Is the Presumption of Joint and Equal Custody/Parenting Time Best for Children?

By Richard S. Victor

The Michigan legislature has discussed and proposed laws creating the presumption that parents in custody or parenting time disputes be awarded parenting schedules of substantially equal periods. The specific language being proposed is:

> If the court awards joint custody, the court shall issue a specific parenting time schedule for each parent and shall provide that physical custody is shared by the parents for specific and substantially equal periods of time.[1]

On its face, this does not appear to be such a bad idea. The proposed law goes on to state, however, that in custody or parenting time disputes, a family court judge's hands will be tied when deciding these cases by being mandated to order joint custody in almost every case without looking toward the best interest of a child:

> In a custody or parenting time dispute between parents, the court shall order joint custody unless the court determines by clear and convincing evidence that a parent is unfit, unwilling, or unable to care for the child. A parent may only be determined to be unfit under this section if the parent's parental rights are subject to termination….[2]

In a perfect world, the concept of removing from the court process by mandating through legislation any disputes regarding custody and parenting time of children implies that the results of

a child custody case—substantially, that the parties would have joint equally shared time with their child—would be logical and in a child's best interest. Certainly, removing children from the center of family disputes can only help in bringing harmony and reducing acrimony for a family. However, in the real world it just does not work that way. Despite its good intentions, this concept—and the law that would represent it—fails to recognize the reality of the times we live in and will change a half-century-old rule: namely, "the best interest of the child" should control. The proposed law would replace that policy with one looking out for "the best interest of the parent."

Make no mistake—I firmly believe in the importance of the active role parents should have in raising their children and in being part of their children's lives, especially children of divorce. It is essential in what I consider to be part of the "Children's Bill of Rights."[3] However, mandatory and presumptive guidelines such as the ones being proposed bind family court judges from the discretion they require when hearing cases. Unlike many other areas of law that deal with black-and-white issues and often have black-and-white laws to govern those disputes, family law and the cases dealing with custody and parenting time disputes have as many emotional and behavioral science ramifications to their makeup as the legal statutes themselves.

That is why most family law disputes must be decided on a case-by-case basis. Discretion must be left to an individual family court judge to make determinations on the basis of the family and the facts that come before the court, without predispositions.

Our current law at MCL 722.27a(1)(a)(b) provides that in custody disputes between parents, the parents will be advised of joint custody and at the request of either parent, the court will consider an award of joint custody and state on the record the reasons for granting or denying a request. The law goes on to set forth specific factors for the court to use in making that determination, including those found as part of the 12 best interest factors and whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of their children. I believe this law, when followed by the court, is good law.

To mandate by law—without any regard for the needs of a child or the specifics of a case—that a child's physical parenting schedule be essentially equal with both parents completely disregards the rights of children and puts them second to the needs and desires of their parents. That is unfair and unfortunate to the innocent victims of divorce: the children. Remember, they did not ask for the divorce but must live with the result of the actions and decisions of their parents.

Mandating substantially equal parenting time assumes both parents are equally capable of handling the significant responsibility coparenting requires. Further, there are many parents who have not had their parental rights terminated but because of their own actions, inability to provide proper care for their child, geographic location, mental or emotional problems, drug or alcohol concerns, work schedule, or lack of past relationship with their child should not logically or appropriately be considered to receive equal parenting time with their child. The fact that parental rights have not been terminated, which the proposed legislation uses as the base standard, should not be the criteria for determining whether a parent is fit to receive equal parenting time.

Fast Facts

Mandatory and presumptive guidelines, without discretion of the court, do not consider the duty our state has to the children and families that come before the court.

Despite good intentions, mandatory joint custody laws fail to recognize the reality of the needs of children.

Replacing "best interest of the child" with "best interest of the parent" is not good public policy.

I just finished handling a case in which the parents were separated and the father had not seen his child for more than five years. No termination of parental rights had ever been filed, yet under this proposed law, he would have standing to request *and be granted* equal parenting time and joint legal custody with the mother—who had been the child's sole caregiver for 90 percent of the child's life—unless the parties agreed on a different parenting schedule accepted by the court. If this law were allowed to pass, it would, in essence, allow unscrupulous individuals to use it as a form of extortion or unfair bargaining to gain financial or property dispute advantages when they obviously do not care about their child. Is this the public policy we want to create and support in our state?

Clearly, if parents have comparable parenting skills and abilities, equal or substantially equal parenting time can and would be a major benefit to the entire family, especially the children. However, as unfortunate as it might be, we live in a society where stable mental health is not a given. I am not referring to individuals who are certifiable, but individuals who may not be appropriate for one or many reasons to coparent on an equal basis regarding parenting time with their children. That is why guidelines such as the 12 best interest factors are presently in our statute—and when used by the court correctly, they work.

Although the authors of the proposed legislation do not state outright that they are repealing the 12 best interest factors[4] in deciding custody and parenting time cases, the proposed law appears to replace them. By mandating that the court must order joint custody and include in its award a physical custody order that is shared by the parents and provides for specific and substantially equal periods of parenting time without regard to the child's best interest, the factors found at MCL 722.23 have little significance in most cases.

No consideration is given concerning whether this would be in a child's best interest. No consideration is given to the age of the child. No consideration is given to where the parents live or the distance a child must travel between homes for shared and equal parenting time. No consideration is given to where a child

attends school. No consideration is given to whether a child is enrolled in activities and events such as school groups, extracurricular activities, and outside sports teams, which are healthy for social development, and the effect distance and need for travel during school time will have on this aspect of a child's life.

No consideration is given for religious training or other activities which improve a child's health, education, and development. No consideration is given for a child's special needs or which parent may be better able to provide for those needs. No consideration is given for the disabled child or the child who requires ongoing medical care and treatment, and the reality of which parent can facilitate that care and treatment or has been responsible for providing that care in the past. No consideration is given for a child's social network, including friends and events, which would otherwise be part of his or her growth and maturity.

A child of divorce should be treated as an important human being with unique feelings, ideas, and desires, just like a child of an intact family. In an intact family, extracurricular activities can be difficult to plan and attend and sometimes impossible to justify. But in an intact family, parents sacrifice their own free time and balance the responsibilities of these schedules with each other for the sake of their children's extracurricular educations and the benefits that come from learning outside the classroom.

At our law firm, we encourage the insertion of the following language in parenting time orders:

> That the minor children's extracurricular activities including, but not limited to sporting practices, games, tournaments, and competitions shall take precedence over both parents' parenting time, meaning that if such an activity takes place during either parent's parenting time, said parenting time shall be comprised of that activity during that time and no make-up parenting time shall be awarded.[5]

Unfortunately, the proposed statute does not address any of these concerns. It does not provide for language to protect a child's daily routine, which benefits the child. The proposed law concerns itself only with what has now been considered to be in the "best interest of the parent."

Sometimes it is simply not possible or appropriate to fulfill this 50/50 requirement owing to a specific reason or reasons. Sometimes it's not in a child's best interest and sometimes it will only create more problems and harm for a child to make parents feel good that neither one of them "lost."

The concept of changing our public policy from "the best interest of the child" to the "best interest of the parent" is not necessarily progress. It is true that everything should be done to keep and incorporate both parents actively in the lives of their children. It is important to make sure that good communication and sharing of information exists. It is desirable for parents to work together to ensure a positive relationship between children and both parents. But preventing family court judges from having the discretion to make decisions to protect the welfare and best interests of children is not necessarily moving forward.

The presumption of equal or shared parenting time has drawn much attention. Some special-interest groups have come forward either in support of or against this concept and proposed legislation. Many fathers' rights groups support this legislation. A purportedly international group known as Leading Women for Shared Parenting claims to support it. These groups firmly believe that the laws in place around the country fail to represent the interests of adults and wish to replace them with a new set of laws. Some proposed joint custody/parenting statutes in other states are tied to laws that do away with or severely limit alimony/spousal support, which a court may award through the use of mandatory guidelines.

Whether or not you support these changes, one thing is certain: they bring out the passion in those advocating for or against the changes. Through my nearly 40 years of practicing family law, I know that each case is deeply emotional to the individuals involved. Each case is different and requires personal treatment and attention. Each case has the ability to affect an individual and his or her money, business, and property. But, more importantly, when children are involved, each case has the potential to affect not only the family but also generations within that family. Mandatory and presumptive guidelines, without discretion for the court, do not take into consideration the solemn duty our state has to the families that come before the court at a time of great need for all involved, especially their children. ■

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ENDNOTES

1. HB 4120.
2. *Id.*
3. See Victor, Richard, *You and Me Make Three* (Auburn Hills: Edco Publishing, 2008).
4. MCL 722.23.
5. Victor, Daniel R., *When parenting time conflicts with extra-curricular activities: Keeping kids out of the middle,* Oakland County Bar Association *LACHES* magazine (March 2004), available at <http://www.victorandvictorlaw.com/published/whenparenting.pdf> (accessed January 14, 2014).