



Shared Custody by Scott D. Abel

When parents are divorcing or separating and considering how their children will be raised, one topic that often comes up is a shared parenting arrangement, or shared custody. What is shared custody, and why is it important?

Shared custody is when each parent has physical care and control of a child for not less than 40 per cent of the time over the course of a year.

Certain situations are obvious when the care arrangements are truly shared custody. The children are in the care of each of their parents for a week at a time, or for an equal amount of time during the week.

However, certain circumstances are often more difficult to categorize, such as where the child spends time with each parent, as the parents can agree. The child is in the care of each parent in a much more relaxed situation, which is how the parents want to spend time with their child.

The difficulty such a situation creates is actually keeping track

of that time, to determine whether or not the parents are in a shared custody situation.

The reason such a determination is important, is because it affects the amount of child support being paid. A shared parenting situation could result in a reduction of child support, although not always.

However, before the Court can even consider whether or not child support ought to be reduced, there must first be a determination that one of the parents has care and control of the child for at least 40 per cent of the time, over the course of a year.

How then does one determine 40 per cent of the time, over the course of a year? Do you count hours or days?

Some judges have taken a rigid, formulaic approach whereby the Court becomes little more than a calculator, and the court hearing is an accounting exercise. Other judges have taken a more global approach, whereby the actual parenting situation is considered.

Recently, the Manitoba Court of Appeal had the opportunity to consider this question. The 40 per cent threshold should not be a strictly mathematic calculation, but there is some mathematical aspect to the analysis.

The Court of Appeal did not reject the minute-by-minute approach, but preferred a calculation based on days or weeks, or portions thereof, as being a more realistic approach.

Ultimately, the judge hearing the case has a certain amount of discretion to determine how he or she will decide whether or not the 40 per cent threshold has been met. As long as the judge explains what approach they are taking, and there is evidence to support the conclusion, the judge has the ability to take whatever approach they choose.

The approach taken must be flexible and allow the judge to take into account the varied circumstances of different families.

So what factors will the court consider in determining whether or not the 40 per cent threshold has been met? The court ought to consider the desirability of flexible custody and access schedules, the stated desire of the children to spend additional time with the parent seeking to meet the 40 per cent threshold, who is responsible for the children while they are at school or in daycare, who is responsible for meal preparation, including school lunches, summer vacation and holiday arrangements, and whether access has in fact been exercised in accordance with the governing agreement or court order.

Unfortunately, like most court matters, no clear and definitive answer can be provided as to whether or not a parent has met the 40 per cent threshold. However, there is now some further guidance from the courts to consider as to whether or not one's personal circumstance is one of a shared custody arrangement.