

CUSTODY AND PARENTING TIME: SUMMARY OF CURRENT INFORMATION AND RESEARCH

A REPORT OF THE PARENTAL INVOLVEMENT WORKGROUP A SUBCOMMITTEE OF THE STATE FAMILY LAW ADVISORY COMMITTEE

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COMMITTEE CHAIR PERSONS:

Linda Scher, Family Mediator and Facilitator, Portland

Dr. Ed Vien, Psy.D, Psychologist and Custody Evaluator, Portland

COMMITTEE MEMBERS:

Donna Austin, Director, Family Mediation Program, Lane County

Paul Edison-Lahm, Multnomah County Family Court Facilitator

Dr. Adam Furcher, PhD, Psychologist and Mediator, Portland

Janice Garceau, LCSW, Director, Family Court Services, Multnomah County

Kelly Lemarr, Attorney/Branch Manager, St. Andrew Legal Clinic, Washington County

Jane Parisi-Mosher, MA, LMFT, Therapist, Mediator, Parent Educator Yamhill County

Robin Selig, Attorney, Oregon Law Center, Portland

The Honorable Diana I. Stuart, Circuit Court Judge, Multnomah County

Judith Swinney, Parent Educator, Portland

I. INTRODUCTION

In March 2010, the Oregon State Family Law Advisory Committee (SFLAC) formed the Parental Involvement Workgroup to investigate local and national trends regarding best interest standards and practices for children of divorce, paying particular attention to the distinction between parenting schedules (referred to throughout as parenting time) and custody, referring to legal decision making authority as defined by ORS 107.169. A multi-disciplinary group was established for the purpose of reviewing developmental research, Family Court patterns, and legislative policies for the benefit of Oregon families. The task included examination of factors that support specific types of parenting time schedules and decision-making arrangements. Focused effort was given to identifying the developmental requirements of children, particularly those at risk for harm or maladjustment due to their family circumstances.

As societal customs and knowledge evolve, remaining abreast of relevant empirical evidence and contemporary standards when determining optimal post-divorce or separation arrangements is vital. A critique of existing presumptions and prevailing practices to promote child-centric policies and applications is integral to the process of creating viable custodial and parenting time arrangements.

II. PROTECTIVE FACTORS

Custody and parenting time decisions impact children and families for the rest of their lives, often influencing future inter-generational patterns. Given such potential life-altering effects, a thorough analysis of the complex and dynamic factors associated with the emotional well-being of children is an essential prerequisite to any legislative changes to Oregon's current custody laws.

To promote "best interest" provisions and positive post-separation adjustment, decisions guided by social science research that incorporate individual features of specific families are

optimal. Oregon's current legislative scheme, outlined in ORS 107.137, permits the application of new knowledge to the existing "best interest" standards.

Reliable empirical research has emerged over the past three decades that is highly relevant to the selection of parenting time schedules and legal authority arrangements.¹ Of particular importance and application are studies regarding resiliency and risk to children of divorce. The robust finding that the majority of children are resilient, adjusting to divorce and family changes without signs of acute distress or residual maladjustment, is easily overlooked.² Most parents finalize divorce and custody plans without protracted conflict and contentious litigation. This is a protective factor that is strongly correlated with a positive outcome for children.

Other protective factors that increase a child's resiliency and capacity to withstand the potential deleterious effects of divorce are related to both parental attributes and child characteristics. A key determinate to children's positive divorce adjustment is their parents' ability to shield them from adult conflict and controversy. At all ages and developmental stages, children benefit from parents who minimize discord while focusing on their offspring's needs and interests. Post-divorce adaptive functioning in children is enhanced by collaborative and cooperative parenting efforts. Parental communication and effective problem solving skills are strongly correlated with children's resiliency and adaptation.

Another highly influential protective factor is the quality of the parents' relationship with their child. Empathetic, nurturing, and sensitive parents, who cultivate close and secure emotional attachments with their offspring, foster their children's sense of stability and well-being.

Finally, children's pre-divorce functioning is an important factor associated with their capacity to cope with family changes and disruptions. Intelligent, sociable, and confident

children are more able to deflect the impact of parental break-up and maintain emotional stability and academic achievement. Furthermore, as children mature, their preference and satisfaction with their parenting time schedule is related to a positive divorce outcome. Additionally, the studies have suggested that continuity of parental involvement and positive affiliation with step-parents tends to mediate the possible adverse affects of divorce.

III. RISK FACTORS

Unfortunately, children of divorce are at greater risk for emotional and behavioral problems when compared to children of intact, two-parent households. Social science research has identified a long list of potential adverse reactions in children, ranging from acute anxiety and depressive syndromes to conduct disorders and school withdrawal.

Empirical studies consistently cite intra-familial dynamics and parental factors as heavily influencing a child's post-divorce adjustment. Exposure to domestic violence as well as protracted and intense parental conflict adversely impact a child's capacity to maintain a healthy developmental trajectory. Angry, uncooperative, and litigious parents are disruptive to a child's sense of security and stability, frequently creating loyalty binds and untenable triangulation for children. In some children, chronic social maladjustment and inability to sustain interpersonal attachments in adulthood is directly associated with the upheaval and distress of divorce they experienced as children.

Parental factors that impede a child's normative and functional development include: limited emotional availability, low psychological insight, immaturity, deficient knowledge, inadequate parenting skills, personality disorders, and significant mental illness. Poor maternal attachment and low paternal education also have been correlated with negative divorce outcomes.³

IV. FAVORABLE CONDITIONS FOR SHARED CUSTODY & PARENTING TIME

Research reviewed by this workgroup examined legal custody, shared parenting time arrangements, or a combination of both joint custody and shared care arrangements. Joint custody in the research and in this document refers to equally shared decision-making authority on the part of the parents. The majority of the research on shared care arrangements identified shared care as any arrangement in which the parenting time ratio constituted a 35/65 percent through a 50/50 percent distribution of parenting time.

In general, shared parenting time schedules are best suited for older children with collaborative parents who live in close proximity to each other, permitting environmental continuity.⁴ Consistent school, social, and family relationships tend to promote confidence, ego-strength, and achievement. Parents best serve their children's interests when they practice child-centric decision-making and implement parenting time arrangements that reflect their children's developmental requirements.⁵

The literature offers significant insight into what works in shared custody and parenting time arrangements. Research has repeatedly shown when certain qualities or factors are present, joint custody and shared parenting arrangements can work well. Those factors include families in which:

- The parents are mature, insightful, and free of violence, substance abuse, or psychological disturbance;
- The parents are able to provide warm, sensitive, and responsive parenting;
- The parents are committed to shared parenting *and* enter into the arrangement voluntarily;
- The parents experience low levels of conflict and psychological acrimony between them;
- The fathers have a higher level of formal education;

- The mothers perceive that the child's maternal attachment is not being disrupted;
- Both parents trust that the child is reasonably safe in the other parent's care;
- Logistical factors such as geographical distance and facility of transitions do not constitute barriers.⁶

Parents who demonstrate the above traits routinely and successfully enter into joint custody and shared parenting time arrangements of their own accord. When parents do not enter into these arrangements voluntarily, ample evidence suggests that compelling such an arrangement leads to increased inter-parental conflict, potential disruption in attachment for young children, an increase in children's experience of loyalty conflicts, and a lack of stability in care arrangements over time. These factors all increase the risk of poor child adjustment after divorce. The literature consistently shows that forced joint custody and shared parenting time arrangements are not good for children.

V. CONTRA-INDICATIONS FOR SHARED CUSTODY AND PARENTING TIME

Children with pre-existing vulnerabilities, such as cognitive, emotional, or behavioral problems are particularly at risk for maladjustment. The stress and tumult in high conflict, post-divorce families tends to exacerbate the children's maladies, frequently requiring remedial services and/or intensive interventions to re-direct detrimental patterns. Shared parenting time schedules and joint custody are not suitable for volatile, hostile, and antagonistic parents. Children are harmed by repeated exposure to parental enmity, that occurs often in shared custody arrangements with chronically discordant parents. Children under age ten are particularly vulnerable because they have not yet developed the internal coping skills or external support systems that would help them navigate family conflict.

Relevant to this discussion are findings that delineate situations in which joint custody and care is problematic or contraindicated.⁷ Where domestic violence, mental illness and high

levels of inter-parental conflict exist, joint custody and care result in poor outcomes for children and parents alike. These recurrent findings are reflected by the vast majority of jurisdictions in which special consideration is given to cases involving such factors and concerns.

Cumulative research finds additional circumstances that contribute to children and families faring poorly. Parenting plans for very young children, those under age four, pose unique challenges for parents. These challenges are exacerbated by the significant developmental and emotional needs of infants, toddlers, and preschoolers and the complexity of research on what are the best arrangements for children these ages. There are notable gaps and disparities in research results and professional opinions in certain domains.

Some research suggests that young children with responsive, skilled, and collaborative parents are able to adjust, girls more easily than boys, to overnight parenting on a consistent schedule with a non-residential parent with whom the child has a strong bond.⁸ Other research evidence indicates that shared overnight care for infants and very young children has a negative impact on certain behavioral and emotional outcomes. In a 2010 longitudinal study, children in shared overnight care situations over time reportedly had greater levels of attachment distress, anxiety, and lower initiative.⁹ Taken as such, an apparent lack of research congruence and differing expert opinions can present a confusing picture when parents and the courts endeavor to make decisions in a young child's best interest.

In other aspects the studies do offer very helpful guidance. Of special significance is that all of the research supports that whenever young children are involved, careful consideration must be given to attachment, infant temperament, level of inter-parental acrimony, consistency of contact, and the degree to which a parent has the requisite skills to support a child's transition between two households. Clearly, the critical developmental needs of young children, the complexity of the clinical findings, and the unique set of parental qualities and attributes

required to successfully share time with an infant, toddler or preschooler, all reinforce the importance of making diligent and individualized decisions about care arrangements.

Another salient factor is the stability of shared care arrangements over time. Longitudinal studies indicate that the majority of families in these arrangements revert from shared care to primary care over a span of several years. The reasons cited were the expressed wishes of the children for a primary home or more time with a primary parent, fundamental logistical hurdles, and whether or not the families had entered into shared arrangements voluntarily.

Notably, the research finds that joint arrangements entered into willingly by parents were *two and a half times more stable* than their counterparts over time.¹⁰ Of considerable concern are the findings that shared parenting time compelled by a legislative presumption appeared to perpetuate higher levels of inter-parental conflict that increased over time and appeared to increase children's reports of feeling caught in the middle.¹¹

VI. PRESCRIPTIONS FOR TAILORED ARRANGEMENTS

In summary, social science research strongly supports the conclusion that legal custody and parenting time arrangements premised on the needs and attributes of a given family rather than statutory presumptions are most desirable.¹² Due to the complex and fluid nature of families, parental decision-making authority and residential schedules that represent the strengths and characteristics of a specific family unit best support positive outcomes for children. Further, arrangements based on the children's welfare and best interests, including their parents' ability to collaboratively address their developmental needs, are ideal. Although joint legal and physical custody is optimal for some families, it is unsuitable and detrimental to others.

A legislative solution requiring presumptive joint legal and physical custodial arrangements is not supported by empirical evidence. No other state has a presumption that

mandates joint physical custody reaching the level of shared care. Of the eight states (and District of Columbia) that do have presumptions regarding joint custody, none require more than a “significant” amount of parenting time for each parent, let alone equal time. Thus statutes in these states effectively create a presumption for joint *legal* custody, for which Oregon already has a statutory preference. Presumptions or preferences for joint legal custody are often easily overcome: for example, by a finding of domestic violence or by a finding that joint custody is not in the best interests of the child, or, as in Oregon, when parents do not agree. Moreover, there is no evidence that the absence of presumptions in the other forty-one states creates any kind of barrier to parents arriving at joint legal custody – nor is there any evidence that Oregon’s existing statutory preference is insufficient for this purpose. Finally, there has been no legislative trend toward joint custody presumptions in the two decades since most were enacted in the 1970s and ‘80s. Instead most jurisdictions, including Oregon, avoid “one size fits all” presumptions and encourage custom-tailored arrangements that accurately correspond with a child’s best interests.

VII. FUTURE TRENDS:

Oregon families are well served by our current statutory requirement for mediation and parent education. Most parents avoid the need for custody evaluation and litigation by working together, often using mediation to establish practical arrangements that benefit their children. These families recognize the importance of cooperative care of their children, mutually supporting their healthy development. This large group of parents accepts responsibility for their children’s needs without the imposition of legal presumptions and directives.

Collaborative parental attitudes and efforts are promoted by parent education that affirms the value of working together in a flexible and conciliatory manner. Recent research highlights the benefits of a skills based curriculum to teach pragmatic co-parenting skills.¹³ Early

participation in the class strengthens a positive outcome, prompting some states to consider requiring parents to simultaneously enroll when filing divorce petitions. At a minimum, parent education completed prior to mediation is suggested to enhance parental understanding and motivation for settlement agreements. Parent education that occurs as early in the dissolution process as possible, even prior to filing, is ideal.

As Oregon moves toward implementing online court access and procedures, parenting education materials will be readily available, along with interactive use of the SFLAC parenting plan guides. These will further enhance the parents' ability to create plans that fit their children's needs. Instead of reflecting contemporary knowledge and standards, statutory presumptions represent rigid adherence to a bygone era. Oregon families will greatly benefit from policies that encourage parents to use all available resources to create optimal custody and parenting time schedules that correspond with their unique circumstances.

VIII. ENDNOTES

^{1.} Jonathan Gould and David Martindale, *The Art and Science of Child Custody Evaluations* (New York: Guilford Press, 2007).

^{2.} Eleanor Maccoby and Robert Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* (Cambridge: Harvard University Press, 1992).

^{3.} Jennifer McIntosh et. al., "Child Focused and Child Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Post-separation Adjustment," *Family Court Review* 14 (2008):105-124.

^{4.} Jennifer McIntosh and Richard Chisolm, "Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation," *Journal of Family Studies* 14 (2008): 37-52
McIntosh and Chisolm review two studies. The first follows 183 families participating in mediation over a four year period. The second discusses seventy-seven parents and 111 children involved in pre and post litigation interviews and assessment for a period of up to four years. It concludes the following:

1. There is a high risk to children's overall emotional well-being in families where there is shared care of children and parents demonstrate immaturity and low levels of insight, parents demonstrate poor emotional availability to the child,

there is ongoing inter-parental conflict there is ongoing psychological acrimony between the parents, and the child is perceived by one parent to be at risk in the care of the other parent.

2. Children who do not fare well in shared care arrangements are those that are under age ten years, report being unhappy with shared care arrangements, and experience one or both of their parents as emotionally unavailable.

⁵. Rosemary McKinnon and Judith Wallerstein, “Joint Custody and the Preschool Child,” *Conciliation Courts Review* 25 (1987): 39-47. The article reviews a longitudinal study of twenty-six children under the age of five years living in shared care arrangements. It concludes that overall there is no evidence that joint custody protects children from the negative impact of parental separation and divorce. Children who did well in joint custody arrangements had parents that were highly motivated to make joint custody work, had high levels of investment in the child, and were able to protect their children from exposure to conflict. In families where fathers had engaged in little primary care prior to separation, mothers struggled for years with fears about the quality of care young children were receiving. Children younger than age three adapted better to the frequent transitions required by joint custody than children aged three to five years. The key to success for parents and children was the presence of committed, mature, sensitive parenting on the part of both parents.

⁶. Janet Johnston, “Research Update: Children’s Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custodial Decision Making,” *Family and Conciliation Courts Review* 33 (1995): 415-425. Johnston’s article is a literature review of six separate studies exploring the impact of custodial arrangements on children. The reviewed studies include a combined total of 1,300 subjects representing children ages 3 to 16 years and their parents. The article identifies the following conclusions and recommendations.

1. Warm, responsive parenting is the best overall predictor of good outcomes for children and is therefore “the domain that should carry the most weight” in making decisions about residential arrangements post divorce/separation.
2. Children fare better in the care of parents free from psychological disturbance and substance abuse.
3. Children need arrangements that minimize exposure to inter-parental conflict.
4. High conflict parents have poor prognosis for cooperative parenting and make poor candidates for joint custodial decision making.
5. In families where there is high conflict or poor quality of parenting it is beneficial to children to maintain supportive relationships with other positive adults.
6. The presence of domestic violence should be addressed by:
 - o parenting plans that address the safety of children and the victim,
 - o sole custody for the non-offending parent, and
 - o supervised parenting time when there is current violence or current threats of violence.

See Also, Jennifer McIntosh, et. al., “Post-Separation Parenting Arrangements:

Patterns and Developmental Outcomes for Infants and Children: Collected Reports,” *Australian Government Attorney General’s Department Special Report*, (2010) 1-169. This article can be downloaded by going to the following website: www.ag.gov.au and adding the title to the above report or by simply typing the name of the report into an internet search engine, such as Google.

The authors summarize two studies commissioned by the Australian Government Attorney General’s Department to explore outcomes of different post separation parenting arrangements on infants and children. Findings were drawn from a study that examined 131 high conflict families and a second study that randomly sampled the parents of 10,000 children between birth and five years of age. The authors cite the following findings:

1. Educational and employment resources, geographic proximity and inter-parental relationship factors such as mutual respect and flexibility made up the “component parts” of dyads in which shared care appeared to “work”.
2. Nurturing relationships with each parent and a supportive relationship between the parents had a greater impact on children’s overall mental well-being than any particular pattern of overnight arrangements.
3. However, rigid arrangements, especially those fueled by acrimony and poor cooperation, did have a negative impact on children’s overall emotional well-being.
4. Children under age two years living with a non-residential parent only one or more nights per week were more irritable and anxious.
5. Children age two to three years spending five nights or more per fortnight with the other parent had lower levels of persistence in tasks, play and learning than their peers, higher levels of distress in their relationship with the primary caregiver, and overall problems consistent with attachment distress.
6. Negative effects for the four to five year age group were negligible and the authors hypothesize that this is due to the development of the capacity to anticipate contact with the other parent that developments by preschool age.

See Also, Jennifer McIntosh, “Legislating for Shared Parenting: Exploring Some Underlying Assumptions,” *Family Court Review* 47 No. 3 (2009): 389-400. McIntosh’s article reviews twenty years of research on the impact of shared care arrangements on children and families. The article also reports on the findings of a study of 141 families (276 children) involved in Child Involved and Child Inclusive Mediation. Participants were assessed at the one and four year mark post mediation. Based on the literature review and the study specifically described in the article, McIntosh concludes the following:

1. Over the four year period, 65% of families reverted from shared cared to primary care arrangements.

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2. Overall, shared care arrangements entered into voluntarily were 2.4 times more stable over time rather than shared care arrangements imposed by the courts.
 3. Nearly two times as many children in shared care arrangements wanted to change their arrangements vs. children in primary care arrangements.
 4. Approximately one third of the children in shared care arrangements expressed the desire to see more of their mothers. One in ten expressed the desire to see more of their fathers.
 5. Over the four year period of the study 45% of all the children in shared care arrangements expressed the desire to change their arrangements. All but one of those children wanted more time with their mothers.
 6. Children in shared care arrangements reported sustained inter-parental conflict over the four year period, while children in traditional/primary care arrangements reported significant decline in inter-parental conflict.
 7. Children in shared care arrangements were significantly more likely to report feeling caught in the middle than children in primary care arrangements.
 8. Fathers in shared care arrangements ultimately reported higher levels of ongoing conflict over time than their counterparts in more traditional arrangements.
 9. Mediation that included direct input from the child was significantly more likely to result in less than shared care arrangements, i.e. less than 65:35 parenting time ratio.

⁷. Joan Kelly and Robert Emery, "Children's Adjustment Following Divorce," *Family Relations* 52 (2003): 352-362.

⁸. Marsha Kline-Pruett, Rachel Ebling, and Glendessa Insabella, "Critical Aspects of Parenting Plans for Young Children: Interjecting Data into the Debate about Overnights," *Family Court Review* 1 (2004): 39-59.

⁹. Jennifer McIntosh, et. al., "Post-Separation Parenting Arrangements: Patterns and Developmental Outcomes for Infants and Children," *Australian Government Attorney General's Department Special Report*, (2010) 1-169. This article can be downloaded by typing the name of it into the search box of www.ag.gov.au or by using an internet search engine, such as Google.

¹⁰. *Id.*

¹¹. McIntosh, *Post-Separation Parenting Arrangements*.

¹². Joan Kelly, "Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce," *Journal of the American Academy of Matrimonial Lawyers*, 19 (2005): 237-254.

¹³. Kevin Kramer et. al., "Effects of Skilled-based vs. Information-based Divorce Education Programs on Domestic Violence and Parental Communication" *Family and Conciliation Courts Review*, 36 (1998) : 9-31.