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Memorandum

To: Members, Legislative Study Committee on Child Placement and Support

From: Ben Kain, Involved Fathers of Wisconsin

Date: September 19, 2018

Re: Family Law Section, State Bar of Wisconsin, Sept. 7th Memorandum

Ben Kain, President & Founder of Involved Fathers of Wisconsin, wishes to share with the Committee members a brief reply to the Family Law Section's (hereafter the "Section") September 7, 2018 memorandum.

Shared Placement Working Group

I agree that the Section's proposed changes as referenced in their memorandum are positive steps towards involving fathers in the lives of their children and alleviating the negative effects fatherlessness has on our society. For example, the requirement that fact-finder's put in writing their reasoning for deviating from shared placement is a great step forward. In addition, I agree that the modifications to the factors are positive steps.

However, I believe that a rebuttable presumption of equal placement would place Wisconsin within the vanguard of states that recognize the importance of equal-shared parenting and the beneficial impact it has on children of divorce/separation.

Presumptions v. Mandates

I want to clear up any confusion which might exist with respect to the effects of presumptions and the Section's reference to a rebuttable presumption of equal placement as a "mandate".

A rebuttable presumption of equal placement is an initial consideration of shared physical placement which would act as a compliment to the best interest of the child standard. The

Section's memorandum refers to a rebuttable presumption of equal placement as a mandate; however, the Section's same memorandum also includes the following statement:

“...the best interest of the child standard can be complimented with orders that start with a consideration of shared physical placement.” (Emphasis added) (Family Law Section's Memorandum at “Rationale for Proposed Changes” Section ¶ 3).

The disinformation regarding the effects of a presumption has been a constant point of dispute amongst supporters of equal placement and those against it. It is vitally important to recognize that a presumption is not a mandate.

When we recognize and understand that a presumption is not a mandate, the arguments against a rebuttable presumption of equal placement, such as the four (4) arguments referenced in the Section's September 7, 2018 memorandum, become ineffective for the following reasons:

1. Judicial discretion still exists, and when we understand that a presumption is not a mandate, we recognize that it is rebuttable under the lowest possible evidence standard (preponderance).
2. It is simply dishonest to suggest that a rebuttable presumption of equal placement places the parent's financial interests above the best interests of the children, as the Section contends in their memorandum. Child support is ordered according to DCF guidelines and is based on the income of the parent(s) in conjunction with the amount of placement time each parent receives. Child support is currently ordered in equal placement cases, and child support will continue to be ordered in equal placement cases if a rebuttable presumption of equal placement were implemented.
3. Victims of domestic violence are protected under the proposed language of the legislation creating the equal placement presumption (the presumption is automatically rebutted when there is domestic violence between the parties). This provision is similar to that which is found in the recently passed equal placement presumption in Kentucky.¹ The presumption does not apply if there have been prior instances of domestic violence between the parties, and the same would be true for Wisconsin. Further, considering the Committee is looking at rule changes which would allow a judge to independently investigate the presence of domestic violence, a rebuttable presumption of equal placement makes sense in conjunction with those proposed changes because a party who is a victim of domestic violence is assured that a judge can independently investigate domestic violence and easily rebut the presumption.
4. Under a rebuttable presumption of equal placement, pro se litigants no longer risk losing substantial time with their children because they cannot afford a lawyer to fight for equal placement (see also No. 5 below). Unfortunately, the Section's contention that a rebuttable presumption of equal placement would negatively affect pro se litigants is at direct odds with all

¹ It is important to note that the equal placement presumption in Kentucky was passed with nearly unanimous bipartisan support.

the information I have received from pro se litigants. Indeed, not facing the mounting task of fighting for placement in court is a welcomed change for each and every pro se litigant I've spoken to.

5. A rebuttable presumption of equal placement would align policy with practice and alleviate the negative effects litigation has on families and children. Despite the Section's contentions to the contrary, a rebuttable presumption of equal placement would almost certainly decrease litigation. It is common sense to suggest that when there is less to fight over, less fighting occurs.

The Need for Change

I started Involved Fathers of Wisconsin in 2014 to address the issue of lack of father involvement and to provide advocacy for the support and protection of the father/child relationship. We are particularly concerned with ensuring that fathers take an equal role in raising their children both during and after the relationship. Children experience a multitude of benefits when they have access to an actively involved father. We seek to ensure each child in Wisconsin has a father who is active, engaged and involved, and to whom they have equal access.

I am ecstatic to see that the Section members agree that the current language as to placement can be modified to better achieve the intended goal of maximizing placement. Upon my review of the decision from the Wisconsin Supreme Court in *Landwehr v. Landwehr*², I believe the "maximize" language in the statute is meaningless and is not being applied as the legislature intended. Although I firmly believe judicial discretion in family matters is essential, I think the guidance we are providing to judges is inconsistent and ambiguous. There needs to be clearer guidance, and a rebuttable presumption of equal placement would provide that guidance by directing judges to start at 50/50, independently investigate the presence of domestic violence and rebut the presumption if there is evidence of the same, consider the factors, and award placement consistent with the best interest of the children standard. It is important to note that the presumption would be rebutted by a preponderance of the evidence if there is domestic violence between the parties, if one of the parties is not a fit parent, and if the parents live too far away from each other.

Protecting the Father/Child Relationship

In today's placement matters, fit fathers are exceptionally vulnerable to falling victim to outdated stereotypes regarding gender roles and parenting and are often relegated to permissive visitors in the lives of their children. This is especially true for unmarried fathers. At a time of unprecedented stress, parents and children are subjected to uncertainties that relate to the most precious relationship one can enjoy in their lifetime: the relationship between a parent and their

² 715 N.W.2d 180, 2006 W.I. 64, 291 Wis. 2d 49 (2006).

child. The devastating picture of the children clinging to their father after their every other weekend “visit”, because they want to stay with dad a little longer, is a picture that occurs each and every Sunday in Wisconsin.

In the initial phases of familial separation, emotions are at an all-time high and the likelihood of a parent acting maliciously towards the other by keeping the children away or limiting placement time increases significantly. This fact is routinely ignored by those opposed to a rebuttable presumption of equal placement. Current law does a dismal job of protecting the parent/child relationship. A study from the Institute for Research on Poverty at UW Madison found that 81% of unmarried fathers in Wisconsin had zero (0) placement time with their children in 2008. Updated numbers are not available. This statistic alone necessitates a remedy that will correct it as soon as practically possible – and that remedy is a rebuttable presumption of equal placement.

Thank you.

Very truly yours,

Benjamin Kain

Involved Fathers of Wisconsin