



13 Ohio – Ohio Rev. Code § 3109.04.....

13 Arizona – Ariz. Rev. Stat. § 25-401 – § 25-417 .....

Equal Shared Parenting, Involvement, and Welfare Checklist in the United Kingdom  
 16 Conclusion

..... 17

**NEED FOR CLARITY AND LEGISLATIVE GUIDANCE IN EQUAL SHARED PARENTING LAW:  
 A REVIEW OVER THREE INTERNATIONAL JURISDICTIONS**

**Introduction**

1. International social science shows that children generally have better outcomes when in shared parenting arrangements after their parents separate. International legislation and case law jurisprudence also recognizes that shared parenting is a common practice, and generally in a child’s best interest.
2. In Canada, shared parenting has become “the most common parenting arrangement.”<sup>1</sup> Significant recent amendments to both federal and provincial legislation clarifies what factors should be considered in making any parenting order. However, the legislation does not refer to shared parenting (except for the purposes of determining child support). The legislation could – and should – provide more clarity on the issue of shared parenting to provide families with much needed guidance, and – to the extent possible – more certainty following parental separation.
3. Some guidance can be gleaned from looking at other jurisdictions. For example, in the United States, state law varies but several states have legislated either a rebuttable presumption that equally shared parenting time is in a child’s best interests (Kentucky) or set out factors to be considered in shared parenting cases (Ohio). Appellate case law has also recognized that, as a general rule, equal or near-equal parenting time is presumed to be in a child’s best interests (Arizona).
4. In the United Kingdom, there is a legislated presumption that the involvement of a parent in a child’s life will further the child’s welfare, unless the contrary is shown. The case law has also evolved on how various factors will be considered, and there is no longer a principle that a failure to communicate by the parents should bar equal shared parenting.
5. In contrast, in Canada, the jurisprudence lacks legislative guidance and, thus, there appears to be much less certainty about when a Court will order shared parenting

on the facts in a specific case. There is value to consistency in approaching family law matters relating to the best interests of children, regardless of the nature of the parental relationship (whether marriage, cohabiting, or otherwise) or the chosen forum or statute under which the application is brought. <sup>2</sup>If shared parenting is beneficial for a child, which is supported by a growing body of often ignored social science studies, families need clear guidance from the legislature that recognizes equal shared parenting as a starting point, with articulated principles on when it is appropriate to depart from such an arrangement. This is a crucial public health issue, not just a legal issue.

Page 2 of 28

### **Benefits of Shared Parenting**

6. While social science studies have their methodological limits, such studies have reported that children with a range of shared parenting arrangements post-separation show better outcomes on measures of emotional, behavioral, psychological, social, physical, and academic well-being when compared to children in sole custody arrangements. Children in shared parenting arrangements maintain closer emotional bonds, frequent contact, and have better quality relationships with each parent, mitigating the negative impact of separation and post-separation inter-parental conflict. Most of these studies considered shared care or parenting-time as an arrangement where children are with each parent between 30%-50% of time.<sup>3</sup>
7. One consensus that emerged from the international participants involved in the Association of Family and Conciliation Courts (“AFCC”) <sup>4</sup> Think Tank Report on Shared Parenting<sup>5</sup> was that “the promotion of shared parenting is a public health issue and not only a legal issue; shared parenting is a key protective factor for children's long term adjustment in separated families.”<sup>6</sup>
8. Case law sheds light on some of the benefits as well. For example, over a decade ago, Associate Chief Justice O’Neil of the Supreme Court in Nova Scotia (a province in Canada) discussed how the Court’s understanding of shared parenting has changed over time:

Jurisprudence on how the allocation of parenting time is to be determined has changed. Several decades ago, shared parenting was an unusual outcome when custody and access issues were litigated. In keeping with the changing role of women in the work place and men in the household, as well as an increased acceptance of the parenting ability of men, the law has evolved. Age old stereotypes about the role of men and women as parents are slowly dissipating.

One is forced to ask what impact the parenting arrangement proposed by Ms. Gibney would have on the children's relationship with Mr. Conohan.

It is through the eyes of the children and with their best interests in

mind that the court must conduct its analysis.<sup>7</sup>

9. In that case, Associate Chief Justice O’Neil considered that the father was devoted and committed to the children, even though he was less involved with the children pre-separation than the mother. There was no evidence that he had ever abused his children, been harsh with them, or failed to respond to their needs. He was more than capable and willing to parent appropriately. His style reflected love, warmth, and concern. Although he was a different parent than the mother, who was more efficient and organized, this did not make him a less qualified parent. Children can benefit from more than one positive parenting role model. The Court quoted from the Supreme Court of Canada in *Young v. Young* (1993) on the long-term value of the child having a meaningful relationship with both parents.<sup>8</sup>

Page 3 of 28

## **Equal Shared Parenting, Maximum Contact, and Best Interests in**

### **Canada Legislative Overview**

10. Canadian parenting legislation underwent significant amendments in 2021 whereby the outdated terms “custody and access” were removed and replaced with “decision making responsibility” and “parenting time” (or “contact” for a non-parent). Additionally, the legislature made changes to the factors governing a child’s best interests, including parenting time considerations.<sup>9</sup>
11. The federal *Divorce Act* directs the Court to take into consideration “only the best interests of the child” in making a parenting order pursuant to s. 16(1).<sup>10</sup>
12. As of March 1, 2021, more details were added to the best interests test. A new s. 16(2) of the *Divorce Act* provides that, in considering of the list of factors under s. 16(3) (discussed below), the Court is required to “give primary consideration to the child’s physical, emotional and psychological safety, security and well-being”.<sup>11</sup> Any conflicts or difficulties in attempting to carry out the best interests analysis should be resolved in favour of ensuring the child’s physical, emotional, and psychological safety, security and well-being are promoted.<sup>12</sup>
13. The new list of best interests factors in s. 16(3) provides that, in determining a child’s best interests, the Court shall consider “all factors related to the circumstances of the child,” including: (a) the child’s needs, given the child’s age and stage of development, such as the child’s need for stability; (b), the nature and strength of the child’s relationship with each spouse, sibling, grandparent and any other significant person; (c) each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse; (d) the history of care; (e) the child’s views and preferences, giving due weight to the child’s age and maturity; (f) the child’s cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage; (g) any plans for the child’s care; (h) each parent’s ability and willingness to care for and meet the child’s needs; (i) each parent’s ability and willingness to communicate and cooperate on matters affecting the child; (j) any family violence; and (k) any civil or criminal proceeding, order, condition, or measure relevant to the child’s safety, security and

well-being.<sup>13</sup>

14. The recent amendments to the *Divorce Act* require the Court to take into consideration the impact of any family violence pursuant to ss. 16(3)(j) and 16(4).<sup>14</sup> These provisions and references throughout the *Divorce Act* to family violence were added as part of the new 2021 amendments.
15. Pursuant to s. 16(5), the Court is not to take into consideration the past conduct of any person in determining a child's best interests, unless that conduct is relevant to the exercise of the person's parenting time, decision-making responsibility or contact with the child.<sup>15</sup> This consideration of past conduct existed in the *Divorce Act* prior to the 2021 amendments.<sup>16</sup>
  16. The principle that children should have maximum contact with each parent as is consistent with their best interests is deeply embedded within Canadian family law.<sup>17</sup> Previously, the federal *Divorce Act* referred to "Maximum contact" as the marginal

#### Page 4 of 28

note (heading), as the principle that a child should have as much time with each parent "as is consistent with the best interests of the child". This came to be referred to as the "maximum contact principle",<sup>18</sup> although Courts across the country were sometimes inconsistent in how to apply this principle.

17. In the current *Divorce Act*, under s. 16(6), Courts are still required to give effect to the principle that a child should have "as much time with each parent as is consistent with the best interests of the child".<sup>19</sup> These amendments have been replicated in several provincial statutes.<sup>20</sup> However, the marginal note (heading) is no longer referred to as "Maximum contact" but rather "Parenting time consistent with best interests of child." Without further guidance as to the weight to be given to this principle and no mention of equal shared parenting, the Courts continue to be inconsistent in applying this principle to parenting arrangements.

#### Maximum Contact and Parenting Time: In the Supreme Court of Canada

18. In the pre-amendment case *Young v. Young* (1993), the Supreme Court of Canada ("SCC") explained that the maximum contact principle (then s. 16(10)) was significant as it was the only specific factor which Parliament saw fit to single out. It was subject only to the best interests of the child. Thus, contact could be restricted to the extent that it conflicted with the child's best interests. But only to that extent.<sup>21</sup> Like all legal tests, the best interests test was to be applied according to the evidence in the case, viewed objectively. There was no room for the judge's personal predilections and prejudices.<sup>22</sup>
19. In another pre-amendment case, *Gordon v. Goertz* (1996), the SCC noted that the maximum contact principle was mandatory, but not absolute. Again, the Court must respect it to the extent that such contact was consistent with the child's best interests.<sup>23</sup>
20. In both pre-Amendment cases, the SCC was clear that the best interests of the child is the *only* consideration when making an order for custody and access.<sup>24</sup> It was in

this broader context that the Court considered the maximum contact principle.

21. The SCC has only weighed in on the parenting time factor (now s. 16(6)) in one post amendment case. In *Barendregt v. Grebliunas* (2022), the SCC held that the “maximum contact principle” is now better referred to as the “parenting time factor.” Further, Justice Karakatsanis, speaking for a majority of the Court, held that some previous trial interpretations have “overreach[ed]” in interpreting this principle as creating a “presumption in favour of shared parenting arrangements, equal parenting time, or regular access”.<sup>25</sup>
22. Since then, Courts across the country have consistently re-affirmed that there is no presumption of equal shared parenting, and that the “maximum contact” principle or “parenting time” factor is subject to a child’s best interests.<sup>26</sup> However, it remains unclear under what circumstances shared parenting will be granted.

#### Page 5 of 28

#### Shared Parenting Time in Trial and Appeal Court Decisions Post-Amendment

##### *Inconsistency in Considering Shared Parenting and the Maximum Contact Principle/Parenting Time Factor*

23. It is clear in Canadian family law that there is no presumption of equal shared parenting in the legislation.<sup>27</sup> However, as was the case with the maximum contact principle pre-amendment, trial and appeal Courts across the country have been left to interpret and apply the parenting time principle (that a child should have “as much time with each parent as is consistent with the best interests of the child”) post amendment, which has been done on an inconsistent basis.<sup>28</sup>
24. For example, in *S.S. v. R.S.* (2021), the Ontario Superior Court of Justice held that “[c]learly the idea of a presumption in favour of one type of parenting order is anathema to the court’s unrelenting focus on the child’s ‘best interests.’ The most one can say is, all things being equal, the child deserves to have a relationship with both of their parents.”<sup>29</sup> In that case, the Court made a temporary order that the children’s primary residence should be with the mother where there were family violence and communication concerns.
25. Similarly, in *Hassler v. Hassler* (2022), the Manitoba Court of King’s Bench continued to refer to the “maximum contact principle” from pre-amendment case law and agreed that, in principle, in appropriate circumstances children should be able to spend as much time as possible with both parents. However, the Court held that “this principle may be disregarded in circumstances where the best interests of the children favours one parent over the other.”<sup>30</sup>
26. However, in *Droit de la famille — 22674* (2022), the Quebec Superior Court relied on Quebec Court of Appeal case law to note that “[w]hile there is no presumption in

favour of equally shared parenting time, this option should be seriously considered when the capacity of both parents is established, the circumstances are favourable and there is no impediment to its implementation.<sup>31</sup>

27. Similarly, in *Friesen v. Friesen* (2022), the Saskatchewan Court of King’s Bench held that [w]hile it is acknowledged there is no presumption at law mandating maximum contact between the child and each of her parents, it remains a target to attain in the appropriate circumstances.<sup>32</sup> It is not clear, however, what the “appropriate circumstances” are for an order of shared parenting. It was only concluded that “there is no rational reason why the parties should not have similar parenting times with the child in her best interests.” The Court ordered an expansion of the father’s parenting time towards the goal of equal parenting time.
28. In British Columbia as well, some Courts have made it clear that there is no presumption under the *Divorce Act* that equal shared parenting or maximum contact is in a child’s best interests.<sup>33</sup> Other cases, however, are less clear on this point. For example, in *R.T.C. v. N.M.C.* (2021), the British Columbia Supreme Court held that the parenting time principle of the *Divorce Act* is “somewhat different” than the parallel provision in the provincial legislation, which “explicitly eliminates the presumption of equal shared parenting time.”<sup>34</sup> On the other hand, in *Bevat v Mazinani* (2022), the British Columbia Supreme Court made the order pursuant to the provincial legislation

#### Page 6 of 28

but reviewed the relevant *Divorce Act* provisions as well, and noted that the outcome would have been the same under either legislation. Here, the Court found that maximum contact between the father and the child required “regular” in-person time, and that 4-hour visits twice a week were insufficient to establish a bond as the child grew older. Instead, it was in the child’s best interests to gradually move towards a shared parenting regime.<sup>35</sup>

29. And in *C.C. v. I.C.* (2021),<sup>36</sup> the Ontario Superior Court of Justice held that while “there is no presumption of equal shared parenting time... the maximum contact principle provides that a child should have as much time with each parent as is consistent with the best interests of the child.” In ordering equal shared parenting in that case, the Court noted that “[y]oung children with attachments to both parents need sufficient contact with both parents without prolonged separations to maintain a meaningful and close relationship with both.”

#### *Variety of Factors and Principles for Shared Parenting in Canadian Case Law*

30. As discussed above, there is a lack of clarity in the legislation on whether shared parenting should be prioritized and how to weigh the different best interests factors that may be particularly relevant when there is a claim for equal shared parenting. Thus, the Canadian case law generally reviews the principles that apply to shared parenting as simply part of considering what order to make on parenting time.<sup>37</sup>

However, several Courts (mostly lower level, non-appeal Courts) have tried to provide further guidance on when shared parenting specifically is in a child's best interests.

31. For example, in *CAS v NPC* (2020), Justice Lema of the Alberta Queen's Bench thoroughly reviewed the Alberta jurisprudence on shared parenting and set out a long list of factors in favour of and against an order of shared parenting. Factors supporting shared parenting include [paraphrased; citations removed].<sup>38</sup>

- both parties being capable and engaged parents;
- good communication;
  - each parent loves the child and “no evidence that they will not be properly cared for with all their needs being met in the care of each parent”;
- adequate proposed work and child-care arrangements from the non primary parent, even if less developed than the primary parent's;
- history of shared parenting (during relationship and first two years after separation);
- parents having different and important interests and capabilities to pass on to their children;
- having spent significant time with the non-primary parent and having strong attachments to both parents;
- a parenting assessment's recommendations;
- child's preference for shared parenting;

**Page 7 of 28**

- child's extracurricular activities not having to change;
- enhancing children's contact with one parent's cultural background; •  
increased opportunity to learn each parent's first language;
- increased “rich time” with half-siblings;
- retaining “meaningful contact” with other family members;
- allowing child to continue attending school with friends and where one of the parents works;
- absence of harm to or neglect of child by non-primary parent;
- non-primary parent in unique position to assist child with disabilities, having experienced similar ones in childhood;
- both parents having an appropriate residence;
- involvement of grandparents for childcare is not a negative factor; •  
ability of both parents to adapt easily to shared parenting;

- giving primary parent a break and allowing them time to build a business; • manageable driving time between parental residences;
- where the current primary parent's only objections was that "change would be difficult" and that the other parent "can be difficult";
- where shared parenting may neutralize or minimize communication difficulties and personal hostility;
- a primary parent's efforts to thwart the other's parenting time;
  - current access parent and a new partner "providing a loving home";
- a work-at-home non-primary parent's ability to manage both work and child care;
- new partner providing child care is not a counter-indicator, especially where other parent also relies on non-parental child care;
- for interim parenting, where post-separation *status quo* was shared parenting; and
- continuing shared parenting during investigation of one parent's mental health.

32. Factors signaling against shared parenting include [paraphrased; citations removed]:<sup>39</sup>

- parents' inability to put children's interests ahead of their own to such a degree that regular cooperation and coordination in scheduling is impossible;
  - parties being and having been in "substantial conflict" and lacking a

**Page 8 of 28**

"genuine willingness" to work together to ensure the success of shared parenting;

- where separation from the child's primary caregiver, particularly at a young age, may be emotionally and developmentally disruptive;
- medical evidence suggesting no major changes to the routine of a disabled child;
  - a parent's frequent violence and angry outbursts against a child;
- the child the feeling need to disparage one parent in that's parent's presence;
- the child being at risk of serious psychological problems;
- one parent's residential and new relationships' instability, coupled with an information gap about who would provide childcare during that parent's working time;

- a parent’s proposal that each enroll the children in separate activities, to be pursued only while with the enrolling parent,;
- one parent having “more scheduled” work commitments which would offer less consistency than that available with the other parent;
- the absence of definite plans for where the non-primary parent would live with the children or where they would go to school;
- opposed-to-shared-parenting opinions of the children (particularly older children);
- too much travel; distance between residences; one parent’s move or likely move;
- demonstrated inability of non-primary parent to responsibly exercise his access over the last few years
  - before trial, where there is significant disagreement on the evidence;
- a shared-parenting regime will not automatically be restored after a long departure;
- evidence lacking on strength or importance of relationship between children, on the one hand, and non-primary parent’s new partner and child, on the other, as well as on non-primary parent’s proposed special-needs accommodations and school-attendance commitments;
- shared parenting not to start until non-primary parent has his own residence that can accommodate him and the children;
- one parent’s possible serious alcohol dependency;
- need for one parent to demonstrate healthy and safe home environment; • insufficient evidence on impact of proposed “sibling break-up”;

**Page 9 of 28**

- until children’s wishes can be ascertained with the assistance of an expert (particularly older children); and
- until re-introduction-of-absent-parent process completed.

33. Applied to *CAS v NPC*, the father’s request for shared parenting was granted where both parties were loving, capable, involved and committed parents; the parties had “passed the lead-parenting role back and forth as their respective work commitments and other circumstances required”, there were many examples of cooperation between the parties and their communication difficulties “do not appear insurmountable”, the children appeared strongly bonded to both parents and their needs would be fully met in each home, and none of the counter-indicator factors applied (including the children’s young ages, at 4.5 and 2.25, since several Alberta Courts had previously ordered shared parenting for young children).<sup>40</sup>

34. In the earlier case of *Gibney v. Conohan* (2011), Associate Chief Justice O’Neil also identified several factors that frequently prove important in assessing shared parenting:<sup>41</sup>

- The proximity of the two proposed homes to each other;
- The availability of each parent to the child on a daily basis (and the availability of a step-parent, if applicable, and other extended family members);
- The motivation and capability of each parent to realize their parenting opportunity for the best interests of the child;
- Whether a reduction in transitions can be achieved;
- Whether “mid-week” parenting time or contact with the other parent can be structured without disrupting the child;
- The opportunity, if any, for shared parenting to provide for each parent to be involved in important child-related decisions and the level of interest each parent has in making these decisions;
- The extent to which shared parenting enhances the development of a routine in each parent’s home;
- Each parent’s willingness to assume their share of the increased responsibility of shared parenting;
- The employment or career benefits that may accrue as a result of more equal parenting responsibilities;
- Whether improvements in the standard of living in either or both households may accrue;
- The willingness and availability of parents to access professional advice on the issue of parenting;
- The financial consequences of shared parenting; and
  - The parenting styles of the parents – for example, can the parent set

**Page 10 of 28**

boundaries, comfort and guide the child, be child-focused, etc.

35. Applied to *Gibney v. Conohan*, the Court was satisfied that each parent would maximize the parenting opportunity afforded to them. They were genuinely interested in their children (aged 9 and almost 7). A shared parenting regime would allow the children continuity with their peer group and school, while continuing to have time with extended family members on both sides of their family. A week-about schedule with a mid-week visit for the parent not having the children in their care for the week was in the children’s best interests.<sup>42</sup>

36. While such guiding principles are helpful, they underscore the uncertainty in Canadian legislation with respect to shared parenting orders. After all, the only

factor statutorily mandated to receive greater weight, in the form of “primary consideration”, is the child’s physical, emotional, and psychological safety, security, and well-being,

37. In addition, the vast majority of cases do not contain such a detailed list of factors supporting or counter-indicating shared parenting, or factors that frequently prove important. Without more specific legislated guidance, the cases usually contain only reasons for the why the specific facts in the case justify or reject a claim for shared parenting, and sometimes contain only a cursory statement that such an arrangement is or is not in the best interests of the child.

### *Factors that Receive Greater Weight in Canadian Case Law*

38. There are a few best interests factors that Courts often focus on in making parenting determinations related to shared parenting. However, as can be seen, even these factors are applied inconsistently, and families are left guessing as to how the Court may decide their matter on any given day.
39. The following best interests factors arise most often when a Canadian Court is considering a claim for shared parenting:

- **Distance:** The geographic distance or commute time is often a factor that is, for practical reasons, considered where the parties live a significant distance apart. However, the case law shows inconsistencies in the distance or commute time that a judge will consider as preventing or promoting shared parenting.<sup>43</sup>
- **Inability to communicate:** In some cases, the parties’ difficulties in communicating on child-related issues will prevent the Court from ordering shared parenting.<sup>44</sup> However, in many other cases, the Court will order shared parenting despite difficulties in communication.<sup>45</sup>
- **Family violence:** In some cases, allegations or prior findings of family violence will prevent the Court from ordering shared parenting.<sup>46</sup> However, in other cases, the Court will order shared parenting despite family violence.<sup>47</sup>
- **History of care:** In some cases, a history of care primarily by one parent will prevent the Court from ordering shared parenting.<sup>48</sup> However, in other

### Page 11 of 28

cases, the Court will order shared parenting despite a history of care primarily by one parent.<sup>49</sup>

- **Stability:** This factor is somewhat linked to the history of care. Some Courts will note the child’s “need for stability” in making parenting arrangements, with a case-specific finding that the result is in the child’s best interests. However, the case law shows inconsistencies in the importance of stability,

and whether a judge will even consider this factor as preventing or promoting shared parenting.<sup>50</sup>

40. The case law shows that the above factors are typically, but not always, considered when the Court determines whether to order shared parenting. However, without legislative guidance, the level of analysis is inconsistent and often lacks clarity on how these factors interact when the Court is deciding whether to order shared parenting.
41. Note that the 2021 legislative amendments provide for different burdens that are presumed to apply in different situations<sup>51</sup> and a list of specific best interest factors<sup>52</sup> when relocation is being considered. This type of legislative clarity is not provided for when shared parenting is being considered. There is no presumption or list of specific best interest factors with respect to shared parenting.
42. There is also a lack of clarity as to what “maximum contact” or “as much time as is consistent with the best interests of the child” actually means in terms of the actual parenting time schedule. In *S.S.L. v. M.A.B.* (2022), Justice Gordon of the Ontario Superior Court of Justice relied on appellate case law (from the Supreme Court of Canada and Court of Appeal for Ontario) to reiterate the general principle that “[t]he goal of maximum contact will only be overtaken to the extent that contact with a parent conflicts with the child’s best interest.”<sup>53</sup> The Court also relied on an appellate case (from the Court of Appeal for Ontario) that described an order granting parenting time on alternate weekends, one week night per week, three weeks in the summer and shared holidays represented “minimal” time that fails to respect the “maximum contact principle” in the absence of any compelling reason to limit parenting time.”<sup>54</sup> However, there are a plethora of cases where less time is ordered, yet the Court does not provide a reason to limit parenting time, or comment on the time being “minimal” such that fails it to respect the “maximum contact principle” or “parenting time factor”.
43. Further, there is a lack of clarity as to the role of social science evidence in making parenting decisions. For example, the Ontario Chapter of the AFCC has developed a Parenting Plan Guide<sup>55</sup> “to assist parents and their professional advisors in specifically developing the best, child-focused, and realistic parenting plans.”<sup>56</sup> It summarizes “basic social science knowledge about the effects of parental separation on children, provides suggestions and guidance to help improve communications and cooperation between separated parents and offers valuable guidance about formulating parenting arrangements that meet the needs of the children.”<sup>57</sup> Some Courts will rely on the AFCC Parenting Plan Guide, or other social science evidence, to implement a parenting plan. Overall, however, only approximately 22 out of approximately 280 Canadian cases reviewed took social science evidence into consideration in determining appropriate parenting orders.<sup>58</sup>

44. The only certainty is that shared parenting will be ordered where there is no apparent

reason not to do so. See, for example, *Therault v. Ford* (2022), where the Court held that there was no apparent reason why the children’s best interests could not be served by having “maximum parenting with each parent, which, in my view, equates to equal parenting time”.<sup>59</sup>

### **Equal Shared Parenting in the United States – Three**

#### **Examples Kentucky – Ky. Rev. Stat. § 403.270**

45. Since 2018, Kentucky parenting legislation has a rebuttable presumption that joint custody and equally shared parenting time is in the best interests of the child.<sup>60</sup> Further, 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”.<sup>61</sup> This presumption of equal and shared parenting does not apply where a domestic violence order is being or has been entered against a party.<sup>62</sup>
46. The relevant best interests factors are: (a) the parent’s or *de facto* custodian’s wishes; (b) the child’s wishes, with due consideration given to any influence a parent or *de facto* custodian may have over the child’s wishes; (c) the child’s interaction and interrelationship with a parent, sibling, and other significant persons; (d) the motivation of the adults participating in the custody proceeding; (e) the child’s adjustment and continuing proximity to his or her home, school, and community; (f) the mental and physical health of all individuals involved; (g) a finding of domestic violence and abuse; (h) the extent to which the child has been cared for, nurtured, and supported by any *de facto* custodian; (i) the intent of the parent(s) in placing the child with a *de facto* custodian; (j) the circumstances under which the child was placed or allowed to remain in the custody of a *de facto* custodian; and (k) the likelihood a party will allow the child frequent, meaningful, and continuing contact with the other parent or *de facto* custodian, except in cases of domestic violence.<sup>63</sup>
47. From a review of appellate cases since 2018,<sup>64</sup> it appears that many reverse trial Courts where they ignore this presumption and order sole custody in favour of one parent. There are a significant number of appellate cases where such decisions are vacated and remanded if it is not clear that the trial Court began its analysis with the rebuttable presumption that equal parenting time is in a child’s best interests or made any findings as to how either party overcame the presumption.<sup>65</sup> This trend indicates that clear legislation and strong appellate decisions will assist any period of transition where a rebuttable presumption of equal shared parenting is a significant change to family law legislation.

#### **Ohio – Ohio Rev. Code § 3109.04**

48. Under Ohio parenting legislation,<sup>66</sup> where at least one parent files a shared parenting plan, and that plan is in the best interests of the child, the Court must consider the plan and may allocate parental rights and responsibilities to both parents under a

shared parenting order.<sup>67</sup> While the Court does not appear to have jurisdiction to

Page 13 of 28

order shared parenting if neither parent makes such a request,<sup>68</sup> the Court can make changes to any parenting plans submitted, if in the child's best interests.<sup>69</sup> Where both parents submit shared parenting plans, it is an error for the Court to only consider one shared parenting plan and not the other.<sup>70</sup>

49. In recent amendments to Ohio's parenting legislation, effective January 5, 2023,<sup>71</sup> several new factors were added for the Court to consider in making an order in a child's best interests. The current best interests factors are: (a) the parents' wishes regarding the child's care; (b) the child's wishes and concerns, if a judicial interview has taken place [added in 2023]; (c) the child's interaction and interrelationship with her or his parents, siblings, and other significant persons; (d) the child's adjustment to home, school, and community; (e) the mental and physical health of all persons involved; (f) the parent more likely to honor and facilitate Court-approved parenting time rights or visitation and companionship rights; (g) whether either parent has failed to make child support payments [added in 2023]; (h) whether either parent or member of either parent's household has previously been convicted of or pled guilty to a criminal offence relating to a child [added in 2023]; (i) whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time [added in 2023]; and (j) whether either parent has established a residence, or is planning to establish a residence, outside the state [added in 2023].<sup>72</sup>
50. There does not appear to be a presumption of shared parenting in Ohio legislation. However, there are additional factors to be considered in shared parenting cases, including: (a) the parents' ability to cooperate and make decisions jointly, with respect to the child; (b) each parent's ability to encourage the sharing of love, affection, and contact between the child and the other parent; (c) any history or potential for abuse, other domestic violence, or parental kidnapping; (d) the geographic proximity of the parents, as the proximity relates to the practical considerations of shared parenting; and (e) any recommendations of the *guardian ad litem*.<sup>73</sup>
51. While no factor is dispositive, effective communication and cooperation between the parties remains an important factor, and is "paramount in successful shared parenting".<sup>74</sup> If the parties do not currently communicate well with each other, but the trial Court sees the potential of joint action in the child's best interests once a Court order is made, an order for shared parenting may be appropriate.<sup>75</sup>
52. If the Court does not order shared parenting, it shall make an order for parenting time. Whenever possible, the parenting time order "shall ensure the opportunity for both parents to have frequent and continuing contact with the child" unless such would not be in the child's best interests.<sup>76</sup>
53. From a review of appellate cases since 2020, it appears that many recent appeals cases stem from a motion to change a shared parenting plan or decree. Once a

Court order has been made, whether for shared parenting or sole custody, there is a strong presumption in favour of retaining that parenting arrangement unless there has been a change in circumstances.<sup>77</sup> For example, the Supreme Court of Ohio has published a guide for parents to plan parenting time, which includes several parenting time sample schedules.<sup>78</sup> In *Schaible v. Schaible* (2022), the lower Court granted the

**Page 14 of 28**

mother request to modify the parties' holiday schedule to correspond with the Court's standard holiday schedule. On the father's appeal, the appellate Court noted that "[d]espite the change requiring more exchanges to take place throughout the year, which the record indicates could lead to [the child] having more anxiety issues, the domestic relations court nevertheless found it was in [the child]'s best interest for him to see each of his parents on an alternating basis for the various yearly holidays." The lower Court's modification of the holiday schedule was affirmed.<sup>79</sup>

54. While there is no presumption of equal shared parenting under Ohio legislation, there are clear factors to consider in cases where one or both parents makes a claim for shared parenting. This provides at least some guidance as to when shared parenting may be ordered.

Arizona – Ariz. Rev. Stat. § 25-401 – § 25-417

55. Similar to Canadian legislation, Arizona legislation requires the Court to "maximize" each parent's respective parenting time if doing so is "consistent with the children's best interests".<sup>80</sup> It is in a child's best interests to have "substantial, frequent, meaningful and continuing parenting time with both parents."<sup>81</sup>
56. While not in the legislation, recent Arizona appellate case law has recognized that, as a general rule, equal or near-equal parenting time "is presumed to be in a child's best interests."<sup>82</sup> However, the jurisprudence is divided on whether the recognition that equal parenting time is presumed to be in a child's best interests actually translates to a presumption of equal parenting time as a starting point. Some recent appellate Courts have held that equal parenting time "operates as a starting point in the superior court's best interests analysis"<sup>83</sup> and that the Court has discretion to depart from near-equal parenting time only "if the circumstances presented show a different plan to be in the child's best interests."<sup>84</sup> Other appellate Courts have held that there is no presumption of equal parenting time.<sup>85</sup> Thus, there appears to be confusion in the case law about whether there is a presumption of equal shared parenting time in Arizona.
57. The relevant best interests factors are: (a) past, present and potential future relationship between parent and child; (b) the interaction and interrelationship of the child with parent(s), siblings and any other significant person; (c) the child's adjustment to home, school and community; (d) the child's wishes, if child is of

suitable age and maturity; (e) the mental and physical health of all parties involved; (f) which parent is more likely to allow frequent, meaningful and continuing contact with the other parent (unless domestic violence or child abuse is an issue); (g) whether one parent intentionally misled the Court to cause an unnecessary delay, increase the cost of litigation or persuade the Court to give them a legal preference; (h) any domestic violence or child abuse; (i) the nature and extent of any coercion or duress used to obtain an agreement regarding decision-making or parenting time; (j) whether the parents has complied with the requirement to attend an educational program on the impact of divorce on adults and children; and (k) whether either parent was convicted of false reporting of child abuse or neglect.<sup>86</sup>

#### Page 15 of 28

58. There is a rebuttable presumption that joint legal decision-making shall not be ordered where there is evidence of family violence.<sup>87</sup> This provision does not preclude equal parenting time in cases of family violence. However, if the Court finds that a parent has committed an act of domestic violence, the parent in question “has the burden of proving to the court’s satisfaction that parenting time will not endanger the child or significantly impair the child’s emotional development.”<sup>88</sup> Further, family violence is still a consideration under the above best interests factors.<sup>89</sup> Nevertheless, findings about family violence will not necessarily preclude an order for equal parenting time.<sup>90</sup>
59. From a review of appellate cases since 2020,<sup>91</sup> it appears that equal shared parenting time is often agreed to between the parties, or is ordered by the Court. However, in those cases where shared parenting is at issue, Courts will often focus on the following factors:
- **Distance:** Equal or near-equal parenting time is “often impossible” in long distance parenting;<sup>92</sup>
  - **Inability to communicate;**<sup>93</sup> and
  - **History of care.**<sup>94</sup>
60. Although stability is often considered in Canadian case law, Arizona appellate case law has held that there is “no place in a parenting-time order for a presumption that ‘stability and continuity’ require the children to spend more time in one home than the other.”<sup>95</sup>

### **Equal Shared Parenting, Involvement, and Welfare Checklist in the United Kingdom**

61. In the United Kingdom, Courts may determine parental responsibility,<sup>96</sup> make contact orders, or make residence orders to settle the arrangements as to the person with whom a child is to live.<sup>97</sup> Where a residence order is made in favour of two or more persons who do not live together, the order may specify the periods during which the child is to live in the different households.<sup>98</sup>

62. In 2014, the legislation was amended to include a provision which confirms that there is a presumption that the involvement of a parent in a child's life will further the child's welfare, unless the contrary is shown. "Involvement" means "involvement of some kind, either direct or indirect, but not any particular division of the child's time".<sup>99</sup>
63. In determining any questions with respect to the upbringing of a child, the child's welfare shall be the Court's paramount consideration.<sup>100</sup> Other relevant best interests factors (i.e., the "welfare checklist") include: (a) the child's ascertainable wishes and feelings; (b) the child's physical, emotional and educational needs; (c) the likely effect on the child of any change in circumstances; (d) the child's age, sex, background and any characteristics which the Court considers relevant; (e) any harm the child has suffered or is at risk of suffering; (f) how capable each parent, and any other relevant person, is of meeting the child's needs; (g) the range of powers available to the Court in the proceedings in question.<sup>101</sup>

**Page 16 of 28**

64. Because of the limits of reported case law in the U.K.,<sup>102</sup> it is difficult to get a fulsome view of when shared parenting<sup>103</sup> may be ordered, or which of the "welfare checklist" factors are most relevant to shared parenting. The issue of shared parenting appears to arise most often in reported relocation cases, where the parties are already operating under a shared care arrangement, or where the proposed relocation would make shared care impossible.<sup>104</sup> However, there is some suggestion in the case law that informal shared care arrangements became more common in the U.K. after 2004.<sup>105</sup>
65. One factor that appears to be considered differently than in some of the other jurisdictions reviewed above, is that a failure to communicate effectively is not a bar to shared care arrangements in the U.K. While such a view was held by the Courts in the past, and there will "certainly be cases where that will be the conclusion on the facts,"<sup>106</sup> overall, "the authorities show that there is no longer a principle to this effect".<sup>107</sup>
66. For example, in *Ms. D. v. Mr. D* (2022), the Central London Family Court refused the mother's request to re-locate where the move would put the children at "real risk of emotional harm" because the mother would not be "capable of prioritizing" the children's need to have their relationship with their father "nurtured and strengthened." The parties had shared parenting since 2017 and the Court found that the proposed relocation distance of 170 miles was likely to create a damaging emotional distance between the children and their father. Instead, the Court re-affirmed the week-about shared parenting arrangements, despite poor communication between the parents. The possibility of exposing the children to frustration and upset by being co-parented by parents who "seem incapable of speaking to each other" was still considered to be a "less bad outcome" than the emotional risks of re-location.<sup>108</sup>
67. While the U.K. does have a statutory presumption of joint parental responsibility for

married parties<sup>109</sup>, as well as a presumption that parental involvement is in a child's best interests, there is no presumption of shared parenting time or residence. It is not clear from the "welfare checklist", or from the limited reported case law, when shared parenting will be ordered.

## Conclusion

68. Shared parenting is a valuable, beneficial arrangement for children that can mitigate against some of the negative impact of separation and post-separation inter-parental conflict. And some sort of shared parenting has become an increasingly common parenting arrangement.
69. By examining both the statutory shared parenting frameworks and case law jurisprudence mostly from Canada, but also from the US and the UK, we have attempted to ascertain how much legislative and judicial guidance exists on when shared parenting arrangements will be ordered by the Court. The review points to more uncertainty in when shared parenting arrangements will be ordered by the Court in family law matters when the legislation is less specific on shared parenting

### Page 17 of 28

(whether as a starting point/principal/presumption, and whether there are specific factors that are particularly relevant to shared parenting). Comprehensive guidance from the legislatures is needed to guide these important decisions.

70. Further, if we accept that equal shared parenting is the best outcome for most children – as the social science evidence supports – it is critical that legislatures craft guidance that recognizes equal shared parenting as a presumption, if not at least a starting point, with specific factors or principles on when it is appropriate to depart from such an arrangement.
71. For example, a departure from the presumption of equal shared parenting may absolutely be appropriate where the parents live a specified distance apart, making shared parenting unworkable. A departure may also be appropriate for cases of family violence or where the child is placed in the middle of conflict due to inter parental communication or conduct. However, it would be extremely useful to have guidance on whether such a departure is temporary, and how shared parenting is impacted by a move/distance, family violence, or level of communication or conduct.
72. Clarity in the law of parenting arrangements promotes certainty if the matter goes to Court and fosters out of Court resolutions. This type of guidance can still be applied flexibly, to be attuned to outlier circumstances as necessary. But most situations involve a child with loving, capable parents. Legislative guidance on shared parenting would align the law to recognize what is truly in our children's best interests.

<sup>1</sup> *Peters v Atchooay*, [2022 ABCA 347 \(CanLII\)](#), at para 87, citing Nicholas Bala & Yakin Ebsim, *The 2021 Canadian Parenting Reforms: Is Shared Parenting the New Normal?* (2022) Queen's Law Research

Paper Series No. 1 (Kingston: Queen's University) at 1.

<sup>2</sup> *Wandler v. Hines*, [2019 ABPC 252 \(CanLII\)](#), at para 72.

<sup>3</sup> Rachel Birnbaum, Nicholas Bala, Shely Polak, Nida Sohani, “*Shared Parenting: Ontario Case Law and Social Science Research*”, Canadian Family Law Quarterly (2016), 35 CFLQ 130 (WL), at p. 3. See also Nicholas Bala & Yakin Ebsim, “*The 2021 Canadian Parenting Reforms: Is Shared Parenting the New Normal?*” (March 2022) Queen's Law, Research Paper Series, [2022 CanLIIDocs 557](#), at p. 8. However, it must also be noted that parents with shared parenting arrangements tend to differ demographically from the broader population of separated parents. As noted by Bala and Ebsim, shared parenting families are more likely to have higher levels of parental education and higher (typically dual) incomes. Parents in equal time arrangements tend to live closer together and have more flexibility in their work hours. Most separated parents who establish shared parenting time arrangements also respect each other, co-operate, communicate in ways which avoid or limit conflict, and can compromise. It is not surprising that children in these situations often have better outcomes.

<sup>4</sup> The Association of Family and Conciliation Courts is an interdisciplinary organization of family justice professionals, including judges and researchers.

<sup>5</sup> Marsha Kline Pruett, J. Herbie DiFonzo, “AFCC Think Tank on Shared Parenting—Closing the Gap: Research, Policy, Practice, and Shared Parenting” (2014) 52:2 Fam Ct Rev 152. The Think Tank Report includes a number of articles on shared parenting and law reform from academic researchers, professors, and psychologists from various countries including Canada, United States, Israel, Norway, and Australia.

<sup>6</sup> Rachel Birnbaum, Nicholas Bala, Shely Polak, Nida Sohani, “*Shared Parenting: Ontario Case Law and Social Science Research*”, Canadian Family Law Quarterly (2016), 35 CFLQ 139 (WL), at p. 16.

## Page 18 of 28

<sup>7</sup> *Gibney v. Conohan*, [2011 NSSC 268 \(CanLII\)](#), at paras 45-47 [emphasis added]. <sup>8</sup> *Gibney v. Conohan*, [ibid](#), at paras 48-51, citing *Young v. Young*, [1993 CanLII 34 \(SCC\)](#), [1993] 4 SCR 3 [WL], at paras 186-187 [paras in WL only].

<sup>9</sup> *Divorce Act*, [RSC 1985, c. 3 \(2<sup>nd</sup> Supp.\)](#), s. 16(3) [federal legislation], which was amended as of March 1, 2021. For provincial law examples, see, e.g., Ontario's *Children's Law Reform Act*, [RSO 1990, c C.12](#), s. 24(3), which was amended as of March 1, 2021, & New Brunswick's *Family Law Act*, [SNB 2020, c 23](#), s. 50(2), which was amended as of March 1, 2021.

<sup>10</sup> *Divorce Act*, [ibid](#), s. 16(1).

<sup>11</sup> *Divorce Act*, [ibid](#), s. 16(2).

<sup>12</sup> *McBennett v Danis*, [2021 ONSC 3610 \(CanLII\)](#), at para 82.

<sup>13</sup> *Divorce Act*, [RSC 1985, c. 3 \(2<sup>nd</sup> Supp.\)](#), s. 16(3)(4).

<sup>14</sup> *Divorce Act*, [ibid](#), s. 16(3)(j) & (4). The definition of family violence is in s. 2(1). <sup>15</sup> *Divorce Act*, [ibid](#), s. 16(5).

<sup>16</sup> See the historical version of the *Divorce Act*, [RSC 1985, c 3 \(2<sup>nd</sup> Supp\)](#), s. 16(9) [with the marginal note/heading “Past conduct”] for the period from June 21, 2019 to February 28, 2021. <sup>17</sup> See, e.g., *H.G. v. K.G.*, [2016 BCPC 274 \(CanLII\)](#), at para 23. See also *Armstrong v. McCusker*, [2017 ONCJ 592 \(CanLII\)](#), at para 139.

<sup>18</sup> See the historical version of the *Divorce Act*, [RSC 1985, c 3 \(2<sup>nd</sup> Supp\)](#), s. 16(10) [with the marginal note/heading “Maximum contact”] for the period from June 21, 2019 to February 28, 2021. See also *Kirichenko v. Kirichenko*, [2021 ONSC 2833 \(CanLII\)](#), at para 56.

<sup>19</sup> *Divorce Act*, [RSC 1985, c. 3 \(2<sup>nd</sup> Supp.\)](#), s. 16(6).

<sup>20</sup> See also Ontario's *Children's Law Reform Act*, [RSO 1990, c C.12](#), s. [24\(3\)\(c\)](#) & *C.C. v. S.C.*, [2021 ONSC 3899 \(CanLII\)](#), at para [155](#) & [163](#); Nova Scotia's *Parenting and Support Act*, [RSNS 1989, c. 160](#), s. [18\(8\)](#); Prince Edward Island's *Children's Law Act*, [RSPEI 1988, c C-6.1](#), at s. 40. Other provincial legislation makes no references to maximum contact, see, e.g., Alberta's *Family Law Act*, [SA 2003, c F 4.5](#), s. [32\(1\)](#), although it tends to get incorporated through the application of the *Divorce Act*, see, e.g., *Gray v Goguen*, [2022 ABOB 273 \(CanLII\)](#), at para [145](#). See also Saskatchewan's *Children's Law Act*, 2020, [SS 2020, c 2](#), ss. [10-11](#) & *J.M.P. v C.J.N.*, [2022 SKQB 170 \(CanLII\)](#), at para [13](#); Manitoba's *Family Maintenance Act*, [CCSM c F20](#), ss. [2\(1\)](#) and [39\(1\)](#); Newfoundland and Labrador's *Children's Law Act*, [RSNL 1990, c C-13](#), s. [26](#); *M.E.G. v S.P.*, [2022 NLCA 50 \(CanLII\)](#), at paras [33-34](#) & [109-110](#); & *A.H. v R.B.*, [2022 NLCA 9 \(CanLII\)](#), at paras [23-24](#).

<sup>21</sup> *Young v. Young*, [1993 CanLII 34 \(SCC\)](#), [1993] 4 SCR 3 [WL], at para 212 [paras in WL only].

<sup>22</sup> *Young v. Young*, *ibid*, at para 211.

<sup>23</sup> *Gordon v. Goertz*, [1996 CanLII 191 \(SCC\)](#), [1996] 2 SCR 27, at para [24](#).

<sup>24</sup> *Young v. Young*, [1993 CanLII 34 \(SCC\)](#), [1993] 4 SCR 3 [WL], at para 210 [paras in WL only]; *Gordon v. Goertz*, *ibid*, at paras [20](#), [37](#), & [46](#).

<sup>25</sup> *Barendregt v. Grebliunas*, [2022 SCC 22 \(CanLII\)](#), at paras [134-135](#). See also *VLM v AJM*, [2021 ABCA 267 \(CanLII\)](#), at para [37](#) [error to equate maximizing child's contact with one party with child's best interests; only if it is shown to be in child's best interests can Court give effect to principle of maximizing parental contact].

<sup>26</sup> See, e.g., *Knapp v. Knapp*, [2021 ONCA 305 \(CanLII\)](#), at paras [30-34](#) & *Burns v. Brown*, [2021 ONCA 450 \(CanLII\)](#), at paras [27-29](#).

## Page 19 of 28

<sup>27</sup> See, e.g., *Knapp v. Knapp*, *ibid*, at paras [30-34](#); *S.S. v. R.S.*, [2021 ONSC 2137 \(CanLII\)](#), at paras [48-50](#); *Touma v. Morrison*, [2021 ONSC 1660 \(CanLII\)](#), at paras [68-69](#); *VLM v AJM*, [2021 ABCA 267 \(CanLII\)](#), at para [39](#); *VGM v MNW*, [2022 ABOB 291 \(CanLII\)](#), at para [130](#); *Os v Os*, [2022 SKQB 161 \(CanLII\)](#), at paras [74-77](#); *A.W. v N.P.*, [2022 SKQB 150 \(CanLII\)](#), at paras [118-120](#). In British Columbia, the *Family Law Act*, [SBC 2011, c 25](#), at s. [40\(4\)\(b\)](#), also specifically sets out that there is no presumption that parenting time should be shared equally among guardians. Contrast Quebec's *Civil Code of Québec*, [COLR c CCO-1991](#), art. [605](#), which provides for joint parental authority. In Yukon, the *Children's Law Act*, [RSY 2002, c 31](#), at s. [30\(4\)](#), sets out a rebuttable presumption that care of a child should be awarded to one or the other parent and that all other parental rights associated with custody ought to be shared jointly.

<sup>28</sup> In research for this paper, over 280 Canadian cases were reviewed where maximum contact and/or shared parenting was an issue.

<sup>29</sup> *S.S. v. R.S.*, [2021 ONSC 2137 \(CanLII\)](#), at paras [48-50](#).

<sup>30</sup> *Hassler v. Hassler*, [2022 MBKB 230 \(CanLII\)](#), at para [14](#), citing *Young v. Young*, [1993 CanLII 34 \(SCC\)](#), [1993] 4 SCR 3 [WL].

<sup>31</sup> *Droit de la famille — 22674*, [2022 QCCS 1753 \(CanLII\)](#), at para [10](#), citing *Droit de la famille — 091541*, [2009 QCCA 1268 \(CanLII\)](#), at para [64](#); *Droit de la famille — 22230*, [2022 QCCA 210 \(CanLII\)](#), at para [17](#); *Droit de la famille — 21860*, [2021 QCCA 810 \(CanLII\)](#), at para [82](#); *Droit de la famille — 15272*, [2015 QCCA 346 \(CanLII\)](#), at para [6](#); *Droit de la famille — 07832*, [2007 QCCA 548 \(CanLII\)](#), at para [27](#) [footnote omitted; emphasis added; temporary equal shared parenting time ordered despite deteriorating relationship between parents due to COVID-19 pandemic]. See also *Droit de la famille — 221657*, [2022 QCCS 3573 \(CanLII\)](#), at paras [4-5](#).

<sup>32</sup> *Friesen v Friesen*, [2022 SKQB 83 \(CanLII\)](#), at paras [122-123](#) & [126](#) [emphasis added]. See also *KFE v*

*JR*, [2021 BCSC 1586 \(CanLII\)](#), at para [85](#) [“While the principle of shared parenting time does not necessitate a perfect 50-50 division of parenting time, the father’s proposal moves the parties closer to that goal”] [decided under provincial legislation].

<sup>33</sup> See, e.g., *M.P. v P.P.*, [2022 BCSC 1511 \(CanLII\)](#), at para [22](#); *Ali v Elfaz*, [2022 BCSC 1339 \(CanLII\)](#), at para [25](#); *Hull v Kornilov*, [2022 BCSC 898 \(CanLII\)](#), at paras [48-50](#); *A.L.K. v M.L.B.*, [2022 BCPC 100 \(CanLII\)](#), at paras [29-34](#); *L.K.U. v J.N.U.*, [2021 BCSC 1635 \(CanLII\)](#), at para [66](#); & *S.Z.M. v K.M.N.*, [2021 BCSC 365 \(CanLII\)](#), at para [40](#). See also *D.L.M. v A.L.F.*, [2022 BCSC 1874 \(CanLII\)](#), at para [43](#) [no presumption of maximizing contact under provincial legislation either].

<sup>34</sup> *R.T.C. v N.M.C.*, [2021 BCSC 2273 \(CanLII\)](#), at para [65](#). See also *D.M.F. v T.J.D.*, [2021 BCSC 1249 \(CanLII\)](#), at para [94](#) [Court not persuaded to depart from principle of maximum contact; equal parenting time ordered] [decided under provincial legislation].

<sup>35</sup> *Beyat v Mazinani*, [2022 BCSC 1236 \(CanLII\)](#), at paras [38-39](#) & [55](#). See also *M.B.H.U. v K.V.*, [2022 BCSC 1169 \(CanLII\)](#), at paras [56-57](#) & [73](#).

<sup>36</sup> *C.C. v I.C.*, [2021 ONSC 6471 \(CanLII\)](#), at paras [53-54](#) [decided under the Ontario *Children’s Law Reform Act*]. See also *Fraser v Lattuca*, [2021 ONSC 6687 \(CanLII\)](#), at para [2](#) [principle of maximum parenting time applied]. Contrast *Brown v Sutherland*, [2021 ABPC 151 \(CanLII\)](#), at para [143](#) [no presumption of maximum contact].

<sup>37</sup> *T.P. v A.E.*, [2021 ONSC 6022 \(CanLII\)](#), at paras [149-154](#).

<sup>38</sup> *CAS v NPC*, [2020 ABOB 421 \(CanLII\)](#), at para [9](#).

<sup>39</sup> *CAS v NPC*, [2020 ABOB 421 \(CanLII\)](#), at para [10](#).

<sup>40</sup> *CAS v NPC*, *ibid.*, at paras [18](#) & [30-39](#).

## Page 20 of 28

<sup>41</sup> *Gibney v Conohan*, [2011 NSSC 268 \(CanLII\)](#), at para [92](#). See also *Dorey v MacNutt*, [2013 NSSC 267 \(CanLII\)](#), at para [19](#), followed in, e.g., *E.L.(W.) v E.L.*, 2019 NSSC 14 (WL), at paras 66-79. See also *Murphy v Hancock*, [2011 NSSC 197 \(CanLII\)](#), at para [50](#), followed in, e.g., *A.N. v J.Z.*, [2018 NSSC 146 \(CanLII\)](#), at para [13](#).

<sup>42</sup> *Gibney v Conohan*, [2011 NSSC 268 \(CanLII\)](#), at paras [2](#), [93-99](#), & [135-146](#).

<sup>43</sup> See, e.g., *RLF v STF*, [2022 ABOB 492 \(CanLII\)](#), at paras [14](#) & [50](#) [shared parenting despite large geographical distance of 75 km between parents]; *D.S. v K.C.*, [2021 SKQB 178 \(CanLII\)](#), aff’d *Chapman v Somerville*, [2022 SKCA 88 \(CanLII\)](#) [shared parenting to continue temporarily despite 5 hour distance between parents]; *Proulx v Proulx*, [2021 ONSC 3657 \(CanLII\)](#), at paras [216-218](#) [Court would have ordered week about parenting if father lived within 15 minutes of child’s school; where father had moved following separation, it was in child’s best interest to continue to reside primarily with the mother], aff’d [2022 ONCA 428 \(CanLII\)](#), at para [13](#). Contrast *AED v SRP*, [2021 ABOB 567 \(CanLII\)](#), at paras [38](#), [42](#), & [81](#) [shared parenting not feasible where parties live 300 km apart]; *D.W. v E.O.*, [2021 SKQB 157 \(CanLII\)](#), at paras [23-24](#), [32](#), & [38-44](#) [while alternate week-about schedule would be in child’s best interests, shared parenting was currently not possible where father could not do drop offs/pick ups at child’s current school and Court found it appropriate for child to remain in current school or school nearest mother’s home; father lived in Regina, SK, approximately 28km from mother’s house in Kronau, SK, and 28km to child’s school, in Balgonie, SK; mother’s house and child’s school also 22km apart but child was bussed there]; & *Mestiri v Mestiri*, [2022 ONSC 1052 \(CanLII\)](#), at paras [45-46](#) [Court would have ordered equal or near-equal parenting if father lived in Ontario and not Tunisia]. <sup>44</sup> Ontario cases: *Gewurtz v McGroarty*, [2022 ONSC 7148 \(CanLII\)](#), at paras [43-48](#) & [61-68](#) [where father’s alcohol abuse led to parental conflict]; *McIntosh v Baker*, [2022 ONSC 4235 \(CanLII\)](#), at paras [127-128](#) [conflict-driven relationship]; *Lamacchia v Carullo*, [2022 ONSC 687 \(CanLII\)](#), at paras [27-28](#); *V.S.B. v B.L.O.*, [2022](#)

[ONCJ 506 \(CanLII\)](#), at paras [124-128](#) [challenging relationship between the parents]; *S.W.-S. v. R.S.*, [2022 ONCJ 483 \(CanLII\)](#), at paras [115-122](#) [equal time would result in chaos]; *N.M. v. S.M.*, [2022 ONCJ 482 \(CanLII\)](#), at paras [145-151](#) & [154-159](#) [level of communication “far too poor to coordinate the care of the children”]; need to reduce exposure to adult conflict]; *M.J.L. v. C.L.F.*, [2022 ONCJ 243 \(CanLII\)](#), at paras [114-123](#) [conflict “far too high” and communication “far too poor”]; *O.C.W. v. T.K.M.*, [2022 ONCJ 82 \(CanLII\)](#), at paras [76-82](#) & [89-95](#) [communication “far too poor”]; *T.L.B.L. v. T.E.M.*, [2021 ONSC 8235 \(CanLII\)](#), at para [332](#), [354](#), [364-368](#), & [386](#) [conflict is such that working jointly is “impossible”; children’s views also taken into account]; *A.E. v. A.E.*, [2021 ONSC 8189 \(CanLII\)](#), at paras [84](#) & [96-101](#) [Conflict and inability to support each other in their efforts to parent and discipline]; *A.R.N. v. M.A.P.*, [2021 ONSC 7676 \(CanLII\)](#), at paras [152](#) & [193-198](#) [Higher degree of cooperation and mutual respect needed]; *Cacace v. Cacace*, [2021 ONSC 4932 \(CanLII\)](#), at paras [20-21](#); *Bressi v. Skinulis et al.*, [2021 ONSC 4874 \(CanLII\)](#), at paras [21-22](#); *A. (J.E.) v. S. (A.)*, [2021 ONSC 4300 \(CanLII\)](#), at paras [53-62](#), leave to appeal ref’d, [2022 ONSC 997 \(Div Ct\)](#) (CanLII); *Freitas v. Christopher*, [2021 ONSC 2340 \(CanLII\)](#), at paras [208-213](#) [“do not have necessary level of communication”]; *M.A. v. M.E.*, [2021 ONCJ 555 \(CanLII\)](#), at para [67](#); *Harry v. Moore*, [2021 ONCJ 341 \(CanLII\)](#), at para [80](#); & *L.B. v. P.E.*, [2021 ONCJ 114 \(CanLII\)](#), at para [121](#).

**Alberta cases:** *Li v Runoh*, [2022 ABKB 669 \(CanLII\)](#), at paras [53-54](#), [93-95](#), [130](#), & [162-164](#); *Gray v Goguen*, [2022 ABQB 273 \(CanLII\)](#), at para [164](#); *AR v JU*, [2021 ABCA 337 \(CanLII\)](#), at paras [75-82](#); *DC v NC*, [2021 ABQB 1015 \(CanLII\)](#), at paras [171-172](#) & [209](#); *ST v KT*, [2021 ABPC 167 \(CanLII\)](#), at paras [118-123](#) [however, inability to cooperate not a bar to shared parenting during summer]; *Brown v Sutherland*, [2021 ABPC 151 \(CanLII\)](#), at paras [142-143](#); & *JS v JW*, [2021 ABPC 138 \(CanLII\)](#), at paras [24-26](#).

**British Columbia cases:** *Kitt v Dutton*, [2022 BCSC 177 \(CanLII\)](#), at para [43](#); & *J.L.B. v K.B.*, [2021 BCSC 2051 \(CanLII\)](#), at paras [46-47](#); & *C.W.C. v L.A.W.*, [2021 BCSC 1774 \(CanLII\)](#), at paras [72-75](#).

## Page 21 of 28

**Nova Scotia cases:** *Pennell v. Larkin*, [2022 NSSC 233 \(CanLII\)](#), at para [119](#); *R.F. v K.F.*, [2022 NSSC 194 \(CanLII\)](#), at para [62](#); *T.L.D. v. R.H.*, [2022 NSSC 103 \(CanLII\)](#), at para [59](#); & *A.M. v. K.W.*, [2021 NSCA 69 \(CanLII\)](#), at paras [28-30](#).

**Other province cases:** *A.Y. v R.D.*, [2022 NBKB 181 \(CanLII\)](#), at paras [39](#) & [57-71](#); *J.H. v N.M.*, [2022 NBQB 136 \(CanLII\)](#), at para [174](#); *Droit de la famille — 221925*, [2022 QCCS 4193 \(CanLII\)](#), at para [43](#); *A.W. v N.P.*, [2022 SKQB 150 \(CanLII\)](#), at paras [117-120](#); & *Hassler v. Hassler*, [2022 MBKB 230 \(CanLII\)](#), at para [35](#).

<sup>45</sup> **Ontario cases:** *Bansal v. Kelly*, [2022 ONSC 7049 \(CanLII\)](#), at paras [7-10](#) & [34-39](#) [temporary week about schedule despite “no effective or timely communication” and “lack of cooperation” between parents]; *S.S.L. v. M.A.B.*, [2022 ONSC 6326 \(CanLII\)](#), at paras [9](#), [88](#), & [133-140](#) [equal shared parenting despite conflict between parents; however sole decision-making to father where mother relocated with child and minimized father’s parenting time]; *Shokoufimgiman v. Bozorgi*, [2022 ONSC 5057 \(CanLII\)](#), at paras [48](#) & [51-62](#) [temporary 2-week rotating schedule despite “poor” communication, criminal undertaking not to communicate, allegations of family violence]; *Dupuis v. Kanhai-Dupuis*, [2022 ONSC 3628 \(CanLII\)](#), at paras [3](#), [11-13](#), [33](#), [75-78](#), [89-90](#), & [109-115](#); *S. S. v. S. P.*, [2022 ONSC 3545 \(CanLII\)](#), at paras [3](#) & [36](#); *K.M. v. J.R.*, [2022 ONSC 111 \(CanLII\)](#), at paras [373-391](#) [despite “below-average ability to communicate”]; *Southorn v. Ree*, [2021 ONSC 7819 \(CanLII\)](#), at paras [429](#) & [459-469](#) [parties’ communication difficulties, while significant, were “not exceptionally serious or high for post-separation conflict”]; *Fraser v. Lattuca*, [2021 ONSC 6687 \(CanLII\)](#), at paras [12-13](#) [“communication difficulties do not resolve if the children are with the parents an unequal or equal amount of time”]; *Closner v. Closner*, [2021 ONSC 6114 \(CanLII\)](#), at paras [145-146](#) & [170-175](#); *Vieira v. Vieira*, [2021 ONSC 5029 \(CanLII\)](#), at

paras [23](#) & [95-99](#) [“While there is much work to be done by each parent in contending with the underlying issues that impede civil communication between them, communication does not have to be perfect”]; *Morrison v. Harder*, [2021 ONSC 5107 \(CanLII\)](#), at paras [117-123](#) & [162](#); *Chmielewski v. Gonzalez*, [2021 ONSC 5019 \(CanLII\)](#), at paras [1](#), [5-7](#), [219-224](#), & [226-231](#) [conflict “too high” for joint decision-making but not for equal parenting time]; *Rajani v. Rajani*, [2021 ONSC 4784 \(CanLII\)](#), at paras [16-53](#); *G.C. v. R.D.P.*, [2021 ONSC 4206 \(CanLII\)](#), at paras [7](#) & [166-168](#); *McBennett v. Danis*, [2021 ONSC 3610 \(CanLII\)](#), at paras [89](#), [258-262](#), & [270](#); *Cuthbert v. Nolis*, [2021 ONSC 2499 \(CanLII\)](#), at paras [5-6](#) & [177-179](#); *Pereira v. Ramos*, [2021 ONSC 1737 \(CanLII\)](#), at paras [13](#), [18](#), [26-32](#), [38-40](#), & [55](#); & *A.R. v. M.C.*, [2021 ONCJ 525 \(CanLII\)](#), at para [66](#).

**Alberta cases:** *Smith v Hansen*, [2022 ABOB 41 \(CanLII\)](#), at paras [6](#), [20](#), & [24](#) [despite concerns about parties’ ability to communicate]; *CMB v AMB*, [2022 ABOB 528 \(CanLII\)](#), at paras [137-140](#) & [159-161](#) [despite “extremely divisive, unstable and toxic relationship” to which children have been exposed]; *Ball v Malone*, [2022 ABOB 321 \(CanLII\)](#), at paras [13-14](#), [90-91](#), & [94](#); *Smith v Hansen*, [2022 ABOB 41 \(CanLII\)](#), at paras [6](#), [20](#), & [23-24](#); & *ST v KT*, [2021 ABPC 167 \(CanLII\)](#), at paras [118-123](#) [inability to cooperate bar to shared parenting during school year but not during summer].

**Other province cases:** *D.W. v E.O.*, [2021 SKOB 157 \(CanLII\)](#), at paras [23-24](#), [32](#), & [38-44](#) [despite inability to communicate or cooperate, shared parenting may be in child’s best interests if parents were to live in same community]; *Droit de la famille — 22674*, [2022 QCCS 1753 \(CanLII\)](#), at paras [9-22](#); *S.M.A v. S.J.N.*, [2022 BCPC 224 \(CanLII\)](#), at paras [112-114](#), [166](#), [171](#), [261-271](#), & [285-289](#); & *S.N. v B.N.*, [2021 BCSC 2339 \(CanLII\)](#), at paras [82-83](#).

<sup>46</sup> **Ontario cases:** *Dayboll v. Binag*, [2022 ONSC 6510 \(CanLII\)](#), at paras [26](#) & [53-65](#) [no interim shared parenting where hostility and mistrust between parties, father’s unilateral decision-making, serious allegations of family violence, and criminal Court restrictions]; *McIntosh v Baker*, [2022 ONSC 4235 \(CanLII\)](#), at paras [124-128](#) [no equal parenting time where physical and psychological abuse against mother, emotional abuse of children by involving in conflict]; *A. (J.E.) v. v. S. (A.)*, [2021 ONSC 4300 \(CanLII\)](#), at paras [53-62](#), leave to appeal ref’d, [2022 ONSC 997 \(Div Ct\)](#) (CanLII); *Freitas v.*

## Page 22 of 28

*Christopher*, [2021 ONSC 2340 \(CanLII\)](#), at paras [208-213](#); & *S.S. v. R.S.*, [2021 ONSC 2137 \(CanLII\)](#), at paras [48-50](#).

**Other province cases:** *ST v KT*, [2021 ABPC 167 \(CanLII\)](#), at paras [118-123](#) [however, family violence not a bar to shared parenting during summer]; *Ali v Elfaz*, [2022 BCSC 1339 \(CanLII\)](#), at para [25-51](#); & *Pennell v. Larkin*, [2022 NSSC 233 \(CanLII\)](#), at para [119](#).

<sup>47</sup> **Ontario cases:** *Weinkauf v. Ruest*, [2022 ONSC 1472 \(CanLII\)](#), at paras [38](#), [65-72](#), & [82](#) [no weight placed on violence incident]; *B.L.O. v. L.J.B.*, [2022 ONCJ 231 \(CanLII\)](#), at paras [256](#) & [270](#); *Nekoz v. Nekoz*, [2021 ONSC 8040 \(CanLII\)](#), at paras [14-15](#) & [18](#); *Mathew v. Barazmi*, [2021 ONSC 7240 \(CanLII\)](#), at paras [17](#) & [38-39](#); & *Pereira v. Ramos*, [2021 ONSC 1737 \(CanLII\)](#), at paras [13](#), [18](#), [26-32](#), [38-40](#), & [55](#).

**Alberta cases:** *JDL v HAL*, [2022 ABOB 427 \(CanLII\)](#), at para [45](#) [despite prior alleged family violence]; *Ball v Malone*, [2022 ABOB 321 \(CanLII\)](#), at paras [13-14](#), [90-91](#), & [94](#); *Smith v Hansen*, [2022 ABOB 41 \(CanLII\)](#), at paras [6](#), [20](#), & [23-24](#); & *ST v KT*, [2021 ABPC 167 \(CanLII\)](#), at paras [118-123](#) [family violence bar to shared parenting during school year but not during summer].

**Other province cases:** *A.S.N. v K.E.K.*, [2021 BCSC 2435 \(CanLII\)](#), at paras [32-39](#); & *D.M.F. v T.J.D.*, [2021 BCSC 1249 \(CanLII\)](#), at paras [94](#) & [134](#) [despite “the family violence I have found him to have engaged in”]; & *L.P. v. B.M.*, [2022 NBCA 19 \(CanLII\)](#) (WL), at paras [30-31](#) [English paras in WL only] [while judge did not refer to allegations, appellate Court found it would not have impacted result]. <sup>48</sup> **Ontario**

cases: *M.N.B. v. J.M.B.*, [2022 ONSC 38 \(CanLII\)](#), at paras [46](#) & [107-114](#) [Court rejects 2/2/3 day equal shared parenting schedule proposed by father during the school year and orders that the children remain primarily with mother during the school year where they had been in her primary care since separation, and were “doing well under the current schedule” with father currently having the children for 11 full or part days per month (his proposal only added 4 more days), although Court orders an equal week-about schedule for the months of July and August; also concerns about ability to communicate and family violence]; *McGrath v McGrath*, [2021 ONSC 7148 \(CanLII\)](#), at paras [16-17](#), [24](#), & [36-38](#); *Rogers v. Brush*, [2021 ONSC 6134 \(CanLII\)](#), at para [31](#); *Armstrong v. Garrison*, [2021 ONSC 3986 \(CanLII\)](#), at paras [36](#) & [45-48](#); *L.L. v N.L.*, [2021 ONSC 3612 \(CanLII\)](#), at para [9](#); & *Ammar v. Smith*, [2021 ONSC 3204 \(CanLII\)](#), at paras [59-65](#).

Other province cases: *Droit de la famille -- 21910*, [2021 OCCS 2081 \(CanLII\)](#), at paras [70-71](#) & *Droit de la famille — 21769*, [2021 OCCS 1754 \(CanLII\)](#), at paras [57-58](#); *A.M. v. K.W.*, [2021 NSCA 69 \(CanLII\)](#), at paras [28-30](#); & *Gunston v MacDonald*, [2021 ABQB 1011 \(CanLII\)](#), at paras [94](#) & [128](#).

<sup>49</sup> Ontario cases: *Weinkauff v. Ruest*, [2022 ONSC 1472 \(CanLII\)](#), at paras [38](#), [63](#), & [82](#) and *Denomme v. Denomme*, [2021 ONSC 7852 \(CanLII\)](#), at paras [71-81](#) For a case with the opposite result, see *Pereira v. Ramos*, [2021 ONSC 1737 \(CanLII\)](#), at paras [13](#), [18](#), [26-32](#), [38-40](#), & [55](#).

Other province cases: *P.D.B. v L.D.A.*, [2021 BCSC 1984 \(CanLII\)](#), at paras 82-85; *Friesen v Friesen*, [2022 SKQB 83 \(CanLII\)](#), at paras [122-126](#); *Scobie v Thiessen*, [2021 SKCA 47 \(CanLII\)](#), at paras [45-54](#) & [59-61](#); & *Droit de la famille — 221346*, [2022 OCCS 2905 \(CanLII\)](#), at paras [100-104](#).<sup>50</sup> *S.F.P. v M.A.E.*, [2022 BCSC 1129 \(CanLII\)](#), at paras [9-11](#) [*status quo* of alternating weeks changed to primary care model due to child’s need for stability, compounded by distance between parents]; *D.M. v M.M.*, [2022 SKQB 44 \(CanLII\)](#), at paras [98-100](#) & [152-153](#) [father not ready for shared parenting and children will benefit from continued schedule, routine, and consistency with mother]; *MacDonald v. Cannell*, [2021 ONSC 7769 \(CanLII\)](#), at paras [50-72](#) [parties had equal shared parenting following separation; Court now ordered primary residence with mother where child needed stability during school year]. Contrast *LC v KK*, [2021 ABPC 122 \(CanLII\)](#), at paras [26](#) & [28](#) [benefits to shared parenting outweigh challenges to stability] & *Dupuis v. Kanhai-Dupuis*, [2022 ONSC 3628 \(CanLII\)](#), at paras [3](#), [11-](#)

## Page 23 of 28

[13](#), [33](#), [75-78](#), [89-90](#), & [109-115](#) [shared parenting in children’s best interests despite father being source of stability for last 5 years].

<sup>51</sup> See, e.g., *Divorce Act*, [RSC 1985, c. 3 \(2<sup>nd</sup> Supp.\)](#), s. [16.93](#); Ontario’s *Children’s Law Reform Act*, [RSO 1990, c. C.12](#), s. [39.4\(5-8\)](#); & Saskatchewan’s *Children’s Law Act, 2020*, [SS 2020, c 2](#), s. [16](#).

<sup>52</sup> See, e.g., *Divorce Act*, *ibid*, s. [16.92\(1-2\)](#); Ontario’s *Children’s Law Reform Act*, *ibid*, s. [39.4\(3-4\)](#); & Saskatchewan’s *Children’s Law Act, 2020*, *ibid*, s. [15\(1-2\)](#).

<sup>53</sup> *S.S.L. v. M.A.B.*, [2022 ONSC 6326 \(CanLII\)](#), at para [88](#), citing *Young v. Young*, [1993 CanLII 34 \(SCC\)](#), [1993] 4 SCR 3 [WL] & *Rigallo v. Rigillo*, [2019 ONCA 548 \(CanLII\)](#).

<sup>54</sup> *S.S.L. v. M.A.B.*, *ibid*, at para [88](#), citing *Vanos v. Vanos, sub nom B.V. v. P.V.*, [2012 ONCA 262 \(CanLII\)](#) [for the full schedule that is described as “minimal access”, see para [14](#)]. See also *S.K. v. D.P.*, [2022 ONSC 2359 \(CanLII\)](#), at para [63](#) & *T.L.B.L. v. T.E.M.*, [2021 ONSC 8235 \(CanLII\)](#), at para [332](#).<sup>55</sup> AFCC-Ontario, *Parenting Plan Guide* (Version 2.0, December 2021), online: AFCC-Ontario <[afccontario.ca/wp-content/uploads/2021/12/AFCC-O-Parenting-Plan-Guide-Version-2.0-December-2021-.pdf](#)> [last accessed April 21, 2023].

<sup>56</sup> *Parenting Plan Guide*, *ibid*, at p. 1. Followed in *Melbourne v. Melbourne*, [2022 ONSC 2299 \(CanLII\)](#), at para [19](#).

<sup>57</sup> *Melbourne v. Melbourne*, *ibid*, at para 20, citing *McBennett v. Davis*, [2021 ONSC 3610 \(CanLII\)](#), at para 92.

<sup>58</sup> See, e.g., *Bansal v. Kelly*, [2022 ONSC 7049 \(CanLII\)](#), at paras 7-10 & 34-39 [temporary week-about; schedule based on AFCC]; *Shokoufimgiman v. Bozorgi*, [2022 ONSC 5057 \(CanLII\)](#), at paras 48 & 51-62 [temporary 2-week rotating schedule based on AFCC]; *Czyzewski v. Fabro*, [2022 ONSC 4883 \(CanLII\)](#) (WL), at paras 10-18 [para citing in WL only] [schedule based on AFCC; week-about meant too much time away from M for 20-month old child; no evidence that parties had been equal parents before separation]; *S. S. v. S. P.*, [2022 ONSC 3545 \(CanLII\)](#), at para 36; *Melbourne v. Melbourne*, [2022 ONSC 2299 \(CanLII\)](#), at paras 18-23 [schedule based on AFCC; father’s suggestion of 2-2-3 more appropriate where had less transitions]; *Hatab v. Abuhatab*, [2022 ONSC 1560 \(CanLII\)](#), at paras 38-39 & 64 [expansion of father’s parenting time to include overnights as per AFCC]; & *Danjeh v. Gaouspoor*, [2022 ONSC 1231 \(CanLII\)](#), at paras 22-25 & 29-31 [AFCC considered].

<sup>59</sup> *Theriacult v. Ford*, [2022 ONSC 3619 \(CanLII\)](#), at paras 17-20 & 29-31. See also *McBennett v. Danis*, [2021 ONSC 3610 \(CanLII\)](#), at paras 89, 258-262, & 270; *Phillips v. Phillips*, [2021 ONSC 2480 \(CanLII\)](#), at paras 49-54 & 59-71; *LL v. KS*, [2021 NSSC 84 \(CanLII\)](#), at paras 48-49 & 60-61; *Beyat v. Mazinani*, [2022 BCSC 1236 \(CanLII\)](#), at paras 38-39 & 55-56; *M.P.M. v A.C.M.*, [2022 BCSC 122 \(CanLII\)](#), at paras 21 & 39-40; *R.T.C. v N.M.C.*, [2021 BCSC 2273 \(CanLII\)](#), at paras 65 & 69 [“I am not persuaded that either parent is incapable of exercising their responsibilities as parents such that the balance tips in favour of one or the other”]; *L.K.U. v J.N.U.*, [2021 BCSC 1635 \(CanLII\)](#), at paras 66 & 102 [“I have been unable to find any basis for the children’s schedule with their parents to be other than an equally divided schedule.”]; *MGR v MRD*, [2021 ABOB 250 \(CanLII\)](#), at paras 55-62; *Friesen v Friesen*, [2022 SKQB 83 \(CanLII\)](#), a paras 122-126 [“no rational reason why the parties should not have similar parenting times”]. Although contrast *VLM v AJM*, [2021 ABCA 267 \(CanLII\)](#), at paras 37, 39, 69-70, & 72-74, where interim shared parenting was found to be premature because there was an absence of the “required” evidence to support shared parenting. The “leap to co-parenting and joint custody required justification.”

<sup>60</sup> Ky. Rev. Stat. § 403.270(2). See also recently the introduced North Carolina’s Senate Bill 576, Section 3, which, if passed, would introduce a presumption of joint custody and shared parenting in N.C. Gen. Stat. § 50-13.2(a1). “Shared parenting” would be defined as the child spending “as close as possible to an equal amount of time with each parent” Currently, similar to Ohio’s legislation, discussed below, joint custody must be considered upon the request of either parent. If the Bill passes, similar to Ohio’s

## Page 24 of 28

legislation, there would be specific factors to consider in determining the terms of a shared parenting schedule, and the following two conditions could rebut the presumption: (a) the Court, after careful consideration of the relevant factors, finds clear and convincing evidence that shared parenting is not in the child’s best interests, or (b) the parties reach an agreement on parenting issues.

<sup>61</sup> Ky. Rev. Stat. § 403.270(2).

<sup>62</sup> Ky. Rev. Stat. § 403.315.

<sup>63</sup> Ky. Rev. Stat. § 403.270(2)(a)-(k).

<sup>64</sup> In research for this paper, over 200 Kentucky appellate cases where equal or shared parenting was an issue were reviewed. Trial decisions do not appear to be as frequently publicly reported.

<sup>65</sup> See, e.g., *Porter v. Abbott*, No. 2021-CA-0094-MR, at \*10 (Ky. Ct. App. Apr. 8, 2022), at paras 11-12; *Nichols v. Nichols*, No. 2020-CA-0837-MR (Ky. Ct. App. Sep. 24, 2021), at para 1; *George v. George*, No. 2020-CA-1057-MR, at \*1 (Ky. Ct. App. Sep. 24, 2021), at para 1; *T.M. v. T.C.G.*, NO. 2019-CA 001444-ME, at \*7 (Ky. Ct. App. Jun. 5, 2020), at para 8; *Pittman v. Estelita*, NO. 2019-CA-000333-ME, at \*13 (Ky. Ct. App. May. 1, 2020), at para 13; & *Gill v. Gill*, NO. 2019-CA-000251-ME, at \*8 (Ky. Ct. App. Dec. 6, 2019), at paras 9-14.

<sup>66</sup> Ohio Rev. Code § 3109.04. As of the date of this paper, no appellate case law has considered the wording of the legislation. In research for this paper, over 200 Ohio appellate cases since 2020 where equal or shared parenting was discussed were reviewed; however, all of these cases considered disputes that were started under the former legislation. Trial decisions do not appear to be as frequently publicly reported.

<sup>67</sup> Ohio Rev. Code § 3109.04, Sections 3109.04(A)(2) & D(1)(a). This requirement to consider any shared parenting plan that has been submitted appears to have existed prior to the recent amendments. <sup>68</sup> See e.g., *Pruitt v. Pruitt*, No. 29331, at \*16 (Ohio Ct. App. 2022) at 47-48 [while father expressed preference for shared parenting and continuation of equal parenting time at final hearings, where neither parent requested such in their pleadings or any pretrial motion, the Court was required to allocate residential and legal custody primarily to one parent].

<sup>69</sup> *Hatfield v. Hatfield*, No. C-210295, at \*3 (Ohio Ct. App. 2022), at 7.

<sup>70</sup> *Hughey v. Hughey*, No. 21CA13, at \*1 (Ohio Ct. App. 2022), at 5-6.

<sup>71</sup> Ohio Rev. Code § 3109.04. As of the date of this paper, no appellate case law has considered the wording of the new legislation. In research for this paper, over 200 Ohio appellate cases since 2020 where equal or shared parenting was discussed were reviewed; however, all of these cases considered disputes that were started under the former legislation. Trial decisions do not appear to be as frequently publicly reported.

<sup>72</sup> Ohio Rev. Code § 3109.04(F)(1). For pre-Amendment best interests factors pursuant to the former R.C. 3109(F)(a), see *Woeste v. Woeste*, No. CA2021-09-055 (Ohio Ct. App. 2022), at 54-55. <sup>73</sup> Ohio Rev. Code § 3109.04(F)(2). For pre-Amendment shared parenting factors pursuant to the former R.C. 3109.04(F)(2), see *Woeste v. Woeste, ibid*, at 56. These factors do not appear to have been changed by the 2023 amendments.

<sup>74</sup> *Woeste v. Woeste, ibid*, at 56 & 74, citing *Seng v. Seng*, 12th Dist. Clermont No. CA2007-12-120, 2008-Ohio-6758, at 21. See also, e.g., see also *Suever v. Schmidt*, No. 1-22-14 (Ohio Ct. App. 2022), at 4, 10, & 66-67 [Court terminated shared parenting and ordered custody to father where parties' could not cooperate and mother went to great lengths to interfere with father's parenting time and father-child relationship]; *Ackley v. Haney*, No. CA2021-07-017 (Ohio Ct. App. 2022) at 17, *Chaney v. Chaney*, No.

## Page 25 of 28

CA2021-09-087, at \*14 (Ohio Ct. App. 2022), at 37; *Vaughn v. Vaughn*, No. CA2021-08-078, at \*19 (Ohio Ct. App. 2022), at 44.

<sup>75</sup> See *Woodford v. Woodford*, No. 20AP-377, at \*6 (Ohio Ct. App. 2022), at 14 & 16.

<sup>76</sup> Ohio Rev. Code § 3109.051.

<sup>77</sup> *Benchic v. Skaggs*, No. 21CA3942, at \*13 (Ohio Ct. App. 2022), at 28.

<sup>78</sup> The Supreme Court of Ohio, *Planning for Parenting Time: Ohio's Guide for Parents Living Apart* (July 2012), online: The Supreme Court of Ohio

[supremecourt.ohio.gov/docs/Publications/JCS/parentingGuide.pdf](https://supremecourt.ohio.gov/docs/Publications/JCS/parentingGuide.pdf) [last accessed April 21, 2023]. <sup>79</sup> *Schaible v. Schaible*, No. CA2022-06-029 (Ohio Ct. App. 2022), at 1 & 25-27. See also *Ash Holloway v. Holloway*, No. 2021-T-0031 (Ohio Ct. App. 2022), at 88 [reversed on issue of parenting time with father to "avoid the unnecessary deprivation of a relationship with his father" given trial Court's "extreme limitations of the father's visitation with [the child]; trial Court had ordered 1 supervised hour per week].

<sup>80</sup> Ariz. Rev. Stat. § 25-403.02.B. See also, generally, Ariz. Rev. Stat. § 25-401 - § 25-417.

<sup>81</sup> Ariz. Rev. Stat. § 25-103.B.1.

<sup>82</sup> *Smith v. Smith*, 508 P.3d 793 (Ariz. Ct. App. 2022), at 14, citing *Woyton v. Ward*, 453 P.3d 808 (Ariz.

Ct. App. 2019) & *Gonzalez-Gunter v. Gunter*, 471 P.3d 1024 (Ariz. Ct. App. 2020), at 11, citing *Woyton v. Ward*, *ibid*.

<sup>83</sup> *Dineyazhe v. Onco-Ingyadet*, 1 CA-CV 21-0122 FC (Ariz. Ct. App. Dec. 21, 2021), at 30. <sup>84</sup> *Van Berkel v. Van Berkel*, No. 1 CA-CV 19-0829 FC (Ariz. Ct. App. Dec. 15, 2020), at 11, citing *Woyton v. Ward*, 453 P.3d 808 (Ariz. Ct. App. 2019).

<sup>85</sup> *Smith v. Smith*, 508 P.3d 793 (Ariz. Ct. App. 2022), at 14-19 & 21 [no error in not ordering equal parenting time to mother, largely due to potential impact of mother's mental health on child's needs]; *Adkisson v. Keith*, No. 1 CA-CV 20-0193 FC (Ariz. Ct. App. Jan. 26, 2021), at 11 ["Arizona public policy favors equal parenting time... However, neither [provisions] mandate equal parenting time."].

<sup>86</sup> Ariz. Rev. Stat. § 25-403. Note, however, that temporary orders setting parenting time, unlike final orders, do not require best-interests findings under § 25-403. See *Gutierrez v. Fox*, 394 P.3d 1096, 1103 (Ariz. Ct. App. 2017), at 2 & 27-35.

<sup>87</sup> Ariz. Rev. Stat. § 25-403.03.

<sup>88</sup> Ariz. Rev. Stat. § 25-403.03(F).

<sup>89</sup> See, e.g., *Rodriguez v. Rodriguez*, 1 CA-CV 21-0522 FC (Ariz. Ct. App. May. 5, 2022), at 4 & 18.

<sup>90</sup> See, e.g., *Lopez v. Scimone*, 1 CA-CV 21-0220 FC (Ariz. Ct. App. May. 31, 2022), at 3 & 20-22 [joint decision-making and equal parenting time upheld despite findings of family violence]; *Dias v. Mady*, 1 CA-CV 22-0019 FC, at \*4 (Ariz. Ct. App. Jan. 24, 2023), at 12-13; *Rodriguez v. Reynolds*, 1 CA-CV 21-0044 FC (Ariz. Ct. App. Oct. 7, 2021), at 4, 10-15, & 20.

<sup>91</sup> In research for this paper, over 133 Arizona appellate cases since 2020 where equal or shared parenting was discussed were reviewed. Trial decisions do not appear to be as frequently publicly reported. <sup>92</sup> *Smith v. Smith*, 508 P.3d 793 (Ariz. Ct. App. 2022), at 2 & 18 [parents lived in different U.S. states], citing *Gutierrez v. Fox*, 394 P.3d 1096, 1103 (Ariz. Ct. App. 2017) [relocation to different state]. See also *De Cormier v. Cormier*, No. 1 CA-CV 19-0568 FC (Ariz. Ct. App. Jun. 30, 2020), at 4 & 24 [parents lived in different U.S. states] & *Dineyazhe v. Onco-Ingyadet*, 1 CA-CV 21-0122 FC (Ariz. Ct. App. Dec. 21, 2021), at 34 [relocation to different state], citing *Gutierrez v. Fox*, *ibid*.

## Page 26 of 28

<sup>93</sup> *Gonzalez-Gunter v. Gunter*, 471 P.3d 1024 (Ariz. Ct. App. 2020), at ¶11-15 [where parties had difficulty communicating].

<sup>94</sup> *Douros v. Douros*, No. 1 CA-CV 20-0198 FC, at \*4 (Ariz. Ct. App. Feb. 16, 2021), at 11 [where children more closely bonded with mother and doing well with her; children also made no request for more parenting time with father, and one child requested more parenting time with mother]. Contrast *Russ v. Tognetti*, 1 CA-CV 21-0563 FC, at \*4 (Ariz. Ct. App. Jul. 26, 2022), at 10 [mother's role as primary parent not bar to joint decision-making and equal parenting time order]; *Curtis v. Curtis (In re Marriage of Curtis)*, No. 1 CA-CV 19-0755 FC, at \*4 (Ariz. Ct. App. Oct. 22, 2020), at 13 [mother as primarily responsible for child's care during marriage did not bar equal parenting time order]. Contrast *Berg v. Berg*, 1 CA-CV 21-0320 FC, at \*8 (Ariz. Ct. App. May. 12, 2022), at 28-29 [father being less involved with children during marriage did not preclude equal parenting time order].

<sup>95</sup> *Riojas v. Mejia*, 1 CA-CV 21-0156 FC, at \*5 (Ariz. Ct. App. Feb. 3, 2022), at 18, citing *Barron v. Barron (In re Marriage of Barron)*, 443 P.3d 977 (Ariz. Ct. App. 2018).

<sup>96</sup> [Children Act 1989, \(c. 41\)](#), at s. 3(1). Note there is also a [Children Act 2004 \(c. 31\)](#), which address children's services.

<sup>97</sup> [Children Act 1989, \(c. 41\)](#), at s. 8(1). See also ss. 10 [Power of Court to make section 8 orders] & 12 [residence orders and parental responsibility].

<sup>98</sup> [Children Act 1989, \(c. 41\)](#), at s. 11(4).

<sup>99</sup> [Children Act 1989, \(c. 41\)](#), at s. 1(1A)(B).

<sup>100</sup> [Children Act 1989, \(c. 41\)](#), at s. 1(1).

<sup>101</sup> [Children Act 1989, \(c. 41\)](#), at s. 1(3).

<sup>102</sup> In research for this paper, over 300 United Kingdom cases decided under the *Children Act 1989* since 2020 were reviewed. First-instance U.K. decisions are generally only made public where the Justice giving the judgment indicates that they are of sufficient interest to be made available for Internet publication. There is also restriction on the number of U.K. cases which are publicly available due to possible copyright issues for judgments given verbally which are then transcribed, or which are published in law reports. For further information, see the British and Irish Legal Information Institute's FAQ, online: BAILII <[bailii.org/bailii/faq.html](http://bailii.org/bailii/faq.html)> [last accessed April 21, 2023].

<sup>103</sup> Also known as a shared “lives with” or “shared residence” order.

<sup>104</sup> See, e.g., *D v S (international Relocation)* [2020] EWFC B78, at para 51 [relocation granted]; *VB & LB (Children), Re* [2022] EWFC 60 [relocation granted]; *BB v CC (residence order)* [2018] EWFC B78 [relocation refused]; *J v P (Leave to Remove to France)* [2015] EWFC 29 [relocation granted; child lives with both parents]; & *S v G (Relocation to Russia)* [2015] EWFC 4 [relocation granted].

<sup>105</sup> *S (A Child), Re* [2015] EWFC 86, at para 18: “Thereafter the courts followed this guidance [Court of Appeal decision on relocation in *Payne v Payne* [2001] 1 FLR 1052] where there was a primary carer. Increasingly, however, parents after breakdown of their relationship came to adopt shared care arrangements and, as they became more common, it was recognised that the guidance in *Payne* was not always as valuable - see for example the decision of Hedley J. in *Re Y* [2004] 2 FLR 230.”

<sup>106</sup> See, e.g., *SNM v TNM* [2017] EWFC B2, at para 9(c) & *E (A Child)* [2014] EWFC B136, at para 112. <sup>107</sup> See, e.g., *L v F* [2017] EWCA Civ 2121, citing *A v A (Shared Residence)* [2004] EWHC 142 (Fam); *Re R (Shared Residence Order)* [2005] EWCA Civ 542; & *Re W (Shared Residence Order)* [2009] EWCA Civ 370. Cited in *Ms D v Mr D* [2022] EWFC 164, at paras 46 & *K (Children)* [2015] EWFC B143, at paras 7-8.

## Page 27 of 28

<sup>108</sup> *Ms D v Mr D*, [2022] EWFC 164, at paras 48 & 52-62. See also *C v C (Parental Acrimony)* [2022] EWFC 182, at paras 129, 149-151, & 166 [shared care confirmed despite conflict and communication issues]

<sup>109</sup> [Children Act 1989, \(c. 41\)](#), at s. 2(1)(2). There is also a pathway to joint parental responsibility for the father where the parents were not married: see s. 4. See also s. 12 [residence orders and parental responsibility]. A person with parental responsibility does not lose that responsibility solely because another person subsequently acquires parental responsibility: s. 1(6).

