



Is a Presumption of Equal Time Sharing in the Best Interests of Children?

A Child Centered Developmental Perspective

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In the last legislative session the Florida Legislature considered amending s. 61.13, F.S.; 38 establishing a presumption that it is in the best interest of the child for the court, in the instance of divorce of the parents, to order equal time sharing for each minor child. "Presumption is a legal assumption that something is a fact based upon another proven fact or set thereof. The presumption is given sufficient weight, once established, that an even greater amount of evidence to the contrary would be needed in order to contravene it. It has the effect of shifting the burden of proof or that of producing evidence to the opposing party."¹ The specific language for the bill stated "The court shall determine all matters relating to parenting and time-sharing of each minor child of the parties in accordance with the best interests of the child and in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act, except that modification of a parenting plan and time-sharing schedule requires a showing of a substantial, material, and unanticipated change of circumstances. It is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing. There is no presumption for or against the father or mother of the child or for or against any specific time sharing schedule when creating or modifying the parenting plan of the child. Equal time-sharing with a minor child by both parents is in the best interest of the child unless the court finds that:

a. The safety, well-being, and physical, mental, and emotional health of the child would be endangered by equal time sharing, that

visitation would be presumed detrimental consistent with s. 39.0139(3), or that supervised visitation is appropriate, if any is appropriate;

- b. Clear and convincing evidence of extenuating circumstances justify a departure from equal time-sharing and the court makes written findings justifying the departure from equal time-sharing.
- c. A parent is incarcerated;
- d. The distance between parental residences makes equal time-sharing impracticable;
- e. A parent does not request at least 50 percent time-sharing;
- f. A permanent injunction has been entered or is warranted against a parent or household member relating to contact between the subject of the injunction and the parent or household member; or
- g. Domestic violence, as defined in s. 741.28, has occurred."²

Florida is not alone in considering equal-time sharing. Other states are considering similar legislation (Michigan) or have legislation enacted that support (Wisconsin) equal physical time-sharing of minor children.³ As of 2006, only "three states did not acknowledge shared placement (alternatively referred to as "extended visitation," "parenting time," "joint physical custody" or "dual residence")."⁴ This movement toward equal time sharing has been accompanied by considerable discussion as to its impact on children and the ability of these arrangements to meet the best interests of the child standard. It would be desirable to report that consensus has been reached but that is not the case. While it appears that the interests of various parent constituencies are served by equal physical time provi-

sions the child development literature does not support the application of such a presumption. We will identify several areas of concern and review the current research.

What we *do* know about when children of divorce do well

"Research shows that the best interests of children after parental separation are most strongly connected to the quality of parenting they receive, the quality of the relationship between their parents, and practical resources such as adequate housing and income – not to any particular pattern of care or amount of time."⁵ Good outcomes for children were more likely when fathers had positive relationships with their children and had an active and positive parenting approach, including both warmth and boundary setting. Children benefit when fathers are actively involved in their children's lives.⁶ However, the available evidence shows that "there is no single optimal amount of time that benefits children, as families are different, and much depends on the pre-existing patterns before any divorce or separation. What is clear is that there is no empirical evidence showing a clear linear relationship between the amount of shared time and improving outcomes for children."⁷

Research shows shared time arrangements work well when they are child-focused, flexible and cooperative. What is interesting is that many of these arrangements are created by the parents and their representatives, without there being imposed by the courts.⁸ These arrangements are flexible and are often changed over time to reflect the evolving requirements and needs of the children.

"Research shows that the factors



which make shared parenting time hard for children (meaning that the stress and burden outweighs the benefits for them) are essentially the opposite of those that facilitate it, notably high on-going parental conflict, family violence and abuse, and rigidity. There is recent and increasing evidence that shared time arrangements present particular risks for children in three main contexts. These are when mothers express on-going 'safety concerns', where there is high on-going parental conflict and when children are very young – or some combination of these.⁹

Finally, there is strong evidence children's exposure to high on-going post-separation parental conflict is damaging for children.¹⁰ Children's exposure to high conflict is associated with increased levels of depression, anxiety and self blame. There is also growing evidence that shared time arrangements involving ongoing high levels of parental conflict are more damaging than other parenting arrangements with entrenched high conflict.¹¹

In sum the available research suggests that a 'one size fits all' solution to the issue of time-sharing for children would not be in the best interest of children and in many cases would have the courts usurp control of an area that is usually negotiated productively and efficiently, and in a manner reflecting the needs and wishes, of the separating parents.

Children of different ages are developmentally different cognitively, emotionally, and temperamentally.

Florida considers the period of childhood to extend from birth to 18 years of age. As regards divorce, there is no state wide recognition that this age range encompasses developmentally different cognitive, emotional and social skill sets that may respond differently to presumptive time sharing arrangements. The language of the proposed legislation does not delineate any developmental needs or differences of children within the 0-18 age range. It appears to presume that a child of two would respond to

an equal time sharing arrangement in the same manner as a child of fourteen. This is not the case in other areas of Florida law. For example, Florida Statute 794.005 distinguishes age criterion within childhood as regards sexual battery.¹² In addition, certain circuits within the state have clearly recognized, in issues related to time-sharing, that children at different ages, especially very young children have different developmental capacities and requirements than children who are older.¹³

One of the more clearly established bodies of knowledge in developmental neuroscience concerns itself with the acquisition of cognitive skills and the interaction of these skills with social and emotional growth.¹⁴ A review of this body of work is beyond the scope of this paper. What is important to note is that children move through a somewhat predictable sequence in development of cognitive skills; however they are subject to both inter-developmental variability and intra-developmental variability. Thus, children of differing ages have differing capacities to process information both along the developmental continuum and within their own developmental course.¹⁵ These variations result in children having different levels of ability to understand and make sense of the world around them.

In addition to cognitive development children differ in temperament.¹⁶ Temperament is essentially internal regulation of how children react and respond to the world around them. These characteristics are innate, describe how the child is hard wired to respond to environmental stimulation and are evident from birth. Temperament characteristics described by the now classic New York Longitudinal Study (NYLS) include distractibility level, rhythmicity, approach-withdrawal, adaptability, intensity, mood, attention span and persistence, distractibility and sensory threshold.¹⁷ As with cognitive characteristics, children differ on a variety of temperamental characteristics. Therefore, children differ from each other very early in life and these differences have important implications for parent-child

interaction.¹⁸ Chess and Thomas¹⁹ describe the concept of "Goodness of Fit" which speaks to the interaction of the child's temperament and parent or family interaction. Thomas, Chess, Birch, Hertzog and Korn²⁰ studying infant temperament, found that 65% could be categorized into one of three groups: *easy*, *difficult*, and *slow-to-warm-up*. Of the 65%, 40% fit the easy pattern, 10% fell into the difficult pattern, and 15% fell into the slow to warm up pattern. Each of these temperamental patterns interacts with the temperamental patterns of the parents producing relationships. These relationships can be adaptive or maladaptive.

Thomas, Chess, Birch, Hertzog and Korn²¹ characterized Easy babies as readily adapting to new experiences, generally displaying positive moods and emotions and having normal eating and sleeping patterns. Difficult babies tend to be very emotional, irritable and fussy, often crying. They also tend to demonstrate irregular eating and sleeping patterns. Slow-to-warm-up babies demonstrate a low activity level, tending to withdraw from new situations and people. They are characterized as slow to adapt to new experiences, but accepting after repeated exposure. They found that these broad patterns of temperamental qualities are remarkably stable through childhood and across cultures. This means that parents as well as children have their own temperamental styles. The result of which is that parents' styles and children's style can be a good match or a poor fit with each other.

A poor "fit" can result in parent-child bond distresses and impacts negatively on the developing child. In sum, children of the same parents will differ significantly in cognitive and temperamental adaptation to the parents themselves, and a time-sharing schedule. An inflexible legislatively or court imposed schedule would not permit the parents to adapt their time sharing to their own and to the individual needs of their child.

The research on the development of children does not support the adoption of legislative action that presumptively supports one time

continued, page 20

**Equal Time Sharing***from page 17*

sharing model. Opinions on various time sharing plans remain equivocal. Specifically, one area of continuing controversy is the impact of equal time sharing and the developmental appropriateness of certain types of parenting plans for very young children. Lamb and Kelly²² have taken the position that young children, including infants and toddlers, should have frequent contact with both parents in a variety of circumstances allowing for the development and maintenance of a nurturing bond between child and parent. They argue that this contact should include overnight time-sharing. Interestingly this interpretation also included the statement that “to be responsive to the infant’s psychological needs, the parenting schedules adopted for children under the age of two or three must involve more transitions, rather than fewer to ensure the continuity of both relationships and the child’s security and comfort.”²³ Lamb and Kelly²⁴ stressed that the infant’s needs might require parental adaptation. Solomon and Biringer²⁵ in response and after looking at the same data, reached the opposite conclusion, and opined that overnight time sharing should not begin until the child was three. They argue that the research is far from conclusive in either direction and substantially more work should be done before the results are incorporated into social policy.

Attachment

Seemingly central to the argument for equal physical time-sharing is the idea that equal time is essential for each child to establish and maintain a stable and secure attachment with their parent. In other words the amount of time itself is the key variable to ensure effective parental bonding. Time is certainly one variable in the creation of a strong and appropriate parental bond. For example research on the strength of attachment between children and their fathers indicates that there is a linear arrangement between amount of time spent and the degree

of closeness between the parent and the child.²⁶ The essential question is whether time, by itself, is the critical variable, the one that accounts for a significant amount of explained variance. The answer is that it is not in most instances of shared or equal responsibility time sharing arrangements, but it is the extreme situation where one parent rarely gets to see the child at all which is problematic. There is, for example, research that suggests that time might be a predictive factor in the creation of stress for the children. Laumann-Billinga & Emery²⁷ found, in high conflict cases, that divorce distress was highest at moderate levels of parenting time with father. Kelly and Lamb²⁸ and Solomon and Biringer²⁹ agree that time is one of a cluster of variables that contribute to the creation of a strong and supportive attachment. As the data from Laumann-Billinga & Emery³⁰ suggest it might not be the most important one.

The preponderance of available research indicates that most infants in intact families form stable and secure attachment to both parents, at about the same age, despite the fact that most infants spend more time with their mothers than with their fathers.³¹ Meta-analysis indicates that it is the quality of the parent child interaction that helps determines the strength and security of the attachment between a child and parent.³² Quality however is a poorly defined term and the research that identifies quality as a predictor variable also indicates that quality explains only a small portion of the explained variance as regards attachment.³³ This indicates that developmental science has not clearly identified all of the factors associated with the formation of secure attachment in young children and that any a priori assumption as to the value of any one predictor variable (i.e. time-sharing equality) is premature. Appleyard and Berlin³⁴ summarizing the available research stated the following. A secure attachment is characterized by the child’s ability to use his or her parent as a source of comfort and a “secure base” from which to explore. A key principle of attachment theory is that dependence leads to indepen-

dence. In other words, it is only when a child feels confident in his parent’s availability that he can fully explore and play on his own. Parental behaviors typically associated with secure attachment include:

- Sensitive and responsive care
- Clear, consistent, developmentally appropriate expectations and supervision
- Warm, positive, and responsive verbal interaction
- Seeing the child as a unique individual, having insight into the child (i.e., why he does what he does)
- “Holding the child in mind” (i.e., awareness of and ability to reflect on the parent’s own feelings and responses to the child)
- Infant and early childhood behaviors associated with secure attachment include:
 - Comfort exploring in presence of an attachment figure
 - When hurt, going to an attachment figure for comfort (i.e., not a stranger)
 - Seeking help when needed
 - Willingness to comply with requests with minimal conflict
 - No pattern of controlling or directing the behavior of caregivers

Clearly, time is a factor in the exposure of children to all of these productive parent behaviors. Just as clearly, time alone cannot determine whether a particular parent will demonstrate these behaviors or whether the attachment that is developed is a secure and positive one. “Variability in attachment organization has been found to fall along two attachment dimensions, attachment anxiety (i.e., variability in fear of abandonment, rejection, and loss) and attachment avoidance (i.e., degree of discomfort with intimacy, closeness, and dependence.”³⁵ Elevated levels of both anxiety and depression have been demonstrated in children who have been described as anxiously attached.³⁶ Anxiously attached individuals are also noted to be excessively dependent on others, unable to distance themselves



from relationships characterized by conflict, and become vulnerable to the internalizing symptoms of unipolar affective disorders (e.g., self-blame, self-deprecation) in the presence of loss and abandonment.³⁷ All of these negative events are the result of exposure to and time spent with parents who ineffectively use parenting strategies. In sum, time alone can produce both positive and negative effects depending on the circumstances.

Flexibility

“Child custody and visitation (sic) disputes are among the most difficult for judges to decide. These disputes entail complex legal, social, cultural, economic, mental health, and related issues. They require judges to predict likely future behavior and outcomes, rely increasingly on competing expert testimony, and ultimately depend upon a broad, indeterminate standard of the “best interests of the child.” This best interest’s standard demands that courts decide cases in a way that ensures the well-being of children.”³⁸ Currently, the State of Florida requires that 20 factors be considered when determining the best interest of a child and the ultimate time sharing arrangements related to best interests.³⁹

Establishing a presumption for a judicial decision is in effect curtailing judicial review based on a variety of complex factors and mandating a decision based on one factor alone. Is this inflexible and hyper focus on one area warranted? The answer as noted above, is no. There is no indication in the developmental literature that equal, physical time sharing supersedes any of the other state required factors in determining what is in the best interests of children. Even the proposed presumption statute anticipates problems with this lack of flexibility and seeks to outline some of the more egregious circumstances wherein the presumption could be set aside. These are outlined above. It can hardly be assumed that these issues would be the only factors that might arise or that the issues identified are specific enough to not require further elucidation (For example, is twenty five miles too great a distance and does the distance factors

change whether you are in an urban or rural environment). Furthermore, developmentally there is no basis for assuming that any one of these factors is more important than one of the others.

Lowenthal⁴⁰ in reviewing the effects of mandatory sentencing guidelines reached a similar conclusion when he stated “Mandatory sentencing emphasizes a single aggravating factor, contrary to determinate sentencing, which directs judges to a whole complex of actions. Mandatory sentencing

also is applied unevenly, with those exercising their right to trial often receiving harsher penalties. Thus, a factor that should not be detrimental under determinate sentencing, such as exercising one’s constitutional right to trial, is detrimental under mandatory sentencing. In sum, the goals of determinate sentencing-consistent punishment for like crimes and proportional punishment for different crimes-are greatly undermined by mandatory sentencing.⁴¹

continued, next page



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Equal Time Sharing from preceding page

Lastly, in addition to curtailing judicial review, it curtails parental flexibility and potentially, emotional investment. It usurps the prerogative of the majority of parents, who are already, without court intercession, successfully developing their own parenting time sharing plans and potentially minimizes their commitment to fulfilling the parameters of the agreement.

Summary and Conclusions

Lamb and Kelly⁴² caution that the available research does not support the application of guidelines that should be followed “mindlessly” whenever parents of young children separate or divorce. They argue for a framework for prudently evaluating the needs and best interests of children. Clearly the available research supports the idea that children are best served when two well-meaning and child centered adults are involved in their care and when these adults are able to put aside their own issues in service to the development and mental health of their children. In fact, emerging research indicates that equal-responsibility and parenting time –sharing arrangements work the best when the families choose to engage in them on their own. Just as clearly the available research suggests that equal parenting in terms of shared responsibility is the desired goal as it relates to parental satisfaction and the degree of attachment post-divorce.⁴³ Given the nature of the data, the findings of benefit related to shared parenting may be related to the parents that select these arrangements as opposed to the effect of the arrangements themselves. In other words, parents who cooperated to provide a warm and secure environment will continue to do so, and high conflict parents will continue to engage in conflict.

Overall, the available research suggests that rigidly adhering to a presumption of equal physical time sharing represents an overreach in the interpretation of the available evidence as regards the child’s best

interest. Presumption also would ignore research indicating that there are circumstances where equal-physical time sharing is not beneficial.⁴⁴ In most instances, with the support of the court, families should continue to have the flexibility to decide what works for themselves and their children. For the vast majority of families that will continue to mean the selection of equal responsibility and equitable time sharing that is in accord with the family’s unique circumstances. In conjunction with their legal representatives, supported when desired by professionals with expertise in child development or mental health, they will determine the best interests of the child through a thorough, considered and thoughtful analysis of all relevant factors including temperamental characteristics of both parents and their children, goodness of fit, developmental and learning concerns and the history of attachment and caretaking. In that minority of cases characterized by high conflict, the role of professionals with expertise in child development may be even more important and essential. The information they bring to the court and counsel can assist the court in its deliberation, being mindful that it is in just such instances where equal physical time sharing may in fact be ill advised. In either circumstance, deliberations about time sharing should not be constrained by a one size fits all model that is not supported by the research. Rather, time sharing decisions should take into consideration the multitude of factors described.



S. FURR

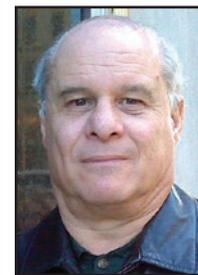
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