

USING THE *AFCC-O PARENTING PLAN GUIDE AND TEMPLATE*:

Tips for Lawyers, Judges, Mediators and Mental Health Professionals

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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* on March 1, 2021,¹ encourages and formalizes 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 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.²

To support and encourage the use of child-focused, realistic parenting plans, the Ontario Chapter of the Association of Family and Conciliation Courts (AFCC-Ontario) has updated the *Parenting Plan Guide* and *Parenting Plan Template*, making these materials freely available to

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¹ Bill C-78, enacted as SC 2019, c. 16. Similar provisions are found in the amendments to Ontario’s *Children’s Law Reform Act*, which is generally applicable to parents who are not obtaining a divorce because they never married.

² S. 16.1(1)

parents and their professional advisors.³ These materials were prepared by a ten member Task Force with multidisciplinary membership, with draft materials being widely circulated for comments during the process of drafting. Three webinars are now available through the AFCC-O website to assist family law and child protection professionals in the utilization of these materials.

The *Guide* combines knowledge gained from developmental research on the impact of parental separation and divorce on children with practical insights from professionals about the needs of children with parents living apart and about effective post-separation parenting. 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. 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* 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.

This short paper offers some suggestions for how professionals can use these materials to assist parents in making appropriate plans for their children.

Using the AFCC-Ontario Materials

The *Guide* provides a useful summary of basic social science knowledge about the effects of separation on children, child development and parenting. As a starting spot, every professional who is involved in a family dispute case, even on an occasional basis, should be fully familiar with the issues and approaches in these materials.⁴ 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* 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. The *Template* provides examples of possible clauses, and in some cases suggests a range of possible clauses. However, these clauses are intended to be suggestive, not in any way

³ <https://afccontario.ca/parenting-plan-guide-and-template/>

⁴ This type of “common sense” professional knowledge can, in appropriate cases, be cited by the courts; see *R. v. Hernandez-Lopez*, 2020 BCCA 12

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 materials clearly state that court proceedings may be essential to protect children and victims of family violence or where there are such issues as parental mental health or substance abuse. Further, professionals who are dealing with vulnerable populations may decide that these materials are not appropriate for some (or all) of their clients.

Tensions in Making a Parenting Plan - The Value of Professional Involvement

There are inevitably tensions in making a parenting plan. Greater specificity and detail may help reduce immediate conflict, but 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 will share the same parenting schedule, both for logistical reasons and to allow them to provide emotional and practical 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.

These tensions and others can best be addressed if parents have access to the assistance of skilled, knowledgeable family justice professionals. Although the materials will be useful for parents who are proceeding without professional assistance, there are many references to the value of professional assistance, and links to such services as Legal Aid Ontario, court-connected mediation in Ontario, and the Ontario Family Law Limited Scope Services Project.

The Parenting Plan as a Document

As discussed in the *Guide* and *Template*,⁵ 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 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

⁵ *Guide* p.7 and *Template*, p. 3 & 37.

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 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 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 using the concept of a “plan” rather than an “order,” is that the concept of a 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.”⁶ Factors that should be accounted for in orders and agreements 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. 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 a week about shared parenting arrangement, are generally not appropriate for very young children.

The *Guide* and *Template* suggest that discussions of a parenting time schedule can often most usefully be based on a “regular” schedule in a 4-week cycle (or a two week cycle that is repeated), with some provisions for a holiday schedule.⁷ The *Guide* has 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

The materials also discuss whether there should be 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

⁶ S. 16(2)

⁷ It is suggested that professionals avoid terms like the “normal” schedule, as this implies that there it meets some external standards of “normalcy”.

there are likely to be significant absences. If conflict is high, this clause can exacerbate tensions, and if conflict is low, many parents can resolve these situations informally.

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. 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 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.⁸ These “day-to-day decisions” will be matters 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-to-day decisions, while others may not.

Drafting - Define the Parties

With the coming into force of the new legislation, 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 co-operating, and in having each of their 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.⁹ All of these statements have similar themes of encouraging child-focused, co-operative co-parenting. While there may be concerns 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

⁸ The new *Divorce Act*, s. 16.2(2) specifies:

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.

be promoted by this. Some judges may require such clauses to be included as recitals, beginning 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 may need to be adjusted, 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. It is generally appropriate for a parenting plan to provide for the possibility of review, and 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 a Parenting Plan order without returning to court. Although a court will not enforce a revision that was not incorporated in a court order, it is unlikely that the varied term will be enforced either. 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 new *Divorce Act* 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, 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.”¹⁰ 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-focused 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” 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 advise parents to get appropriate legal advice if this may be an issue.

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.

Recent Revisions of the AFCC-O Materials

The materials were recently revised by the AFCC-Ontario, to reflect changes in Ontario's *Children's Law Reform Act* and the *Divorce Act*.