can take “judicial notice”

WHAT IS PARENTAL ALIENATION FROM A LEGAL PERSPECTIVE

Quote from Bors v. Beleuta 2019 ONSC 7029 (canlii.org) at para. 119

Counsel directed me to the Manitoba case of L.M.A.M. v. C.P.M. 2011 MBQB 46. Dr. Michael Stambrook provided a very comprehensive, and in my view accurate, definition of parental alienation. Justice Thomson quoting from Dr. Stambrook's testimony wrote at paragraph 98:

It is a descriptive term that refers to a process. It is not a diagnostic label. It doesn't appear in any nomenclature about mental health disorders. It is a descriptive term that refers to a process where there is a systematic devaluation, minimization, discreditation of the role of, typically the other parent in a parental dyad. One parent systematically, through a variety of physical, emotional, verbal, contextual, relational set of maneuvers systematically reduces the value, love, commitment, relationship, involvement of the other parent by minimizing, criticizing, devaluing that parent's role. It can involve children having their sense of history being "re-written" by a parent's redefinition of history, reframing things, repetitively talking about things. It can involve sometimes very subtle and sometimes not so subtle suasion, coercion, direction, misrepresentation and so on.

It is an abusive practice. It is child abuse when it occurs. It's emotionally abusive. It cripples and stunts children's development because the reality they knew at one point is undermined by this process. It is dangerous for the development because in [an] ideal situation, children should feel free to love and interact with the adults who are important in their lives, unencumbered by twisted turns of relational loyalties that are, unfortunately misplaced in this situation.

So parental alienation is a process, an interactional process where systematically one parent's role in, for the children is eroded over the course of time.

LITIGATING THE PARENTAL ALIENATION CASE

- How to formally argue the case – see factum used on appeal in Bors v. Bors 2021 ONCA 513 (www.canlii.org)
- Lessons from Wilson vs. Sinclair 2022 ONSC 2154 (www.canlii.org)
- APSAC Guidelines on child maltreatment (www.apsac.org)
 - Spurning, terrorizing, exploiting/corrupting, emotional unresponsiveness, isolating, mental health, medical and educational neglect
- Harman, Kruk and Hines 2018 and more recent articles
- Identifying Coercive Control Canadian Family Law (Family Court Review Volume 59, 4, October 2021, pages 810 – 827)
- Substantial case law recognizing parental alienation conceptually and that it does not require an expert report for diagnosis or for therapy or for protective separation (other than proposed practitioners speaking to their treatment plan/program): Wiggins v. Fiorito, 2015 ONCA 729, Bors v. Bors 2021 ONCA 513, A. M. v. C. H. 2019 ONCA 764, D. v. T., 2019 ONSC 644, affirmed 2021 ONCA 850, D. v. T. 2021 ONSC 2945, D. v. T. B. 2021 ONCA 850

SOURCES OF SCIENCE

See “Parental Alienation – Science and Law”, Lorandos and Bernet Editors, Charles C Thomas Publisher, Ltd., Springfield Illinois 2020. This is the successor textbook to the International Handbook of Parental Alienation, First and Second Editions.

See also the three special editions of the Family Court Review (the periodical published by the AFCC in 2000, 2010 and April 2020).

See, in particular, Dr. Lorandos’ article April 2020 Edition surveying US Appellate Court Jurisprudence.

See https://www.bailii.org/form/search_cases.html

CaseText in the US offers reasonable pricing for large datasets

INTRODUCING SCIENCE INTO FAMILY LAW ADJUDICATIONS – SHARED PARENTING

1. Can you qualify an expert in shared parenting science or is that intruding on what Judges know and do so you cannot pass the qualification test?
 - A. Mixed results in cases attempting to introduce this science through an expert report
 - B. Given the state of the law, we should be able to, however it is rarely accepted
2. What about ICSP official pronouncements and scientific literature library?
3. What about individual peer review research studies?
4. What about Governmental or Quasi-Governmental official pronouncements on parenting after divorce?
5. Caselaw does accept the AFCC parenting plan guides as an acceptable summary of scientific understanding

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