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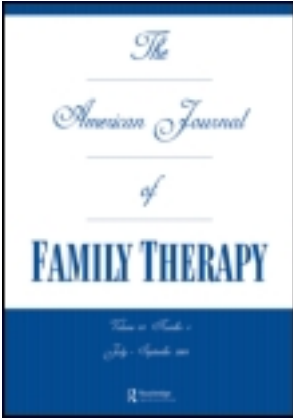
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### Arguments for an Equal Parental Responsibility Presumption in Contested Child Custody

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## **Arguments for an Equal Parental Responsibility Presumption in Contested Child Custody**

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*Sixteen arguments in support of an equal parental responsibility presumption in contested child custody are presented from a child-focused perspective, and clinical and empirical evidence in support of each argument is contrasted to the conflicting evidence. These arguments are made in support of the model equal parental responsibility presumption outlined in Volume 39, Number 5, of The American Journal of Family Therapy.*

We state our case for the equal parental responsibility presumption outlined in Volume 39, Number 5, of *The American Journal of Family Therapy*, in “A Model Equal Parental Responsibility Presumption in Contested Child Custody.” Given the drawbacks of the “best interests of the child” (BIOC) standard and the harms attendant to the sole custody model detailed in the earlier article, we consider that each of the sixteen arguments below is sufficient to adopt equal parental responsibility (EPR) as a viable alternative; combined, they are a powerful testament to the urgent need for law reform in the direction of equal parenting. The research studies cited in support of each argument have, for the most part, utilized large and representative samples, and overcome most of the methodological limitations of earlier research.

### SIXTEEN ARGUMENTS IN SUPPORT OF EQUAL PARENTAL RESPONSIBILITY

#### 1. Equal Parenting Preserves Children’s Relationships With Both Parents

Before and after divorce, children need both parents to be physically and emotionally attuned, involved, and responsive in their lives, and the removal

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of a primary parent threatens their physical and emotional security. In a little-known study, Lund (1987), utilizing multiple measures of children's adjustment, including interviews with both sets of parents, classroom teachers, and therapists to assess children's post-divorce functioning, isolated the variables of parental conflict and parenting arrangement to assess their relative impact on children's post-divorce functioning. She found that the benefits of co-parenting were evident in both the harmonious and conflicted co-parenting groups, and that the strongest predictor of child well-being was the active involvement of co-parents in children's lives. More recent studies (Amato & Gillbreth, 1999; Bender, 1994; Bisnaire, Firestone, & Rynard, 1990; Buchanan & Maccoby, 1996; Campana, Henley, & Stolberg, 2008; Gunnoe & Braver, 2001; Lamb, 1999; Lamb, Sternberg, & Thompson, 1997; Laumann-Billings & Emery, 2000; Melli & Brown, 2008; Pleck, 1997; Warshak, 1992) have demonstrated the salutary effects of joint physical custody, compared to sole custody, on children's divorce-specific and general adjustment; Fabricius, Diaz, and Braver (2011) concluded that children's highest level of emotional security is at 50% time levels with each of their parents, confirming the findings of Sandler, Miles, Cookston, and Braver (2008). Finally, Bauserman's (2002) meta-analysis of the 33 major North American studies comparing outcomes in joint versus sole custody homes, including both the major peer-reviewed studies and Ph.D. dissertations on the subject, and both self-selected samples and those with legally mandated joint physical custody arrangements, found that joint custody is associated with more salutary outcomes for children. Comparing child adjustment in joint physical and legal custody settings with sole custody, as well as intact family settings, and examining children's general adjustment, family relationships, self-esteem, emotional, and behavioral adjustment, divorce-specific adjustment, as well as the degree and nature of ongoing conflict between parents, Bauserman found that children in joint custody arrangements fare significantly better than those in sole custody on all measures. High conflict families fared as well as the self-selected samples, reinforcing the findings of earlier studies that joint custody works equally well for high conflict families in which parents are vying for custody (Benjamin and Irving, 1989; Brotsky, Steinman, and Zimmelman, 1988).

Traditional visiting patterns and guidelines are, for the majority of children, outdated, unnecessarily rigid, and restrictive, and fail in both the short and long term to address their best interests (Kelly, 2007). In addition, sole custody and primary residence orders are highly correlated with parental alienation and disengagement (Kruk, 2010a; Kruk, 2010b; Amato et al., 2009); and a multitude of studies have demonstrated that father absence, particularly after divorce, more than any other single factor, is associated with children's compromised social and emotional well-being.<sup>1</sup> Inasmuch as the "winner take all" sole custody approach removes a primary caregiver from children's lives, robbing children of the love of one of their parents and uprooting them from their extended family, community, culture and

traditions, an alternative approach is urgently needed. An EPR presumption preserves children's relationships with both parents.

Finally, equal parenting arrangements are durable over the long-term and provide significantly more and better quality parental care time for children than sole custody arrangements, in which children spend significantly more time in substitute care (Melli and Brown, 2008; Lamb and Kelly, 2009). An EPR presumption maximizes the available resources of both parents for the betterment of the child.

## 2. Equal Parenting Preserves Parents' Relationships With Their Children

Just as children need both parents, so parents need their children in their lives. And as studies have demonstrated the salutary effects of EPR on children, so parental adjustment to the consequences of divorce is furthered by EPR (Bauserman, 2002; Melli and Brown, 2008). Primary among the benefits of EPR for parents are better physical and emotional health, resulting from the sense of purpose and personal gratification associated with active parenting, as the highest levels of depression occur among adults who have a child under age 18 with whom they are not living or actively involved (Evenson and Simon, 2005). The most salient loss for parents in the divorce transition is that of their children and their parental identity (Kruk 2010a; Kruk, 2010b). The constraints of the traditional access relationship following divorce is strongly associated with contact loss (*ibid*), as 30% of children of divorce have no contact with their non-custodial fathers (Amato et al., 2009).

Research from twenty years ago found that parents who lost contact with their children following divorce suffered a grief reaction containing all the major elements of a bereavement (Kruk, 1991). Today these parents are manifesting an even more pronounced reaction of post-traumatic stress, as they are acutely aware of the consequences of their absence in their children's lives. The loss of one's children and the parent role is a defining and organizing experience that forms the core of non-resident parents' post-divorce identity. These parents routinely report increasing isolation, loss of employment and inability to form or sustain new relationships, and these impacts are connected to more disturbed patterns of thinking and feeling, including shame, stigma, and self-blame, and learned helplessness and hopelessness about the future (Kruk 2010a; Kruk, 2010b). A "suicide epidemic" has been identified among divorced fathers without custody, linked directly to family court judgments that remove them as routine caregivers of their children (Kposowa, 2000).

An EPR presumption would go a long way toward preventing parental disengagement from children's lives, in those situations in which parents want to maintain an active role as caregivers to their children, but are

prevented or constrained from doing so by custody orders that remove them as primary caregivers. The fact that these parents want to live with their children and seek at least a shared care arrangement is a reflection of their of their attachment to their children (Kruk, 1993). Contrary to the claims of EPR opponents (Jaffe et al., 2003), there is no evidence that parents who seek custody of their children are doing so for reasons such as avoidance or reduction of child support payments, leverage in property settlement, or to continue their domination over their former spouses (Maccoby and Mnookin, 1992). Most parents have strong primary attachments to their children and seek custodial arrangements that will enable them to maintain these attachments; feeling important and competent as a parent, being actively involved with children on a routine basis, and maintaining a relationship with one's children without interference from the other parent or other outside sources are identified by parents as key elements in a positive post-divorce parent-child relationship (Tepp, 1983).

Whereas non-resident parents suffer the acute effects of child absence, custodial parents are typically overwhelmed by sole responsibility for their children's care, and diminished parenting results, as parents are less physically and emotionally available to their children (Lamb and Kelly, 2009; Kelly, 2007; Kelly, 2003). Maximizing parental well-being encourages and increases parental availability and responsiveness to children, and this in turn maximizes children's well-being. Children's well-being is compromised when a parent is relegated to "second-class" status; if a parent is diminished in the eyes of a child, the child's self-esteem suffers (Kruk, 2010a). Parents should be the pride of their children.

Finally, sole custody outcomes reinforce women's traditional economic dependence on men, whereas an EPR presumption puts pressure on governments to address wage differentials between women and men (Pulkingham, 1994).

### 3. Equal Parenting Decreases Parental Conflict and Prevents Family Violence

As Birnbaum and Bala (2010) have argued, it is essential in child custody determination to differentiate among types of high conflict. Conflict is a normal part of everyday life, and to shield children from normal conflict is doing them a disservice, whereas family violence and child abuse are dangerous to children. A rebuttable presumption of EPR would exclude cases of violence and child abuse, and a rebuttable presumption against EPR in cases of family violence and child abuse would be applied. Children of divorce should be afforded the same protections as all other children when there is an investigated finding that a child is in need of protection from a parent; and family violence should be recognized in criminal law (Chisolm,

2009). Family violence does not abate unless allegations are fully investigated and prosecuted via criminal proceedings (*ibid.*).

There is also no question that exposure to ongoing and unresolved high conflict is harmful to children. What is under debate is the amount of parenting time that is advisable in high conflict situations. Research has produced mixed findings on this question, as studies have rarely distinguished between frequency of contact and actual parenting time. Earlier research (Johnston, Kline, & Tschann, 1989) examined frequency of contact, and found negative outcomes between high conflict and frequent visits. Kelly (2007), however, notes that amount of shared parenting time is not as problematic for children as frequency of contact in high conflict situations, and suggests limiting frequency of alternations and arranging for transitions with no direct parental contact. More recent studies have examined parenting time, as opposed to frequency of contact, and have found not only that EPR is not harmful in high conflict situations, but equal parenting can ameliorate the harmful effects of high conflict: a warm relationship with both parents is a protective factor for children in high conflict families. Thus Pruett, Williams, Insabella, and Little (2003) concluded that the effects of parental conflict on child outcomes are mediated by paternal involvement, Gunnoe and Braver (2001) and Bauserman (2002) found that the benefits of joint custody on children's well-being exist independent of parental conflict, and Fabricius and Luecken (2007) concluded that equal parenting is beneficial for children in both low and high conflict situations. Finally, Fabricius, Diaz, and Braver (2011) determined that children's ongoing relationships with each parent can counter the harmful effects of parental conflict, and that limiting parental time when there is parental conflict makes children doubly vulnerable to long-term physical and mental health problems.

"Winner-take-all" adversarial processes and sole custody or primary residence orders are strongly associated with exacerbation or creation of parental conflict. Hawthorne and Lennings (2008) found that limiting fathers' involvement in children's lives via sole maternal custody judgments was correlated with their reported level of subsequent hostility toward their ex-wives. Inter-parental conflict decreases over time in shared custody arrangements, and increases in sole custody arrangements; inter-parental cooperation increases over time in shared custody arrangements, and decreases in sole custody arrangements (Bauserman, 2002; Melli and Brown, 2008). Fully half of first-time family violence occurs after separation, within the context of the adversarial "winner-take-all" sole custody system (Ellis and Wight-Peasley, 1986; Hotton, 2003; Johnson and Hotton, 2003; Statistics Canada, 2006). This is no surprise, given the high stakes involved; when primary parent-child relationships are threatened, the risk of violence rises dramatically. When neither parent is threatened by the loss of his or her children, conflict diminishes. The culture of animosity created by the sole custody system seems tailor-made to produce the worst possible outcomes when there are two capable parents who

wish to continue as primary caregivers, cannot agree on a parenting plan, and are forced to disparage each other within the adversarial system in an effort to simply maintain their role as parents.

Within a sole custody or primary residence regime, conflict over access is often protracted, as non-resident parents keep returning to court in an effort to gain more time with their children, with their efforts resisted by custodial parents, who seek to lessen non-custodial parents' time in an effort to establish an orderly and uncomplicated living schedule, free from the other parent's interference. Sole custody is also an instigation to escalate conflict. The problem of perverse incentives to limit another parent's involvement, such as by exaggerating the amount of conflict that occurred or manufacturing allegations of abuse (the "hostile parent veto"), has been discussed by a number of commentators. Birnbaum and Bala (2010) write, "There is a presumption in case law...against joint custody in high conflict cases. As a result, parents who seek sole custody often characterize their cases as high conflict. The parent exaggerates the extent of conflict, or purposely engages in conflict to resist an order for joint custody." And judicial errors compromise children's safety; children of divorce are at risk when a parent is removed from their lives as a primary caregiver without a comprehensive investigation and assessment by a competent child protection authority. The parent mounting the stronger legal case usually emerges as the winner in a child custody dispute; judges must make difficult decisions in the context of allegations and counter-allegations of abuse, alienation, and parental unfitness, but rarely is there any sort of criminal or child welfare investigation of the allegations. The result is that in many cases custody is removed from a fit and loving parent and children end up in the sole care of the more adversarial and potentially alienating parent. Judicial errors in these cases lead to tragic outcomes (Richardson, 2006).

There is no evidence that to support the contention that EPR increases inter-parental conflict (Bauserman, 2002; Gunnoe and Braver, 2001); rather, when neither parent is threatened by loss of their children, conflict levels go down. Rather than accepting that high conflict is inevitable, the goal should be to reduce parental conflict after divorce. Most acrimonious parents can successfully learn to minimize conflict when motivated to do so, and an EPR presumption provides an incentive for parental cooperation, negotiation, mediation, and the development of parenting plans (Kruk, 2008). A number of specialized interventions to help parents reduce conflict have been developed, including therapeutic family mediation, parent education programs, parenting coordination, and parallel parenting. Key interventions in such cases include enhancing parents' attunement to children's needs (Moloney, 2009), and a strengths-based approach. What we expect of others, they endeavor to provide: if we expect divorcing parents to be responsible and act in their children's best interests, and provide the supports to enable them to do so, they will act accordingly; if we expect them to fail, they will fail.



In sum, much of the “practice wisdom” regarding high conflict and equal parenting is not empirically supported, including the following assumptions: conflict is inherently bad for children; conflict will increase with equal parenting; equal parenting will not benefit children in high conflict situations; and little or nothing can be done to decrease conflict. Current literature does not support a presumption that the amount of parenting time should be limited in cases of high conflict, and high conflict should not be used to justify restrictions on children’s contact with either of their parents (Lamb and Kelly, 2009; Fabricius and Luecken, 2007).

#### 4. Equal Parenting Respects Children’s Preferences and Views About Their Needs and Best Interests

Relatively few researchers have systematically examined the perspective of children of divorce; those who have asked children directly about their residential preferences conclude that children strongly favor equal parenting (Fabricius, 2003; Finley and Schwartz, 2007). Children of divorce want equal time with their parents, and consider shared parenting to be in their best interests. Seventy percent of children of divorce believe that equal amounts of time with each parent is the best living arrangement for children, including 93% of children raised in equal time homes; and children who have equal time arrangements have the best relations with each of their parents after divorce (Fabricius, 2003). Fabricius’ (2003) large-scale ( $n = 829$ ) study of young adult children who had lived through their parents’ divorces compared children’s actual post-divorce living arrangements with the living arrangement they wanted, the living arrangement their mothers wanted, the living arrangement their fathers wanted, the living arrangement they believed is best for children of divorce, the living arrangement they believed is best for children of divorce if both parents are good parents and live relatively close to each other, the relative number of days in a typical week with each parent they believe is best for children of divorce for children at different ages, how close they now felt toward their mothers and fathers, the degree of anger they now felt toward their mothers and fathers, the degree to which each of their parents wanted the other parent to be involved as a parent, and the degree to which each of their parents undermined the other parent as a parent. Equal time with each of their parents is what the majority of divorced respondents wanted as children and considered to be in their best interests, regardless of their actual living arrangement. Although children of divorce perceive a large gender gap in their parents’ generation on the issue of child custody, there was no evidence of this gap in their generation. Finally, children in sole custody arrangements experiencing a history of unavailability of the non-custodial parent articulate feelings of insecurity in their relationship with that parent, perception of rejection by that parent, and anger toward both their parents. Consistent with this finding, Amato and Gilbreth (1999),

in their meta-analysis of the father-child post-divorce relationship, found that children who were less close to their fathers after divorce had worse behavioral and emotional adjustment, and lower school achievement. These findings are also consistent with earlier research focused directly on children of divorce (Derevensky and Deschamps, 1997; Lund, 1987).

## 5. Equal Parenting Respects Parents' Preferences and Views About Their Children's Needs and Best Interests

According to the majority of parents, the optimal post-divorce living arrangement, even in cases of high conflict, is equal parenting. Public opinion polls report that EPR is favored by about 80% of parents, with a slightly higher percentage of women favoring a legal presumption than men (Braver, Fabricius, & Ellman, 2008; Fabricius, Braver, Diaz, & Velez, 2010; Nanos Research, 2009). On the matter of child custody, there thus is a marked disconnection between public opinion and the opinion of legal professionals (Pruett, Hogan Bruen, & Jackson, 2000), with changing public opinion reflecting an ongoing cultural evolution of parenting values and norms. Child custody law and policy must reflect contemporary cultural standards, and both the judiciary and legislatures would be ill-advised to ignore the strong public support for EPR and the equally-strong public condemnation of the courts as unreasonably gender-biased in regard to child custody (Fabricius et al., 2010). The law walks a dangerous line when it deviates substantially from an emerging community consensus such as equal parenting (Maldonado, 2005); at the same time, the success of an EPR presumption is enhanced by the coincidence of this law reform effort and community opinion.

Kruk's (2010a, 2010b) research on divorced fathers' and mothers' perspectives on their children's needs and parental and social institutional responsibilities in relation to those needs found that parents define their children's best interests as commensurate with the active involvement of both parents in children's lives in a shared care arrangement. Seventy-eight percent of divorced fathers and 86% of non-custodial mothers in these studies identified EPR as the legal presumption most in keeping with their children's best interests.

## 6. Equal Parenting Reflects Child Caregiving Arrangements Before Divorce

It is now well established that children form primary attachment bonds with each of their parents (Rutter, 1995; Lamb and Kelly, 2009). Further, with the "gender convergence" of child care roles, shared parental responsibility has emerged as the norm in two parent families (Atwood, 2007; Marshall, 2007; Bianchi, Robinson, & Milkie, 2006). North American time budget analyses

report that mothers and fathers working outside the home now spend about the same amount of time caring for their children. On average, mothers who work outside the home devote 11.1 hours to direct child care tasks per week; fathers devote 10.5 hours, a 51/49% split of child care tasks (Higgins and Duxbury, 2002). Although working longer hours outside the home than mothers, young fathers spend an average of 4.3 hours a day with their children, only 45 minutes less than mothers (Galinsky, Aumann, & Bond, 2009). An EPR presumption thus most closely reflects child caregiving arrangements before divorce; claims that mothers are overwhelmingly the primary caregivers of children before divorce (Boyd, 2003) are outdated and no longer supported by empirical evidence.

### 7. Equal Parenting Enhances the Quality of Parent-Child Relationships

An EPR presumption provides a context and climate for the continuation or development of high quality parent-child relationships, allowing parents to remain authoritative, responsible, involved, attached, emotionally available, supportive, and focused on children's day-to-day lives (Flouri, 2005). Attachment bonds are formed through mutual participation in daily routines, including bedtime and waking rituals, transitions to and from school, and extracurricular and recreational activities (Lamb and Kelly, 2009; Fabricius et al., 2010). Quantity is necessary for quality, and there is a direct correlation between quantity of time and quality of parent-child relationships, as high quality relationships between parents and children are not possible without sufficient, routine time to develop and sustain a quality relationship (Lamb and Kelly, 2009; Kruk, 2010a; Fabricius et al., 2011). For children, attachment and feelings of "mattering," feeling prioritized and cared for and cared about, emotionally as well as physically (Trinder, 2009), are not possible within the constraints of visitation. For parents, quality of relationships with children are compromised both in cases where a parent is overwhelmed by sole custodial responsibility and where a parent feels disenfranchised as a non-resident parent. The constraints of traditional "access" relationships are well documented (Kelly, 2007; Kruk, 1993); closeness, warmth, and mutual understanding are elusive when parenting within the constraints of thin slices of time (Smyth, 2009). Meaningful relationships are developed and sustained through emotional connectedness (Moloney, 2009), made possible through the emotional stability and security of equal parenting time.

### 8. Equal Parenting Decreases Parental Focus on "Mathematizing Time" and Reduces Litigation

According to Smyth (2009), too much of the debate about parenting after divorce remains stuck in "mathematizing time." An EPR presumption, defined

both in terms of the approximation standard and as equal time division, frees parents and the judiciary from ongoing disputes over amounts of contact time to be spent by the non-resident parent with the children. When one parent is the primary custodial parent, ongoing litigation over access time for the non-custodial is prevalent.

Conflict is fuelled by the adversarial nature of contested child custody; an EPR presumption reduces strategic bargaining, hostile negotiations and litigation, and removes child custody from the adversarial arena. The intensified anger and hostility attendant to litigation has a deep emotional impact on children in particular (Pruett and Jackson, 1999); in addition, the scarcity of resources and financial insecurity resulting from ongoing litigation accounts for much of the negative impact of divorce for all family members (Semple, 2010). Less hostile dispute resolution processes are a key factor contributing to quality co-parenting relationships (Bonach, 2005).

An EPR presumption also addresses the problem of “one-shoe-fits-all” arrangements prevalent in sole custody determinations, such as limiting access to every second weekend for the non-resident parent. An EPR approach guides parents toward the development of individualized parenting plans, resulting in greater variety of outcomes; children of different ages and stages of development require different schedules, and an EPR presumption leads to parenting arrangements tailor made to needs of each individual child and family: an infinite variety of shared parenting arrangements are possible. The EPR model we propose applies the approximation standard in cases of dispute, apportioning 50-50 time when both parents are primary caregivers, scheduled according to children’s ages and stages of development.

## 9. Equal Parenting Provides an Incentive for Inter-Parental Negotiation, Mediation, and the Development of Parenting Plans

As Emery (2007) points out, parental self-determination should be the overriding goal of legal custody determination. Within a BIOC/sole custody system, however, there little incentive for parents who foresee winning sole custody, or are determined to punish their former spouses, to engage in a process of assisted negotiation. An EPR presumption would provide such an incentive, with processes such as mediation and post-divorce family therapy focused on the development of a parenting plan.

An EPR presumption will not work without adequate supports in place, such as Family Relationship Centres, therapeutic family mediation, parent education programs, and parenting coordination, especially in high conflict situations. At the same time, an EPR presumption not only encourages the uptake of such support services by parents, but puts pressure on legislatures to develop programs that will enable parents to negotiate parenting plans. The experience of jurisdictions that have moved toward establishing an EPR

presumption makes this clear; increased use of family relationship centers and family mediation services in Australia has resulted in 72% of parents now being able to resolve post-divorce parenting arrangements without the use of legal services (Kaspiew, Gray, Weston, Moloney, & Qu, 2009; Kaspiew, Gray, Weston, Moloney, & Qu, 2010).

An EPR presumption also allows the option of parallel parenting in situations of high conflict between parents, which protects children from parental conflict while protecting their relationships with both parents, as parents continue parenting in a disengaged manner; over time, as the dust settles and parents begin to separate their former marital hostilities from their ongoing parental responsibilities, parallel arrangements gradually give way to cooperative parenting (Birnbaum and Fidler, 2005).

#### 10. Equal Parenting Provides a Clear and Consistent Guideline for Judicial Decision-Making

The BIOC is an indeterminate standard that promotes litigation, a highly destructive process for all family members. Criteria respecting the BIOC are rarely defined in legislation; the nebulous nature of these criteria, and their vulnerability to value preferences, has resulted in a situation in which judges are guided by any number of idiosyncratic biases regarding children's best interests. Child development and family dynamics are a delicate matter, and the discretionary power of judges an area in which they are neither professionally trained, nor competent to assess third party evaluations or professional literature on the matter, is a recipe for disaster. In making decisions regarding child custody and access, judges do not consult relevant research on child outcomes (Kelly and Lamb, 2000), and are highly susceptible to error bias (Firestone and Weinstein, 2004; McMurray and Blackmore, 1992): judges are not infallible and routinely make mistakes, awarding custody to the more litigious parent, with children running the risk of being placed in the exclusive care of an abusive parent. Melton (1989) presents a startling account of how little social science knowledge trickles down into legal policies that are intended to benefit children in the child custody realm. In the case of two fit and loving parents, the act of judges privileging one parent over the other as a residential parent, removing one from the child's life as a custodial parent, thus lacks empirical foundation. And although judges determine custody in a relatively small proportion of cases, these decisions have profound repercussions for the larger proportion of non-adjudicated cases, as fathers in particular do not contest custody when they believe their chances of success are small (Kruk, 1991).

A legal presumption such as EPR in contested child custody, a clear-cut default rule, removes speculation about future conduct as a basis for making custody decisions, limits judicial discretion, enhances determinacy and

predictability of outcome, and reduces litigation and hostility. It eliminates the need for courts to adjudicate between two fit and loving parents, or to remove one parent as a primary caregiver. It also provides an anchor for negotiation for those who bargain in the shadow of the law. As Emery (2007) points out, a legal presumption does not abandon children's best interests, but provides a clear, evidence-based definition of children's needs in the divorce transition.

In sum, an EPR presumption eliminates unnecessary complexity, and simplifies that which has increasingly been made unnecessarily complex in child custody disputes. As Burgoyne et al. (1987) asked many years ago about child custody, "Why courts at all?" Within marriage, custody is held jointly and equally by both parents and it may be questioned whether the courts should even be involved in changing that situation. Indeed, this could be put more positively; at the end of a marriage or common-law union the law would simply reaffirm the role of both parents and make clear that although the divorce is the end of the parents' relationship, their parental rights and responsibilities continue. An EPR presumption allows the court to make no order at all about custody so that the situation that obtained in the marriage could simply continue, thereby removing the court system from unnecessary intrusion in family life when there are two "good enough" parents in disagreement over child custody. An EPR presumption would allow the court to disengage from those cases where a child is not in need of protection.

## 11. Equal Parenting Reduces the Risk and Incidence of Parental Alienation

For children, parental alienation is trauma writ large, as they lose the joy and love of their previous loving relationship with a parent, which affects a sizeable number of children of divorce (Bernet, von Boch-Galhau, Baker, & Morrison, 2010; Baker, 2005; Bala, Hunt, & McCarney, 2010). There is consensus among researchers that severe alienation is abusive to children (Fidler and Bala, 2010); the removal of a fit and loving parent as a primary caregiver from the life of a child, some have argued, is in itself a form of parental alienation, as children are robbed of their parent's routine care and nurture, as well as that of their extended family.

Parental alienation flourishes in situations where one parent has exclusive care and control of children, as sole residential custody is at times granted to parents with serious psychological problems who mount the stronger case in the adversarial arena (McMurray and Blackmore, 1992). An EPR presumption reduces the risk and incidence of parental alienation, and the forced disengagement and absence of non-custodial parents, because children continue to maintain meaningful routine relationships with

both of their parents, and are thus less susceptible to the toxic influence of an alienating parent. At the same time, with EPR neither parent is threatened by the potential loss of their relationship with their children, and a parent is less likely to denigrate the other parent in an effort to bolster their own sense of parental identity and obtain a primary residence order.

## 12. Equal Parenting Enables Enforcement of Parenting Orders, as Parents are More Likely to Abide by an EPR Order

Primary residence orders with periodic access provisions for non-resident parents have presented a law enforcement nightmare, with non-custodial parents vying for more time with children while custodial parents attempt to limit that parent's involvement. Access denial is endemic in sole custody families (Kruk, 2010a); in the case of non-residential parents, refusal to comply with sole custody orders is more likely because they are perceived as inherently unfair or unequal. Rank-ordering of parents fuels discord (Warshak, 2007); with EPR, neither parent's relationship with their children, nor their parental identity, is threatened, and neither parent is constrained by the limitations of a "visiting" relationship (Kelly, 2007; Kruk, 1993). This makes enforcement less of a problem, as parents are more likely to abide by an EPR order they perceive as fair, than a sole custody "winner-loser" determination that they believe either gives them veto power over visits or is inherently biased (Brinig, 2001).

## 13. Equal Parenting Addresses Social Justice Imperatives Regarding Protection of Children's Rights

An EPR presumption ensures equal legal protection of parent-child relationships for children of divorce, under the anti-discrimination provisions of the UN Convention of the Rights of the Child. Whereas sole custody practice and legislation permitting removal of parental custody subsequent to divorce discriminates against children of divorce, permitting judges to remove custody from a parent (and a parent from children's lives) on the basis of the indeterminate, discretionary BIOC standard, as opposed to the more stringent CINOP standard for all other children, EPR ensures equal protection of parent-child relationships for all children, regardless of parental marital status. This double standard violates Article 2 of the UN Convention, as it applies a different standard to warrant parental removal to that applied to children in two-parent families. An EPR presumption applies the more stringent "child in need of protection" standard to warrant parental removal, which necessitates thorough investigation by a competent child welfare authority, the standard applied with children in two-parent families. An EPR presumption establishes a child's right to be raised by both parents and to preserve primary relationships with each of them.

#### 14. Equal Parenting Addresses Social Justice Imperatives Regarding Parental Authority, Autonomy, Equality, Rights, and Responsibilities

Parents' rights are needed to enable them to successfully carry out their parental responsibilities, and parental authority in children's lives is an effect of parentage. An EPR presumption avoids having the rights of one parent being opposed to those of the other, and avoids privileging the rights of one parent over the other. An EPR presumption affirms the equality of parents as primary caregivers, and as equally capable and salient in the lives of their children. As Kelly and Johnston (2005) point out, there is no basis in law or psychology for preferring one parent over the other, or for choosing between two "good enough" parents contesting custody.

Unequal parenting arrangements are perceived by parents as inherently unfair, and these are more likely to break down subsequent to divorce than EPR arrangements (Warshak, 2007; Melli and Brown, 2008; Brinig, 2001). This includes "unequal" shared parenting arrangements such as 70/30 or 60/40 divisions of child care responsibility, which are associated with higher levels of parental discord than equal (50/50) time share arrangements (Melli and Brown, 2008; Kaspiw et al., 2009).

#### 15. The BIOC/Sole Custody Model is not Empirically Supported

The evidence of the failure and harms of the sole custody model vis-à-vis children, parents, and extended family members is abundant. Sole custody is associated with both diminished parent-child relationships, leading in some cases to the absence of a parent from children's lives, and to exacerbation of conflict between parents, leading in some cases to incidents of first-time family violence. The effects of these phenomena are particularly damaging to children: disrupted parent-child relationships lead to emotional insecurity in children, and compromised mental and emotional well-being; heightened conflict between parents compromises children's physical security and well-being.

Yet as Kelly (1991) writes, the pattern of primary residence to one parent with intermittent "visitation" granted to the other continues, not subject to the degree of scrutiny and challenge it deserves.

#### 16. A Rebuttable Legal Presumption of Equal Parenting Responsibility is Empirically Supported

The empirical evidence of the effectiveness of equal parenting as a viable alternative to a sole custody approach is mounting, as most studies comparing child outcomes in sole versus physical joint custody show that children adjust



significantly better in shared parenting arrangements, even in high conflict situations. Bauserman's (2002) meta-analysis of the 33 major North American studies comparing child and parent outcomes in sole and joint custody settings and found significantly better outcomes for children in joint custody homes on all measures of general and divorce-specific adjustment. Although many of the studies reviewed by Bauserman compared self-selected joint custody families with sole custody families, several included legally mandated joint physical custodial arrangements, where joint custody was ordered over the objections of the parents. These families fared as well as the self-selected samples, confirming the findings of earlier studies that joint custody works equally well for conflictual families in which parents are vying for custody (Benjamin and Irving, 1989; Brotsky et al., 1988). Bauserman also found that interparental cooperation increases over time in shared custody arrangements, and decreases in sole custody arrangements.

The research evidence for EPR is stronger than is generally acknowledged; studies by Braver (Braver and O'Connell, 1998; Gunnoe and Braver, 2002), Fabricius (Fabricius, 2003; Fabricius and Luecken, 2007; Fabricius et al., 2010), Kelly (Kelly, 2007; Kelly and Johnston, 2005), Warshak (Warshak, 2003), Bauserman (Bauserman, 2002), Finley (Finley and Schwartz, 2007), Lamb (Lamb and Kelly, 2009; Lamb, 2004), and Millar (Millar, 2009), among others, report salutary outcomes for children of divorce in EPR arrangements, and that parent-child relationship security attendant within an EPR arrangement is strongly associated with child well-being. Although some suggest that there are few differences between sole custody and shared parenting arrangements in child adjustment (Neoh and Mellor, 2010), the mounting evidence in support of EPR reflects an emerging consensus on the issue of child custody (Fabricius et al., 2010; Lamb, 2004).

As EPR is an emergent pattern of care, and not yet implemented in pure form in any jurisdiction, research evidence from jurisdictions with an EPR presumption is somewhat tentative. Most studies have utilized small and unrepresentative samples, or data sets where only custodial or residential parents' views were sought. Nevertheless, the Australian Institute of Family Studies (Kaspiew et al., 2009) review of EPR legislation indicates that an EPR presumption is widely supported by both parents and professionals, and is beneficial and working well for children, including children under 3, according to parents; child custody litigation rates have dropped, and there is a corresponding increase in the use of mediation and family dispute resolution services; most parents are able to resolve their conflict within a year after separation without the use of legal services, and are making use of family relationship services; EPR arrangements are durable; and there is no evidence that high conflict has a more negative effect for children in EPR arrangements than for those in sole custody homes. What remains an issue of concern in Australia is the lack of application of a presumption against EPR in family violence situations, a cornerstone of the EPR approach proposed here.

## CONCLUSION

I have argued that a more child-focused approach to child custody determination is needed to reduce harm to children in the divorce transition and ensure their well-being. The well-being of children should take precedence over judicial biases and preferences, professional self-interest, gender politics, the desire of a parent to remove the other from the child's life, and the wishes of a parent who is found to be a danger to the child. It is in children's interests that any new paradigm of child custody determination must ensure consistency in decision-making, removing discretion in areas in which judges have no formal expertise; protect children from the loss of a primary parent, preserving loving parent-child relationships; protect children from violence and abuse, and ongoing high conflict; and ensure stability and continuity in children's routines and living arrangements. The model rebuttable legal EPR presumption outlined in the 2011 volume of this journal offers the best hope for accomplishing these goals, and thus represents a viable alternative to the BIOC paradigm.

Given the overwhelming evidence in favor of an EPR presumption, it may be asked, why the many roadblocks to the passage of EPR legislation around the globe? The more cynical will say that if the more stringent "child in need of protection" standard were to replace the BIOC standard in regard to the removal of a parent from a child's life after divorce, the livelihood of family law and allied professionals would be seriously threatened. Even more of a threat would be the curtailment of the power of lawyers and judges in the realm of child custody—that is the real issue, the primary barrier to meaningful child custody law reform, according to some. The real answer, however, is a little more complex. Human service providers are motivated not only by self-interest, but also by altruistic motives, seeking to make a positive difference in the lives of vulnerable children and families. The well-being of children is the primary motive of practitioners and policymakers in the child custody field. The road to hell, however, is paved with good intentions, and a more considered examination of alternative approaches to helping children and families in post-divorce transition is warranted. Equal parenting responsibility as a legal presumption is primary among these alternatives. The "parental deficit" perspective prevalent among many divorce practitioners, I suggest, is a significant barrier to the establishment of an EPR presumption. A strengths-based orientation, on the other hand, emphasizes the importance of protecting primary relationships and strengthening children's emotional security in their relationships with both their parents, reducing parental conflict and litigation, ensuring stability and continuity in children's lives, allowing for predictability of outcome, and simplifying and expediting child custody determination as fundamental to children's well-being. The EPR presumption makes this ideal possible.

## NOTE

1. Eighty-five percent of youth in prison have an absent father, 71% of high school dropouts are fatherless, 90% of homeless and runaway children have an absent father, and fatherless children and youth exhibit higher levels of depression and suicide, delinquency, promiscuity and teen pregnancy, behavioral problems and illicit and licit substance abuse, diminished self-concepts, and are more likely to be victims of exploitation and abuse (Stein, Milburn, Zane, & Rotheram-Borus, 2009; Rosenberg and Wilcox, 2006; Crowder and Teachman, 2004; Ellis et al., 2003; Ringbäck Weitoft, Hjern, Haglund, & Rosen, 2003; Jaynes, 2001; McCue Horwitz et al., 2003; McMunn, Nazroo, Marmot, Boreham, & Goodman, 2001; Blankenhorn, 1995).

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