In whose interest?

Critics of proposed Bill C-422, which would presume equal parenting rights after divorce, say it's a misguided, cookie-cutter solution that ultimately will fail children.

By Patti Ryan

ROBERT JOHANNSEN

It isn't always easy deciding what to do with the kids when a marriage falls apart.

The court's mandate is to help restructure your family in its best interest. That could mean sole custody, joint custody, shared custody or even the rare split custody — whatever is going to be most workable and offer the best outcome for the kids. It isn't always pretty, but in the end, families can walk away with a custom-tailored solution that, hopefully, makes the best of an unpleasant situation.

But there is a movement afoot by fathers' rights groups — supported by Saskatchewan MP Maurice Vellacott — to overhaul Canada's current divorce legislation and replace it with legislation that would impose a one-size-fits-all model on divorcing families. The size? Equal parenting: 50/50, straight down the middle, unless one of the partners can prove there are circumstances — such as abuse or neglect — that would make a different setup "substantially" better for the kids.

Vellacott, who won re-election as the MP for Saskatoon-Wanuskewin last May, is behind Bill C-422, a private members' bill designed to introduce an "equal parenting" presumption upon divorce. First introduced in 2009, the bill died when Parliament was prorogued at the end of that year, and was reintroduced the following spring. This year, the bill was dissolved along with Parliament when the election was called, but Vellacott will reintroduce it, says his parliamentary assistant Tim Bloedow.

At first glance, the bill seems harmless enough: Who would argue against equal access to mothers and fathers for children in split families?

"From the evidence we've seen, children benefit best from the ongoing relationship with both parents, so this is basically a measure to try to encourage that situation to a greater degree than seems to be the case today," says Bloedow. "It's an issue of social justice that [Vellacott] heard about from people, and it became a concern for him in terms of an injustice that he felt was out there." (Vellacott declined an interview, saying he was too busy with the election.)

Divorce legislation should not settle parental power struggles at the expense of serving children's needs, say most family lawyers.

But the idea that the existing *Divorce Act* is unjust, say most lawyers, is exactly where the proposed bill goes wrong, because the bill emphasizes parents' rights, not children's. By making equal time the default, the bill aims to correct a perceived injustice among fathers' rights groups who feel that dads don't always get their fair share of time with their children.

But divorce legislation should not settle parental power struggles at the expense of serving children's needs, say most family lawyers.

"I've been to some of the fathers' rights groups meetings, and this is what they all believe, that they should absolutely have equal time with their kids," says

Droit de la famille?

Dans l'intérêt de qui?

La présomption de garde partagée introduite dans le projet de loi C-422 irait à l'encontre du meilleur intérêt de l'enfant.

Parvenir à un accord concernant vos enfants après le divorce n'est pas nécessairement facile.

Le rôle du tribunal est d'aider les parents à restructurer votre famille en accordant une garde exclusive, conjointe ou partagée en fonction des meilleurs intérêts de votre progéniture, entre autres financiers.

Mais un groupe de défense des droits des pères — soutenu par un député de la Saskatchewan, Maurice Vellacott — veut faire remplacer la législation actuelle sur le divorce par une loi qui favoriserait une présomption du partage égal du rôle parental. Cela deviendrait la norme, à moins qu'un abus ou une négligence de la part d'un des parents soit prouvé.

Pour le moment, le projet de loi est mort au feuilleton avec le déclenchement des élections fédérales. Mais Vellacott, réélu le 2 mai, a affirmé qu'il avait l'intention de réintroduire C-422.

À première vue, le projet de loi semble inoffensif : qui refuserait de donner un accès égal à la mère et au père d'une famille divisée? Tim Bloedow, un porte-parole et assistant parlementaire pour Maurice Vellacott, considère même que faire bénéficier les enfants d'une relation continue avec leurs deux parents rétablirait la justice.

Mais cette position ne fait pas l'unanimité, la majorité des avocats considérant que le projet de loi C-422 met l'accent sur les droits des parents plutôt que ceux des enfants en tentant de corriger l'injustice perçue par les groupes de défense des droits des pères.

La plupart des avocats en droit familial s'entendent pour dire que la législation sur le divorce ne doit pas outrepasser l'intérêt des enfants. L'avocat et associé Grant Gold chez McCague Borlack à Toronto, qui a assisté à des réunions de certains groupes de défense des droits des pères, fait remarquer

ChildView®
(coast to coast)
Discover Canada's Family Law Gem!
Child Support
addresses all areas of a Child Support Guideline calculation
Spousal Support
includes comprehensive calculations and analytical tools for spousal support:
- SSAG calculator
- Spousal analyzer
- Lump sum payments
Software
includes financial analysis tools such as budgets and cashflow statements
annual license includes:
- program with all calculators
- unlimited telephone support
- all updates
- reference manual
Toll Free 1-800-787-8620 www.childview.ca

Grant Gold, a partner and family law practitioner with McCague Borlack in Toronto. "But the reality is that even in most together families, there isn't equal parenting time. In separated families, to suddenly impose something that doesn't exist in intact families, on the one hand is wrong — and on the other, it doesn't look at what's best for children."

Besides, the court already has the power to order equal parenting time under existing legislation, Gold points out, and it does so when it deems it to be in the best interests of children. But to make it a presumption?

"I see it fraught with problems," says Gold.

Currently, courts have considerable scope to assess what is best for children. The proposed bill would remove that scope and put the onus on parents to prove that something different from exactly equal parenting would be better.

Gwen Goebel, a partner and family law practitioner with Robertson Stromberg Pederson in Saskatoon who specializes in custody-related issues, worries that the need to prove abuse or neglect in order to come away with anything other than shared parenting may provoke or increase harmful mudslinging.

"Desperate times call for desperate measures," she says. "I am very concerned that the focus will be switched from, 'Okay, what are the needs of the children?' to 'How terrible is that other person? What mistakes have they made?' My concern is that abuse is going to be alleged in every case, and it's going to diminish the way the courts look at abusive situations."

Goebel sees a parallel between the evolution of family property law and Bill C-422. Decades ago, the law made a transition to the presumption of equal sharing of property for married spouses regardless of their perceived contributions. "But of course, children are not property," Goebel points out.

qu'une garde égale n'existe même pas dans les familles les plus unies. L'imposer à des familles séparées ne correspond donc pas aux meilleurs intérêts des enfants.

Il ajoute que les tribunaux ont actuellement toute latitude pour imposer une garde parentale égale ou une autre solution. Or, avec l'adoption de C-422, il incomberait aux parents de prouver qu'une option autre que la garde égale serait meilleure.

Gwen Goebel, une avocate en droit de la famille et associée chez Robertson Stromberg Pederson à Saskatoon, craint que les parents invoquent des abus présumés de la part d'un partenaire pour éviter la garde parentale égale; la perception par les tribunaux de situations vraiment abusives serait altérée.

Me Goebel voit un parallèle entre C-422 et l'évolution du droit quant au partage du patrimoine familial. Il y a 10 ans, la loi avait envisagé la présomption de partage égal de leurs propriétés pour des époux, sans tenir compte de leurs contributions. Selon elle, accepter C-422 reviendrait à considérer les enfants comme des biens et enlèverait la possibilité aux parents qui n'ont pas envie de consacrer 50 % de temps à leurs enfants de trouver une solution intermédiaire.

La spécialiste du droit de la famille chez Gordon Zwaenepoel à Edmonton et membre exécutif de la section nationale du droit de la famille de l'ABC, Patricia Hebert, représente souvent les enfants lors de divorces.

Elle trouve le projet de loi malavisé : contrairement aux années où l'on considérait que les enfants devaient être avec leur mère, les tribunaux d'aujourd'hui estiment plutôt que les parents sont libres de trouver l'entente qui leur convient le mieux. S'ils ne parviennent pas à un accord, les tribunaux définissent alors la meilleure situation pour les enfants. En outre, l'adoption du projet de Vellacott exacerberait plutôt les conflits entre parents, et, à cause de son caractère rétroactif, tout parent pourrait contester un ancien jugement, ce qui créerait un débordement de cas portés devant les tribunaux.

Après avoir promulgué une loi sur une garde parentale égale, la Californie et l'Australie ont ensuite fait volte-face en autorisant cette option seulement lorsque les parents l'approuvent. Les résultats d'un sondage des 2/3 des familles californiennes démontrent que la garde conjointe imposée a entraîné un manque de collaboration entre parents, une instabilité à cause des déplacements entre domiciles et des difficultés logistiques. La législation a donc été abandonnée en 1994.

Selon M. Bloedow, une bonne relation entre les parents après un divorce importe le plus pour le bien des enfants. Me Hebert est d'accord, précisant que les enfants se moquent d'un temps partagé à 50 %. **N**

— Yasmina El Jamaï

"To evoke a presumption of shared parenting regardless of that child's needs, regardless of the history of that child's care, essentially puts them in the position of being property."

Finally, adds Goebel, presumptive equal parenting may create leverage for parents who don't really want to have their children 50 per cent of the time, but are prepared to put that on the table. "Maybe one parent has no intention of stepping into a prominent parenting role, but with this new bill in their toolbox, they can leverage that against other legal issues like support or even property issues," she says.

Patricia Hebert, a family law specialist in private practice with Gordon Zwaenepoel in Edmonton, and executive member of the National Family Law Section at the CBA, often represents children in divorce cases. If there is one word she can think of that fits the proposed bill, she says, it's "misguided."

Hebert says she understands where the concerns come from, since historically there have been presuppositions that the courts should look at the Tender Years Doctrine, "that little kids needed to be with mommy," and so on, she says.

But that's no longer the case. The court today considers each particular family and how to restructure it so kids get the best arrangement available. Because there are no presumptions anymore, parents have wide latitude to find the arrangement that works best for them, and if they can't agree, the court has similarly wide latitude to decide on the best situation for the kids.

Bill C-422 would thrust the element of presumption back into the mix. Although proponents insist it will decrease litigation, many lawyers believe it will do just the opposite by imposing a high threshold that objecting parents would need to overcome in order to rebut the presumption. Hebert calls it "a big step backwards." Like Goebel, her concern is that it

NEWLY REVISED & UPDATED FOR 2011

PRECEDENTS One

Separation Agreements and Marriage Contract/Agreement

Revisions have been made to existing clauses and commentary, plus we've added new clauses and schedules (including a streamlined "Statement of Income, Assets and Debts/Liabilities"), based on current case law and legislation including:

- Rick v. Brandsema (S.C.C.) re: financial disclosure
- Turner v. Di Donato (Ont. C.A.) re: insurance clauses
- Bhupal v. Bhupal (Ont. C.A.) re: material change clauses
- Fisher v. Fisher (Ont. C.A.) re: review clauses
- Family Statute Law AmendmentAct, 2009 (ON only) re: custody and access applications and pending pension changes
- BC Form changes (BC only) re: Form F8 Financial Statement

Don't miss out on a great program that is easy-to-use, comprehensive, well-drafted and can be applied to a full range of possibilities - from the most basic to the very complex.

Don't spend valuable time and resources updating your precedents when DIVORCEmate has already done the work for you!

DIVORCEmate One...From Marriage Contracts to Divorce Judgments and Everything in Between.

DIVORCEmate One

a product of DIVORCEmate software

Toll Free: 1-800-653-0925
or 416-718-3461 x446
e: sales@divorcemate.com
www.divorcemate.com

will lead to a greater number of custody battles.

"It causes parents to have to litigate if they want something other than this cookie-cutter approach," she explains. "So they have to throw all the mud at the wall in order to say, 'In our family that's not going to work,' instead of just bringing forward what *would* work."

Worse, adds Hebert, because the legislation would have retroactive application, any parent whose case and conflict have long been settled could elect to reopen the case without a change in circumstances, creating a potential flood of litigation. "Anybody who is remotely dissatisfied now would have an open visa to come back to the courts to have their matter re-argued."

Problems with similar legislation in other jurisdictions may be a good reason to avoid it in Canada. California and Australia, for example, have both enacted versions of presumed equal parenting, and in both cases, amendments were required because of overwhelmingly negative outcomes. Two-thirds of family court judges in a California survey concluded that joint custody imposed under a presumption led to mixed or worse results for children, including lack of parental co-operation, continuing parental conflict, instability caused by moving between households, and logistical difficulties for parents. The law was amended in 1994 to allow joint custody only when parents agree.

For his part, Bloedow figures opponents of Vellacott's bill must think that "having ongoing relationships with both parents is not in children's best interests."

Criticism of Bill C-422, contends Bloedow, "doesn't really make sense if one takes the position that the best interests of children, outside of situations of proven abuse and neglect, is the ongoing relationship with both of their parents. That's what seems to be the case from the best evidence we've seen. We think there is no conflict between these priorities, because the children's best interest is the ongoing relationship with both parents, even in cases of divorce."

Based on comments like this, Hebert says it's clear that Vellacott doesn't understand how his proposed bill would work in practice.

"He really just doesn't get it," says Hebert of Vellacott, a socially conservative backbencher and former pastor is a father of four who has been married for 35 years. "It comes from a profound misunderstanding of what a presumption does in a legal case, and also just the realities of how people go through the process of making decisions for their kids — by themselves or with legal or court assistance. If you haven't experienced it, you might not get how a presumption would completely disrupt the balance in the playing field that exists now."

While Vellacott and the fathers' rights lobby continue to hammer home their mantra that children of divorce do best with precisely equal access to both parents, Hebert says psychological evidence shows kids do best when they have a *quality relationship* with each parent.

"Kids don't care about exactly 50/50," she says. "What they care about is how does it work in their lives? Does it make sense? Are they feeling shuffled around? Do they have to get up at six in the morning when they're at dad's house because he's too far from school? Do they have to stay at after-school care till six at night when they're at mom's house, even though dad is home? Those are the things that make sense to them." N

Patti Ryan is a journalist based in Ottawa.

SUPREME FACTUM

FACTUMS AND APPEAL DOCUMENTS | PRINTING SERVICE | CD-ROM AND ELECTRONIC FILING

We take care of the technology so you can focus on what you do best: winning your case.

Supreme Factum provides a turnkey solution that includes the ongoing management of all the stages related to the preparation and production of appeal documents, from the extensive review of the file to service.

Aside from being printed, every single document is digitized and integrated into an interactive **CD-ROM**: an indispensable tool for the consultation of your documents with immediate access to cited references with the help of hyperlinks and keyword search.

+ Developed in collaboration with the Supreme Court of Canada

1 877 737 0834 | supremefactum.ca