

## **Using the *AFCC-O Parenting Plan Guide and Template*: Resources for Family Justice Professionals and Parents**

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### **I. Introduction:**

To support and encourage the making and use of child-focused, realistic parenting plans, the Ontario Chapter of the Association of Family and Conciliation Courts (AFCC-O) prepared its [\*Parenting Plan Guide\*](#) and [\*Parenting Plan Template\*](#), making these web-based materials available without charge to parents and their professional advisors.<sup>1</sup> These materials may be used by parents who are making plans on their own, and they are also intended to be resources that Ontario family justice professionals, including lawyers and mediators, can provide their clients so that they will be better prepared to address issues with their professional advisors. Judges may also find it useful to refer parties to these materials, especially when dealing with self-represented litigants at a pre-trial stage and trying to encourage settlement.

Although the materials discuss the value of making plans without court involvement, they also discuss the importance of seeking professional advice, and in particular, in **bolded statements**, raise concerns about voluntary arrangements in cases where there has been domestic violence, or a parent has mental health or substance abuse problems. The materials also include links to such sources of professional assistance as the [Ontario Family Law Limited Scope Legal Services Project](#) and [mediation services affiliated with the Ontario Family Courts](#).

This paper discusses project that resulted in the preparation of the materials, and provides advice about the making of parenting plans and the use of these materials.

### **II. Background to the Project**

The idea for having an Ontario *Parenting Plan Guide and Template* originated as a response to comments made by a speaker at the Family Law Summit of the Law Society in April 2018 at a panel on making parenting plans. Toronto lawyer, Jennifer Wilson<sup>2</sup>, shared materials on parenting plans from various American jurisdictions, lamented the absence of parenting plan precedents for Ontario lawyers and parents, and complained that some Ontario professionals did not seem to fully appreciate the developmental needs of young children when making parenting schedules. At that time, Ontario family justice professionals sometimes made use of the *Arizona*

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<sup>1</sup> <https://afccontario.ca/parenting-plan-guide-and-template/>

<sup>2</sup> Jennifer Wilson, Partner, Torkin Manes

*Parenting Time Guide*,<sup>3</sup> even though the governing legislation in the two jurisdictions is fundamentally different. Arizona has a presumption of equal parenting time and joint decision-making.<sup>4</sup> Instead, in Ontario we are governed by the “best interests of the child” approach, in Ontario’s *Children’s Law Reform Act* and the federal *Divorce Act*, which require the making of individualized decisions without presumptions about parenting time or decision-making.

A number of members of the AFCC-O left that session motivated to address the needs identified. The impetus for developing materials was increased in May 2018, when the federal government introduced Bill C-78,<sup>5</sup> amendments to the parenting provisions of the *Divorce Act* that replaced the archaic concepts of “custody” and “access” with the more flexible and child-focussed concepts of “parenting time” and “parental decision-making responsibility,” and that make specific reference to the “parenting plans.” It is expected that very similar amendments to Ontario’s *Children’s Law Reform Act* will be enacted in the Fall of 2020 and come into force at the same time as the *Divorce Amendments* on March 1, 2021.

In December 2018, the Board of the AFCC-Ontario Chapter appointed a ten-member Task Force, chaired by Queen’s University Law Professor Nicholas Bala, to prepare parenting plan materials.<sup>6</sup> The Task Force had six lawyers and four mental health professionals, and was broadly representative of geographical and racial diversity of family justice professionals in the province.<sup>7</sup> The Task Force met about once a month by teleconference, with Prof. Bala doing much of the initial drafting, and extensive input and discussion from members of Committee. The Committee drew on materials prepared in other jurisdictions,<sup>8</sup> as well materials prepared by

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<sup>3</sup> <https://www.azcourts.gov/portals/31/parentingTime/PPWguidelines.pdf>

<sup>4</sup> The words of the Arizona statute establish a rebuttable presumption that courts will “maximize” time with each parent, which has been interpreted as rebuttable presumption of equal parenting time. W.V. Fabricius, M. Aaron, F.R. Akins, J.J. Assini & T. McElroy, What happens when there is presumptive 50/50 parenting time? An evaluation of Arizona’s new child custody statute (2018), 59 *Journal of Divorce and Remarriage* 414 - 428.

<sup>5</sup> *Divorce Act Amendments*, S.C. 2019, c. 16, coming in force March 1, 2021 (Canada, Bill C-78, 42 Parliament, 1<sup>st</sup> Session). When Parliament amended the *Divorce Act*, it specifically avoided the phrase “maximum parenting time”. See discussion of Bill C-78 and rejection of the concept of “maximum parenting time” and adoption of the term “parenting time consistent with child’s best interests.” N. Bala, Bill C-78: The 2020 Reforms to the Parenting Provisions of Canada’s Divorce Act (2020), 39 *Canadian Family Law Quarterly* 45-74.

<sup>6</sup> Nicholas Bala, Law professor, Kingston (Chair); Rachel Birnbaum, Social Work professor, London; Brian Burke, family lawyer, Toronto; Crystal George, Co-ordinator of Social Services, Aamjiwnaang First Nation, Sarnia; Kim Harris, psychologist, London; Andrea Himel, family lawyer, adjudicator & mediator, Toronto (now a Justice of the Ontario Superior Court); Carolyn Leach, Office of the Children’s Lawyer, Toronto; Rana Pishva, psychologist, Ottawa; Michael Saini, Social Work professor, University of Toronto; and Jennifer Wilson, family lawyer, Toronto.

<sup>7</sup> A continuing issue that is slowly being addressed is that the family justice profession does not reflect the present racial diversity of the Province.

<sup>8</sup> American Psychologist, Dr. Robin Deutsch, had an important role in preparing two sets of the American materials that the Task Force relied on: *Planning for Shared Parenting: A Guide for Parents Living Apart*, sponsored by the Massachusetts Chapter of AFCC; and American Academy of Matrimonial Lawyers, *Child Centred Residential Guidelines* (2015).

Canada's Department of Justice.<sup>9</sup> In the latter stages of the project, other professionals, including members of the judiciary, reviewed and commented on the materials.<sup>10</sup> In the Fall of 2019, the draft materials were distributed to all members of the AFCC-O, and presented at the Chapter's annual conference in October 2019; comments received from the membership resulted in further revisions. The project was completed in January 2020, and the materials have been posted on the Chapter's website, and are available in pdf and Word, with an express statement that the materials can be freely used or adapted, and a statement that they are not intended to provide legal advice and the AFCC-O and the drafters have no liability for their use.

At an early stage in the drafting process a decision was made to have both a *Parenting Plan Guide* and a *Parenting Plan Template*. The *Guide* discusses post-separation parenting and developmental considerations in making plans for children of different ages, as well considering some of the issues that parents most commonly have to address in the context of parental separation. The *Template* briefly discusses some of the issues that are most commonly addressed in making Parenting Plans and offers possible wording, often with possible alternatives. The *Template* emphasizes the importance for parents making, and revising, their own plans, with appropriate professional assistance, and not simply using the text provided, and is provided in Word to facilitate adaption of the clauses provided.

The materials focus on issues of parenting, and do not address other related issues, such as child support, other than to observe that there is a relationship between these issues, and to refer readers to other materials that address these issues, such as those prepared by [Community Legal Education Ontario \(CLEO\)](#) and the [federal government on child support guidelines](#), and to remind self-represented litigants of the value of legal advice, in particular if parenting arrangements are made or changed to result in a shared parenting situation.

The discussion in this paper focusses on *the AFCC-O Guide* and *Template*. These materials are intended to be resources for family justice professionals and their clients when making parenting plans. Individual professionals may decide that they prefer other materials,<sup>11</sup> or that they will supplement the AFCC-O materials with other print, video, audio or web-based materials. What

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<sup>9</sup> Justice Canada, *Making Plans: A Guide to Parenting Arrangements After Separation or Divorce - How to Put Your Children First*, (2013); Justice Canada, *Parenting Plan Checklist* (2015); and *Parenting Plan Tool* (2019); <https://www.justice.gc.ca/eng/fl-df/parent/plan.html>. While these materials provide some very sound advice for separating parents, understandably for materials produced by the government, they tend to be very vague about more contentious issues. The *Parenting Plan Tool* is not "user friendly" as a web-based product. These materials are available in English and French, and it is expected that they will be revised as we move towards the coming into force of Bill C-78.

<sup>10</sup> In Arizona and Minnesota, members of the judiciary and the courts have been directly involved preparing such materials. There is obviously value in having judges involved in such a project and giving it some "official" imprimatur, but this would not be consistent with Canadian views about the role of its appointed judiciary, in the absence of express direction from the government for such an undertaking.

<sup>11</sup> The Justice Canada material, cited at footnote 9, is useful. There are also many websites with good information for separated parents: see e.g. <https://www.afccnet.org/Resource-Center/Resources-for-Families>; and <https://www.helpguide.org/articles/parenting-family/co-parenting-tips-for-divorced-parents.htm>; There are also many self-help books, including Justice Harvey Brownstone, *Tug of War* (2009); and Moran, McCall & Sullivan, *Overcoming the Alienation Crisis: 33 Coparenting Solutions* (2020).

is critical is that professionals are provided their clients with some type of materials that will help orient them to the needs of children in the context of separation, and the issues that will arise as they make parenting plans. Having such materials will make the work of the professional more efficient and useful, and help parents and their children, both when the plan is initially made and as their children grow older and it may be necessary to revise the plan.

The materials are written to be comprehensible and useful to readers without legal or mental health education. The AFCC-O is actively looking at options to translate the materials into French.

### **III. Making Parenting Plans and Using the AFCC-O Materials**

#### ***Parenting Plans***

Some family justice professionals in Ontario already have significant experience with “parenting plans” as a way of helping parents to focus on the needs of their children and make plans for their care, and some professionals have their own templates or make use of materials available on the internet. The coming into force of the amendments to Canada’s *Divorce Act* in March of 2021,<sup>12</sup> is serving as an impetus for encouraging and formalizing their use, with the new law including a definition:

16.6 (2) ***parenting plan*** means a document or part of a document that contains the elements relating to parenting time, decision-making responsibility or contact to which the parties agree.

There is value in the legislation recognizing the potential for having a “parenting plan” added to the possibility of having a court order, until now an order based on the traditional “custody” and “access,” but under the new law sharing or allocating “parenting time” and “parental decision-making”. The concept of a parenting plan suggests more a focus on parental roles and responsibilities, rather than on parental rights. The idea of having a plan rather than an order also suggests that it is an arrangement that parents themselves will make, often with professional assistance, rather having a legal regime imposed by a judge. This is consistent with the emphasis in the Bill C-78 *Divorce Act* amendments on family dispute resolution outside of the court process. Further, the idea of a having a plan for children implies that it is an arrangement that may be reviewed and modified as the parents and children try out the plan and see how it works, and as their circumstances change.

The new law also provides that parents who have made a parenting plan “may” submit it to the court when obtaining a divorce; if they do, the court “shall” include their parenting plan (or some

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<sup>12</sup> Bill C-78, enacted as SC 2019, c. 16. It is expected that very similar amendments will soon be introduced to Ontario’s *Children’s Law Reform Act*, which is generally applicable to parents who are not obtaining a divorce because they never married.

portion of it) in the parenting order, unless the court determines it is not in the child's best interests, in which case the court may make amendments before including it in a court order.<sup>13</sup>

### ***Using the AFCC-Ontario Materials***

The *Guide* provides suggestions intended to help improve communication and co-operation between parents, and offers guidance for the making of plans to co-parenting a child after separation. These materials combine knowledge based on child development research on the impact of parental separation and divorce on children with practical insights from professionals about effective post-separation parenting. A central theme of the *Guide*, and the *Divorce Act* amendments, is that in most cases it is in the best interests of children for parents to cooperate and minimize conflict between them, and for their children to have a significant relationship with both parents. The materials advise on post-separation co-parenting; point out the harm to children from conflict; emphasize the importance of communication, co-operation and mutual support between the parents; and help prepare parents for their long term, evolving co-parent relationship. The materials also recognize that there are cases involving domestic violence and concerns about the mental health or substance abuse of a parent where the involvement and protections afforded by a court process and judicial order are needed to promote the safety and well-being of children.

The *Guide* provides a useful summary of basic social science knowledge about the effects of separation on children, child development and parenting. Professionals who are involved in a family dispute case, even on an occasional basis, should be fully familiar with the issues and approaches in these materials. Professionals, whether lawyers, judges, mediators or otherwise involved in the family dispute resolution process, should be encouraging all parents to carefully read these (or similar) materials prior to starting to make plans, in some cases even before separation.

The *Guide* and *Template* both discuss issues related to parenting schedules, and set out a range of possible schedules, emphasizing the need for individualized plans that will need to be adjusted as the needs of children and the circumstances of parents change. As is common with similar materials for parents from other jurisdictions and Canada's Department of Justice, the materials do not give citations to research studies for various statements about children's needs and parental behaviour. Nevertheless, the materials reflect the views of an interdisciplinary group of leading family justice researchers and professionals, and were prepared after receiving comments from a large number of professionals and reflect a consensus about current knowledge. While the materials are expected to primarily be used for informational purposes, there may be scope for citing some of the general statements about child development in contested proceedings as a basis for judicial notice.<sup>14</sup> For example, there are statements about the value of overnight

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<sup>13</sup> S. 16.1(1)

<sup>14</sup> This type of "common sense" professional knowledge can, in appropriate cases, be cited by the courts; see *R. v. Hernandez-Lopez*, 2020 BCCA 12; see also *AM v CH*, 2019 ONCA 764 and *Wandler v. Hines*, 2019 ABPC 252, on the scope of judicial decision-making about children's best interests in family cases without expert evidence.

parental care by both parents, even for infants.<sup>15</sup> There are, however, also statements about the vulnerability of young children, and need to have graduated increases in care when one parent, usually the father, has not had much involvement with the child and the value of “step-up care” arrangements.

In *Saunders v. Ormsbee-Posthumus*, one of the parties in a dispute over parenting cited the *Guide*. In making an order that increased the father’s time with the child, aged 4 ½ years, from 4 to 5 days per two weeks and established a “step-up” plan to reach equal time and joint decision-making, Justice Trousdale of the Ontario Superior Court observed:<sup>16</sup>

[73] I note that the *AFCC-O Parenting Guide* is not binding on the court. However, it does provide a great deal of very helpful information to the court, which would also be of assistance to the parties in this case now and in the future.

The *Guide* is intended to be used in conjunction with the *AFCC-Ontario Parenting Plan Template*, which offers suggestions for specific clauses that can be used or adapted for a parenting plan, and explains the practical implications of some of the choices. The *Template* provides examples of possible clauses, and in some cases suggests alternative possible clauses. These clauses are intended to be suggestive, and are not in any way definitive.

Canada has a diverse population in such dimensions as cultural and religious heritage, language, gender identity and sexual orientation of parents. There are some efforts to recognize this diversity in the materials. However, professionals may want to have their own, modified templates to provide to parents, especially if they have a significant number of clients with needs and concerns not addressed in these materials, or may wish to translate the materials into a language other than English. The *Guide* and *Template* can each be downloaded as pdf or Word documents. This allows parents or professionals to easily adopt or adapt the terms or clauses as they consider appropriate and integrate relevant terms into separation agreements, court orders or parenting plans.

### ***Tensions in Making a Parenting Plan***

There are inevitably tensions in making a parenting plan. Greater specificity and detail may help reduce immediate conflict, but also create a greater need for review. Professionals hope that parents will co-operate with the implementation of the plan that they agree to, but they may also be concerned about whether and how terms may be enforced in court.

The *Guide* and *Template* suggest that in most cases siblings should share the same parenting time schedule, both for logistical reasons and to allow them to provide emotional and practical

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<sup>15</sup>The issue of the overnight visits with fathers of young children has already been the subject of contrary approaches by Ontario judges, effectively based on judicial notice. In *Perchaluk v. Perchaluk*, 2012 ONCJ 525 (per Zisman J.) which held that such visits should not occur without expert evidence that they in the child’s best interests. By way of contrast, in *Burley v Bradley*, 2019 ONCJ 624 (per March J) held that such visits should occur in the absence of evidence of harm.

<sup>16</sup> 2020 ONSC 2300, at para. 73

support for one another. However, there are situations, for example involving children with special needs or talents, or a large difference in age, when siblings will have different schedules, almost invariably with some opportunity for them to spend time together.

### ***The Parenting Plan as a Document***

As discussed in the *Guide* and *Template*,<sup>17</sup> a parenting plan may be a distinct document, or can be incorporated into a larger Separation Agreement that deals with other issues, in particular property and support issues.

There is value in having a Parenting Plan as a separate document, as it emphasizes to parents that issues related to the care of their children are separate from their other economic and legal affairs, and this will also facilitate the almost inevitable review of provisions of the Plan as children grow older and circumstances change. Ultimately, the nature of the matters to be resolved by the parents, the nature of the parents' relationship, the stage of the separation process and the role of family justice professionals involved (e.g. judge, lawyers or mediator) will all influence whether the Plan is in a separate document.

In cases where court enforcement is not likely to be a concern, lawyers should consider having the Parenting Plan as an Appendix or Schedule to a Separation Agreement, with a stipulation that parents may review and amend the Plan without affecting the validity of the Separation Agreement. This may encourage timely, child-focussed reviews.

### ***Incorporating a Parenting Plan into a Court Order?***

The decision about whether to ask a court to incorporate a parenting plan, or part of it, into a court order will typically be made after the plan is complete, sometimes quite a long time after it has been negotiated and signed. It is, however, important to consider this question as negotiations and drafting proceed, as this may affect the contents of the plan, and in particular the degree of detail.

The advantage of incorporating a parenting plan into a court order is that it will likely encourage compliance, as, if necessary, court processes can be used to enforce the plan, or at least major provisions. One of the challenges of incorporation is that a judge may be reluctant to do this, even on consent, if the plan has provisions that are vague or aspirational. Further, review or variation of the plan will be more expensive and complex if it is expected that the court order will be amended. A plan that is detailed, or has provisions that mentions times, places or has other specific provisions, is almost certain to need to be reviewed as the circumstances of parents and children change.

### ***Starting the Discussions – The Parenting Time Schedule***

The parenting time schedule is often regarded as the foundation of a parenting plan, as so many other issues are related to the schedule. However, issues related to the schedule may also be

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<sup>17</sup> *Guide* p.7 and *Template*, p. 3 & 37.

among the most contentious between the parents, so it may be necessary for parents and their professional advisors to work towards the negotiation of the schedule over time. If the schedule is contentious, it may be helpful to start discussions about issues that are less contentious; indeed, an interim resolution of such issues as schooling or extracurricular activities may help parents to develop a child-focused, logistically realistic schedule.

One of the features of discussions about developing a “plan” rather than a seeking a court “order,” is that using the term plan suggests that the parents can have a temporary plan, or try one arrangement and then assess how it is working for themselves and their children. There may also be a “step up” plan, with the role of a parent who may been less involved in child care scheduled to increase over time, as that parent gains experience having sole responsibility for the children; this may be especially appropriate children are very young and need relatively intensive care.

While some have advocated a presumption of equal parenting time, the law in Ontario (both federal and provincial) does *not* have any presumptions about parenting time schedules. Indeed, consistent with social science research, the law requires that parenting schedules are based on an assessment of the best interests of the individual child. The amendments to the *Divorce Act* provide that the court shall give “primary consideration to the child’s physical, emotional and psychological safety, security and well-being.”<sup>18</sup> Factors that should be taken into account when making an agreement or seeking an order include:

- the children’s needs, given their ages and stages of development, including the children’s need for stability;
- the nature and strength of the children’s relationships with parents, family and others;
- each parent’s willingness to support the children’s relationship with the other parent;
- the children’s views and preferences, giving due weight to their age and maturity;
- the children’s upbringing and heritage, including indigenous upbringing and heritage; and
- any family violence.

### ***Developmentally Appropriate Parenting Schedules***

The *Guide* discusses developmental stages, needs and capacities of children of different ages, and relates developmental issues to appropriate parenting time schedules for children of different ages.<sup>19</sup> The special needs and vulnerabilities of preschool children, and especially children in the first three years of life, receive particular attention. Depending on the parenting history and the children’s needs, overnight parent time with each parent may be well be appropriate for pre-school children, but arrangements involving relatively lengthy absences from either parent, such

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<sup>18</sup> S. 16(2)

<sup>19</sup> *Guide*, 11-24.

a week about shared parenting arrangement, are generally not appropriate for very young children.<sup>20</sup>

The *Guide* and *Template* suggest that discussions of a parenting time schedule can often be most usefully based on a “regular” schedule in a 4-week cycle, with some provisions for a holiday schedule.<sup>21</sup> Many parents have a 2-week schedule (which lawyers and judges often refer to in a short hand, but incomplete way, such as 2-2-3. Even with a 2-week cycle, it may be easier for parents to understand or visualize if set out based on a 4-week calendar. The *Guide* and *Template* have examples with a number of different schedules, with a discussion of developmental factors to consider at different ages. Of course, in some cases, the employment schedules of parents or other factors may make it more appropriate to have a different cycle, perhaps based on a 3-week rotation.

### ***Details of the Parenting Time***

For many parents, their plan should include both a regular schedule, and for variation for holidays, school breaks, and summer, and perhaps for special days like a child’s birthday. Many parents, especially in the period after separation, also benefit from a clear plan that sets out details about the location and time for pick-ups and drop-offs, recognizing that over time these details will likely have to change.

### ***Make-up Time and The Right of First Refusal***

One or both parents may wish to address the right of first refusal for instances when the parent with assigned care is unable to personally supervise the children, and have a provision for “make-up time”. Many professionals suggest avoiding having this type of clause as it requires parents to report their activities to one another, unless one parent only has the child for a relatively limited time, or there are likely to be significant, regular absences. If conflict is high,

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<sup>20</sup> In *Wyatt v. Reindl*, 2020 SKCA 36 (C.A.) the Saskatchewan Court of Appeal upheld a trial decision for a 3 year old girl which provided for 9 days with her father and 11 days with her mother, to fit with the father’s work schedule in an oil field. In commenting on this case, Aaron Franks and Michael Zalev (*Family Law Newsletter*, June 22, 2020) wrote (emphasis added):

Conventional wisdom tells us that children – especially young children – should generally not go for extended periods of time without seeing a parent. For example, in its recently released *Parenting Plan Guide*, the Ontario Chapter of the Association of Family and Conciliation Courts (“AFCC-O”) recommended that even in cases where the parents are involved in a shared parenting arrangement, they should still ensure that “separations from each parent [for children under 3] are not too long (no more than two to three days or two nights for example)”, and that while “it may be appropriate to have an arrangement with roughly equal care” for 3 to 5 year olds, they should still not be spending “more than 3 nights away from either parent.” The AFCC-O’s *Parenting Plan Guide* is available at: <https://afccontario.ca/parenting-plan-guideand-template/>. ***It is an excellent resource.*** Accordingly, it is exceedingly rare for a court to order a schedule for a very young child whereby the child goes for a week or more without seeing one of his/her parents.

They went on to explain the decision, and its rare circumstances.

<sup>21</sup> It is suggested that professionals avoid terms like the “normal” schedule, as this implies that there it meets some external standards of “normalcy”.

this clause can exacerbate tensions, and if conflict is low, many parents can resolve these situations informally.

When the period of absence is short (for example 3 to 6 hours), this type of clause can be constricting as it prevents a parent from hiring a babysitter or asking family members for help until after the non-resident parent has been offered the opportunity to care for the children. Increasingly, these clauses tend to come into effect when the parent with care is not available for one or more overnights for example for business or a family emergency. Some parents prefer not to mandate a first right of refusal, choosing instead to have the flexibility for the parent with care to make the arrangements that they consider appropriate.

### ***Decision-Making Responsibilities***

It is important for professionals (and their clients) to get a realistic sense of the parents' level of conflict and ability to co-operate. Will the parents be able to communicate and compromise about significant decisions, such as education; culture, language, religion and spirituality; health; and significant extra-curricular activities? The involvement of both parents in major decisions is generally desirable, so absent concerns about coercion or power imbalances, and so long as the parents can co-operate, a plan will often provide for shared decision-making for major issues, though with provision for some method of assisted dispute resolution, such as mediation, or a clause assigning final decision-making to one parent if they cannot agree.

For parents where there are concerns about the ability to co-operate, it will normally be preferable to assign final responsibility for certain decisions (or all major decisions) to one parent, with an obligation to consult the other parent before a decision is made. It may be necessary to specify what type of consultation is required. If there are concerns about the ability to co-operate and the parents have sufficient resources, appointing a parenting co-ordinator to oversee the implementation of the parenting plan may help the parents to move forward.

If there is significant conflict, it may be preferable to give one parent responsibility for some (or all) major decisions with an obligation to inform the other of decisions that have been made.

If primary decision-making responsibility is divided, it may be necessary to specify how "cross-over issues" are to be identified and addressed – Is psychological testing a medical or educational issue? Is the decision to attend a Catholic school an education or religious decision? Future conflict may be avoided by naming the children's school, doctors and/or religion in the parenting plan.

### ***Clarity on Day-to-Day Decisions***

Most parenting plans and court orders address responsibility for making "major" decisions, but leave "day-to-day decisions" to the parent with care of a child at a particular time.<sup>22</sup> These

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<sup>22</sup> The new *Divorce Act*, s. 16.2(2) specifies:

“day-to-day decisions” will be generally be issues that one parent can implement without direct involvement of the other parent. Most professionals would agree that these matters would include such issues as evening routines, meals and visits with friends, in contrast to decisions that may arise on a regular basis but that affect both parents, such as whether a child takes prescribed medication for ADHD on the weekends or whether a parent may cut the child’s hair. Depending on the level of conflict and issues in dispute, some parents may need more specificity and examples of day-today decisions, while others may not.

### ***Drafting - Define the Parties***

With the coming into force of the new *Divorce Act* provisions, those drafting parenting plans should avoid using the terms “custodial parent” or “access parent,” which in any event have long had unfortunate connotations. However, depending on the provisions, it may be useful to use the terms “resident parent” and “non-resident parent” to describe *who has care of the children at any given time*, and to indicate the rights and responsibilities of each when in that role.

The parents will often find it helpful if the plan refers to them by their first names, or if appropriate, by the terms mother and father. Avoid using the terms Applicant and Respondent as this can be confusing to the parties and to others interpreting the order or agreement.

### ***Drafting – Principles***

The *Guide* discusses the value for children in parents avoiding conflict and encouraging positive co-operation, and in having each of the parents recognize the important role of the other parent in their children’s lives. The *Template* offers suggestions for a number of statements of principle that reflect these ideas which parents may incorporate or modify for their parenting plan.<sup>23</sup> All of these statements have similar themes of encouraging child-focused, co-operative co-parenting. While there may be questions about the legal significance or enforceability of some of these statements, especially for cases where there is high conflict, a discussion of these principles by parents and the inclusion of some of them can serve a useful educational purpose for many parents. Most parents will try to comply with the spirit of clauses that they have discussed and voluntarily accepted.

There are some judges who will incorporate such “aspirational clauses” into a court order, at least on a consent basis, premised on the view that the “best interests” of the child will be promoted by this. Some judges may require such clauses to be included as recitals, beginning

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#### *Day-to-day decisions*

(2) Unless the court orders otherwise, a person to whom parenting time is allocated under para. 16.1(4)(a) has exclusive authority to make, during that time, day-to-day decisions affecting the child.

<sup>23</sup> *Template*, p.4-6.

with “Whereas the parties agree.” Other judges, however, may be concerned about issues of enforceability and may refuse to incorporate such clauses, even on a consent basis.

### ***Review Clauses***

Children and parents change, and parenting plans or orders will need to be adjusted unless they are very general, particularly if, as children grow older, their needs or preferences no longer align with the plan that was previously made.

From time to time parents should meet to discuss whether their current arrangements should be adjusted. It is generally preferable for parents to undertake such a review informally, and without unnecessary involvement of family justice professionals. However, if conflict is high or there are on-going concerns of family violence or abuse, or mental health issues, professional involvement or a court application may be necessary.

While the variation of a court order can be a relatively complex process, a parenting plan that is not incorporated into a court order (or the relevant portions are not fully incorporated), can be amended relatively easily. A parenting plan should provide for periodic review, that can hopefully be mutually agreed without professional involvement. If parents are unable to agree when undertaking a review, the Plan should encourage or require parents to engage in a non-court family dispute resolution process, like mediation, before bringing a court application, or perhaps requiring submission of a dispute over the parenting plan to arbitration.

It is not uncommon for parents to informally review and revise terms of their parenting plan order without returning to court. Although a court will not enforce a revision that was not incorporated in a court order, after an informal revision, it is also very unlikely that the original term will be enforced. Further, the court is likely to take account of the agreed upon revision in any future variation application. While a lawyer should be cautious when providing advice about informal revisions, these changes may be in the interests of the children, the parents and the justice system as they offer an affordable, quicker and less conflictual way to implement changes.

### ***Negotiation and Drafting: Avoid Contentious Hypotheticals***

The *Guide* and *Template* address many of the clauses that are commonly included in parenting plans, but no plan is likely to address all of them. For example, some of the clauses address issues that only arise in later childhood or adolescence, such as children using social media and dating. While it is valuable for parents to be aware that these issues will need to be addressed at some point, whether in a written parenting plan or by some form of *de facto* resolution, discussion about contentious issues that will arise in the future but are not present concerns makes the process of making a parenting plan more challenging. Hopefully, experience in co-operating under the plan will help parents to address future issues in a constructive, child-focussed way.

### **....*Except Perhaps Relocation***

While it is generally preferable to try to avoid trying to resolve issues that seem hypothetical, one or both parents may wish to address in a parenting plan may want to address issues related to possible future relocation, especially since the provisions of the *Divorce Act Amendments* that deal with relocation are quite vague. Some of the issues that might be addressed include

- what constitutes a “relocation” in terms of time or distance;
- how is the burden of proof on a parent intending to relocate to be interpreted in this case: that is do the parents consider that they have the children a “substantially equal time” or that one parent has the children the “vast majority of the time”, or neither.

### ***Involving Children***

The *Guide* and *Template* address in general terms the sensitive issues about how to involve children in post-separation decision-making and in the review of parenting plans in a number of places. On the one hand, the law is clear that children’s perspectives and preferences are important in assessing their best interests, both when an initial plan is made and as variation is being considered. On the other hand, there is the potential for children to be drawn into parental disputes or try to manipulate their parents, especially if there is high conflict between the parents.

The *Guide* makes the important point that “it is preferable for parents to decide together how to involve their children [in making a parenting plan] and develop a joint strategy.”<sup>24</sup> However, this is not always possible. This is the type of challenging issue that requires professional assistance if parents are unable to agree on a joint child-focussed strategy.

### ***Child Support and Economic Issues***

The materials emphasize that the parenting time schedule should be governed solely by an assessment of the child’s best interests, but it is necessary for parents to be informed about the possible child support implications of their plan. Family justice professionals will be aware that there are cases where a concern about the “40% threshold” for the invocation of the shared parenting provision in s. 9 of the *Child Support Guidelines* is an “elephant in the room.”

The *Guide* and *Template* make some reference to economic issues that arise in the context of separation or divorce, in particular child support. A parenting plan may well affect child support issues, especially if the parenting time schedule results in a “shared parenting time” (or “shared custody” situation under the *Child Support Guidelines* s.9, 40%-60% of time with each parent). The materials flag this issue for parents, with links to other sites that address them, and advises parents to get appropriate legal advice if this may be an issue.

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<sup>24</sup> *Guide*, p.6

As a matter of practice, parents and their advisers may decide that the document called a “parenting plan” will also deal with child support; that may be most appropriate if there are no other economic issues that need to be addressed. However, if the parents are also making an agreement that deals with property, debts or other support issues in a Separation Agreement, it will usually be appropriate to also deal with child support in that document.

#### **IV. The Value of the *Guide* and *Template* to the AFCC-Ontario Chapter**

Since the release of the *Guide* and *Template* in January 2020, there have been a number of presentations by members of the Task Force to judges, lawyers, mediators and social workers across the province, initially in person and since the Covid 19 pandemic by webinar. In at least one reported Ontario decision, the judge has made specific direction that the parents should receive a copy of the materials, in the hope that this would facilitate a possible settlement,<sup>25</sup> and the authors of this paper are aware of a number of judges who have referred to these materials in the course of conference discussions with parents about the possibilities of settlement. This project has been an important undertaking for the Ontario Chapter. The materials themselves make a significant contribution to family justice in the province, and we have received significant positive feedback about their value, including from the judiciary.

It is expected that there will be some relatively minor revisions undertaken in 2021, about the time of the expected amendments to the *Children’s Law Reform Act* coming into force. Users of the materials, especially family justice professionals, are invited to provide comments and suggestions for revision, and the materials include an invitation to send comments to [info@afccontario.ca](mailto:info@afccontario.ca)

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<sup>25</sup> In *Edwards v. Robinson*, 2020 ONSC 2056, at para. 6 a request for an urgent motion about parenting during the Covid 19 pandemic period of very limited court, Justice Jarvis ordered that copies took judicial notice of the *Guide* and *Template* where to be provided to the parties, along with other material, to help them prepare for the motion, or hopefully make their own, child-focused interim parenting arrangement.