Barbara Kay: After a divorce, equal parenting rights should be the norm
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In 1999, an exhaustively researched Joint House-Senate committee report, entitled “For the Sake of the Children,” offered recommendations whose spirit is encapsulated in Bill C-560, which will move to second reading in Parliament on March 25.

If passed, Conservative MP Maurice Vellacott’s private member’s bill will serve to amend the Divorce Act to create a rebuttable presumption that equal shared parenting supports the best interests of children whose parents are separating. As the name suggests, “equal shared parenting” (often known as ESP) describes arrangements in which parents from a divorced union have an equal role in raising their children.

The Bill is animated by the basic principle that adults are divorcing each other, not their children. The proposed solution, ESP, consistently garners approval ratings as high as 80% in polls, with little variation by gender, region or political affiliation. Increasingly, social-science literature, including responses from grown children of divorce, favours shared parenting as the model that best reflects the indissolubility of parenthood.

The present adversarial system for high-conflict cases, whereby one parent (usually the mother) “wins” primary residence for the children, has produced injustice, heartbreak and financial ruin on a massive scale. That the family-law system is in serious need of fundamental reform is not in dispute, with report after report demanding action. The new model would replace the concepts of “custody” and “access” with “parenting responsibilities” and “parenting time” applicable to parents.

Under the current Divorce Act (1985), judges have paid lip service to vague concepts such as the “best interests” of the child. But many have ignored persuasive evidence showing that the single most important “interest” of children is to continue to love and to be loved by both their parents. Relationships cannot flourish without significant time in each other’s presence.

Opposition to ESP arises mainly from two sources: family-law lawyers who are by far the greatest financial stakeholders in the adversarial system, and ideologues. The lawyers insist that a vague test is best, leaving the matter for endless litigation; and ideologues either claim outright that mothers are indispensable to children’s happiness, fathers inessential; or accuse fathers of demanding ESP merely to reduce their financial obligations (which, in practice, won’t happen).

Some critics voice fears that ESP represents a “forced,” one-size-fits-all solution. The concern is misplaced. I recently spoke to Toronto family lawyer Brian Ludmer, a co-founder of the group Lawyers for Shared Parenting (L4SP), who helped to draft the wording of Bill C-560. The underlying principle, he says, is still “best interests,” but the more robust wording is meant to cause deeper consideration of ESP: “While there is a rebuttable presumption in favour of ESP, the Court will specify in appropriate cases why a different solution was ordered. However, it [would] need to be established that the best interests of the children in a case will be ‘substantially enhanced’ by something other than ESP.”

The key words are “presumption,” “established” and “substantially enhanced,” Ludmer says. Legally, these terms create a “steep but not insurmountable hill” for those desiring “primary parent” status. This means that a judge could decide to allocate parenting time other than equally, but would have to justify the decision with hard evidence that the child was demonstrably better off without equal parenting because of poor parenting skills, frequent absences, abuse or neglect.

According to Ludmer, this is not a one-size-fits-all prescription, but a guideline that will suit the majority of families, and which will dramatically reduce the burden on the Court system, taxpayers and parents. Extensive courtroom litigation will be reserved for those cases that require it, and not for “custody wars.”

Some variation of ESP is the norm or currently being debated in several U.S. states, many European countries and Australia (where ESP, in combination with related measures such as increased use of family mediation services, has

resulted in “72 % of parents now being able to resolve post-divorce parenting arrangements without the use of legal services”).

Regarding the current primary parent/secondary parent model, Ludmer asks, “Why do this to children who are used to seeing both of their parents every day?” An excellent question. For while there is ample evidence that being marginalized from a parent harms children, there is no credible evidence that minimal time with a parent is good for them.

Bill C-560 is an intelligently designed bill that is just, balanced and respectful of today’s gender-convergent parenting realities. It has the strong support of Canadians and Parliament should enact it.