No Presumption of Equal Parenting-Time In Family Law Cases

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How parenting-time is determined in a family law case is important. It helps frame the approach and discussions between parents [and counsel] on the structure to put in place.

No Presumption of Equal Parenting-Time: Supreme Court of Canada

Recent amendments to legislation that addresses parenting (*Divorce Act* and *Children's Law Reform Act*), together with guidance from the Supreme Court of Canada and Ontario Court of Appeal, have shown that there is no presumption of equal parenting-time (*Barendregt v. Grebliunas*, 2022 SCC 22, paras. 134-135; *Knapp v. Knapp*, 2021 ONCA 305, paras. 30-34; *Rigillo v. Rigillo*, 2019 ONCA 647, para. 13).

The Supreme Court, in *Barendregt*, noted that Courts have been overreaching by interpreting that the "maximum contact principle" creates a presumption in favour of shared or equal parenting time or with the implication that "as much contact with both parents as possible will necessarily be in the best interests of the child" (paras. 134-135).

The Court referred to the amended *Divorce Act*, which eliminated the phrase "maximum contact" [known as the maximum contact principle], and replaced it with the title "Parenting time consistent with best interests of child" (*Barendregt v. Grebliunas*, 2022 SCC 22, paras. 134-135; *Divorce Act*, RSC 1985, c 3 (2nd Supp), section 16(6)).

The Court said that going forward "the "maximum contact principle" is better referred to as the "parenting time factor" (para. 135), and that the notion of the "maximum contact principle" must "not be used to detract" from the child's best interests inquiry (para. 135).

Lastly, the analysis before the Court is not "how to best promote the parenting time factor; it was how to best promote the best interests of the children," and that "[t]hese considerations are not synonymous. Nor are they necessarily mutually reinforcing. Courts should only give effect to the parenting time factor *to the extent* that it is in the best interests of the child" (para. 164).

Every Family is Unique: Ontario Court of Appeal

A similar approach has been articulated by the Ontario Court of Appeal. In *Knapp v. Knapp*, Benotto J.A. held that maximum time "does not necessarily require equal parenting time", and that each family being unique means that parenting-time may be equal or it may not be equal (*Knapp v. Knapp*, 2021 ONCA 305, paras. 30-34; also see *Rigillo v. Rigillo*, 2019 ONCA 647, para. 13).

Interpretations in Practice

Even prior to *Barendregt*, Superior Courts have been interpreting the "parenting time factor" in the amended Divorce Act to mean that there is not "a presumption in favour of equal time or maximum time with each parent" (*McBennett v. Danis*, 2021 CarswellOnt 7411 (S.C.J.), para. 89; *S.C v. C.C.*, 2022 CarswellOnt 6713 (S.C.J.), para. 34). The "overriding test is the children's best interests and the paramount consideration set out in s. 16(2) of the child's physical, emotional and psychological safety, security, and well-being" (*S.C v. C.C.*, 2022 CarswellOnt 6713 (S.C.J.), para. 34).

When approaching the parenting-time matter, presumptions are not in place. Rather, the focus is on the children's best interests given the unique factual makeup of the particular case.

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