SUMMARY STATEMENTS REGARDING 50/50 PLACEMENT ISSUE

Kip Zirkel, Ph.D

Below are summary statements and conclusions based on review of relevant research as well as clinical experience. A more complete summary of research articles can be provide upon request.

Disclaimer: I have accumulated 40 years of experience counseling with fathers and mothers engaged in high conflict divorce, as well as thousands of children who are struggling with the complexities of living in two homes. I am not considered a proponent of parenting access based on gender. I also have presented findings at four statewide Family Court Commissioners conferences as well as numerous Guardian ad litem trainings sponsored by the American Bar Association. I have attached my vita to this document.

1. The issue of a statutory 50/50 presumption is a concept based on parents' preoccupation with their rights rather than on their child's best interests.

2. Children in most intact families do not have an exact 50/50 relationship with their parents; rather, parenting time is based on availability of a parent, work schedules, parenting comfort level, and children's needs.

3. Most researchers consider 'shared' placement as meaning anywhere from a parent having at least 25% to 35% parenting time with their child.

4. Few researchers agree that a state-mandated 'boilerplate' rule regarding 50/50 placement is in the child's best interests. Most do agree that any plan which reinforces quality parenting time with two involved and sensitive parents is in a child's best interests.

5. Research has shown that many parents who negotiate a 50/50 shared arrangement in mediation drift back within a year or two to a schedule that previously was in place, likely due to factors noted in #2 above.

6. Removing an infant or toddler from the consistent care of a primary parent (typically the mother) for inappropriately long periods of time, on a repeated basis, may overly stress the developing infant brain and result in significant psychological problems later on, and the impact of this disruption may be difficult to remedy.

7. There is no inherent reason dads cannot provide sensitive and attuned care of infants and young children provided they are willing, available, able to cooperate and communicate with the baby's mother, and are flexible in designing parenting time based on the baby's needs and nursing schedule. These requirements are uncommon in high conflict situations.

8. A significant proportion of high conflict divorces involve one or both parents who have serious mental health issues, have a history of domestic violence or coercive control issues, have alcohol or other drug abuse histories, or do not have the necessary parenting skills that children need to grow and thrive.

9. There are researchers who only publish research articles and summaries promoting what can be called 'father's rights' positions. These researchers are referred to in the literature as 'scholar-advocates' and are not considered reliable by the larger community. Their writings contribute to the polarization evident in our field. Some professionals have attempted to find common ground between these two extreme positions (see attached article).

10. Numerous interventions have been created to assist families in developing child-sensitive placement plans including child-inclusive mediation, collaborative and cooperative law, moderated attorney and parent conferencing, parenting coordination, and other alternative dispute resolution approaches, with the goal of helping parents adopt a schedule that fits parents' needs and schedules yet considers the developmental needs of their children.

11. Many states have adopted state guidelines for parenting time. None recommend 50/50 schedules for young children. Rather, all of these plans have a graduated 'phase in' plan for babies and toddlers, achieving a more shared schedule as the child nears school age. These various plans are based on input from hundreds of mental health professionals, family law attorneys, and judges. Notable examples include parenting plans from Arizona, Colorado, Texas, Alaska, Minnesota, Massachusetts, Indiana, and Oregon (see attached summary).

12. Relying upon a single research article for guidance is not valid. No one research article can provide answers to the issues affecting a specific family. The few research studies that have been done generally suggest caution in moving too quickly into a shared schedule with infants and toddlers.

13. A plan that focuses on developmental needs of children while attempting to support both parents' involvement, as well as assisting parents in cooperating together on behalf of their children is the best approach for ensuring that these children grow up reasonably well adjusted and happy in two homes. A state-mandated 50/50 presumption is not in the best interests of either the children or their parents.

The above summary statements are based on the following writers and researchers. A more compete summary of their specific articles and books can be provided upon request:
Richard Warshak
David Lamb
Bill Fabricious
Robert Emery
Marsha Kline Pruett
Jennifer McIntosh
Ben Garber
John Zervopolous
Linda Nielson
Bruce Perry
Leslie Drozd

CUSTODY AND PLACEMENT OF INFANTS AND TODDLERS: MOVING TOWARDS COMMON GROUND

Kip Zirkel, Ph.D.

Given the intensity and occasional outright acrimony which has accompanied the debates about infant/toddler placement, it is encouraging that there may be finally some evidence of common ground. This is an encouraging development in the field. There do remain, however, significant differences of opinion regarding such issues as when to begin overnights with the "less-involved parent" (usually dads), how long a child can be away from one parent or the other, the importance of safeguarding "primary" attachments, and the like.

For a long time, researchers and other experts have claimed that others have "cherry-picked" findings to support their respective agendas. There appears to be no end in sight to these debates, since drawing definitive conclusions from most social science research is prone to error. Debates over methodology abound, including lack of control groups, inability to generalize from limited research samples, difficulties controlling for all the complex mix of variables which characterize family dynamics—this will continue to make it difficult to draw compelling conclusions from the available research results, until such time as a body of research exists that enables us to draw more definitive conclusions. Even then, as McIntosh (2012) cautioned, there will never be a perfect fit between science and the individual case.

In addition, this debate does not assume that children are better off being raised in full-time maternal care, nor that fathers are not equally important. There is no research indicating that parental gender makes any difference in terms of the overall adjustment of children, although some studies do report differences in the quality of child care between mothers and fathers, neither one being better or worse than the other, simply qualitatively different, having different impacts at various stages of a child's development!

The placement debate will continue a few weeks from now at the AFCC national convention in Toronto, where Kelly, McIntosh, and Pruett will present a workshop (May 30) entitled "Overnights and Young Children: Unified Principles from Attachment and Parenting Involvement and a New Practice Framework." The very next day, we will hear from the "other side," when Sokol, Stevenson and Fabricius offer their presentation entitled "New Findings on Infant Overnights and Relocation." It is hoped that the consensus-building will continue and AFCC is to be congratulated in providing a forum for this to occur.

THE MAJOR PLAYERS

Richard Warshak, a highly regarded and capable researcher and writer, has reached conclusions that have relevance for supporting shared parenting of infants and toddlers. He concludes from a review of the literature, as well as obtaining input from over a hundred other researchers and scholars, that the caution about moving to infant overnights with fathers is unwarranted, and that the "mother-primary" folks select from the attachment literature data that support their biases regarding the need for protecting the mother-baby bond at the expense of the father's greater involvement. He does caution us against assuming that he is "advocating 50/50 placement" or supporting the presumption of shared custody. Here are some of his conclusions:[1]

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[1] Richard A. Warshak, with the endorsement of 110 researchers and practitioners listed in the appendix. (2014). "Social Science and Parenting Plans for Young Children: A Consensus Report." Psychology, Public Policy, and Law. 2014, Vol 20, #1, p 46-67.

- Parents' consistent, predictable, frequent, affectionate, and sensitive behavior toward their infants is key to forming meaningful, secure, and healthy parent– child relationships.

- Having a secure attachment with at least one parent provides children with enduring benefits and protections that offset mental health risks of stress and adversity.

- Having a relationship with two parents increases children's odds of developing at least one secure attachment.

- The deterioration of father–child relationships after divorce is a pressing concern.

- The majority of children of divorce from preschool through college are dissatisfied, some even distressed, with the amount of contact they have with their fathers after divorce and with the intervals between contacts.

- Policies and parenting plans should encourage and maximize the chances that children will enjoy the benefits of being raised by two adequate and involved parents.

- We have no basis for rank ordering parents as primary or secondary in their importance to child development.

- Normal parent–child relationships emerge from less than fulltime care and less than round-the-clock presence of parents.

- Full-time maternal care is not necessary for children to develop normally. Children's healthy development can and usually does sustain many hours of separation between mother and child. This is especially true when fathers or grandparents care for children in place of their mothers.

- These findings support the desirability of parenting plans that are most likely to result in both parents developing and maintaining the motivation and commitment to remain involved with their children, and that give young children more time with their fathers than traditional schedules allow (generally daytime visits every other weekend with perhaps one brief midweek contact).

- These findings do not necessarily translate into a preference for parenting plans that divide young children's time exactly evenly between homes.

Jennifer McIntosh, Marsha Pruett, and Joan Kelly, on the other hand, have come together from historically different points of view to collectively examine and summarize research in order to prioritize *both* early attachment security *and* ongoing parental involvement. The upcoming Family Court Review article authored by McIntosh, Kelly and Pruett contains a detailed table outlining parenting plans for young children (ages 0-4).[1] This table is based on their theoretical integration paper (Pruett, McIntosh, and Kelly, 2014). The guidelines ensure that the child's safety comes first, and assume that the child in question has an already-established attachment and level of comfort with both parents. If that has not happened (as with parents who have not co-habited with their infant), then protecting the "primary" relationship is preferenced, while building the "secondary" one (read: fathers) in a way that is comforting and reassuring to the baby.

McIntosh, et.al. go on to suggest that even when all parenting conditions are met (i.e., sensitive, attuned, available, caring), higher frequency overnights (more than weekly) are generally not indicated for infants 0-18 months. And their recommendations regarding when to begin or increase overnights (defined as anything more than 3 overnights per month") require that the following conditions be met:

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[1] "Parental separation and overnight care of young children: Consensus through Theoretical and Empirical Integration." Marsha Kline Pruett, Jennifer E. McIntosh & Joan B. Kelly In Press, Family Court Review, April 2014

1. Child is "safe" with both parents, and parents are safe with each other.

2. Child seeks comfort from and is soothed by both parents, finds support for exploration with both parents.

3. No apparent alcohol or drug abuse or mental health issues noted; if present, these issues are well-managed and do not negatively impact the parenting.

4. Child has no significant developmental or medical needs, or if present, the parenting plan accommodates these well. ("Significant" implies serious, requiring ongoing psychological or medical care.)

5. Child does not need consistent breast-feeding.

6. Child doesn't show concerning behaviors such as irritability, aggression, crying, clinging, regression, lasting over 3-4 weeks.[1]

7. Parents are able to be civil with each other, communicate non-defensively, manage conflicts, put children's needs first, and create low-stress transitions.

8. Parents follow the right of first refusal for overnights—i.e., if not available, care by the other parent is prioritized.

9. There are other supports for the child—relatives, siblings, etc—in order to assist the child in adapting to the transitions. The established status quo is also considered in the plan.

CRITIQUE

How often do we see these aforementioned qualities in the families we deal with? These healthy functioning parents aren't likely to seek legal intervention to resolve their difficulties. They are more likely to use counseling, or mediation, or some other ADR when disputes arise. It is much more likely that the parents who come into our office cannot communicate, carry extensive hostility towards one another, suffer from serious personality malfunctions, or have compromised attachments to their children. With our help, that they can evolve better ways of doing things, when the goal of shared parenting is prioritized

McIntosh, Pruett and Kelly then provide other guidelines for these folks, mainly after evaluating how the parents and children are "emerging" from these compromising conditions. For example, if one parent has little sensitivity in meeting the child's needs, or has mental health issues, but is emerging from these drawbacks (presumably with the help of counseling or other interventions), then we can consider adding a few more overnights (up to weekly), with the so-called compromised parent. If the child has significant developmental or medical needs, and the child is "emerging from or overcoming" these handicapping conditions, then more overnights can be added—perhaps 5 or more a month. McIntosh, et al, emphasize throughout that clinical judgment will be needed in evaluating the fit of these guidelines to the individual case, and that the guidelines are just that: guidelines. In their words, "This developmentally based guidance for children 0–3 (i.e. up to 48 months) is not intended to override the discretion of parents who jointly elect to follow other schedules in the best interests of their child,

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[1] Warshak cautions that most infants show these symptoms even in intact 2-parent families. For example, he reports that research indicates that almost half of all infants sometimes refuse to eat, sometimes hold on to their mothers when she tried to leave, and nearly 40% got upset with their mother (Smart, 2010).

and in the context of their own circumstances."[1]

How much weight should we place on each of these compromising factors? That is a question which depends on the particular circumstances each family brings to the table. One area of exploration involves how we can promote compromised parents' "emergence" from these issues, and how we can assess and provide treatment for them in a cost-effective and time-efficient manner. This clearly is a matter for further research. Still, this approach goes a long way towards clarifying the need for defining more specifically the factors courts should consider when making custody and placement decisions.

Both the McIntosh group and Warshak cite research supporting their views and contradicting the opposite view. For example, Warshak states that there is no research that supports their warning to be "cautious" about including overnights early on. Other researchers note that no study has shown that having frequent overnights with the nonresident parent *causes* greater distress either. However, as the saying goes, "absence of evidence does not mean evidence of absence." In other words, simply failing to find an effect from a research study doesn't mean the effect isn't there! There could be many reasons why the expected effects weren't evident, including having small sample sizes, having a large range of subject responses (thus weakening the statistical significance of group mean differences), or failure to control for some intervening variable such as temperament, amount of conflict, involvement in court services, etc.

We don't want to get to the point of concluding that all scientific research is meaningless, otherwise all we have left are "arguments by authority" or impassioned testimonials. Medical research often finds no effect, or even harmful ones, from research on medications of various kinds. Nutrition research has the same track record: one study shows benefits from Vitamin C, another doesn't. The wise consumer needs to compare the risks against the benefits and draw his or her own conclusions.

Another issue: the legal system is largely preoccupied with the percentages of overnights a child has with a parent, largely ignoring the more important factors noted above, such as the quality of parenting, the attachment of the child to the parents, and such. Indeed these factors far outweigh the issues of "percentages of time spent in each house" in terms of the impact on children's long term mental health and adjustment. Changing the amount of time a child spends with a "compromised" parent really doesn't address the problem, as the child will very likely continue to be affected by the so-called compromising conditions no matter how much time is spent with that parent.

Finally, since we are dealing with group data, we really do not know how any one particular family resembles the typical subject in any one research study. The parents sitting in your office may very well be "outliers," having characteristics which place them markedly apart from the "typical" family described in the research.

AREAS OF AGREEMENT BETWEEN BOTH SIDES

In spite of the ongoing debate, it seems that researchers on both sides of the spectrum do agree on the following (in no particular order):

1. The need for a developmentally appropriate plan, individually tailored to meet the specific needs of each family, while avoiding universal templates that either support or oppose overnights for young children.

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[1] "Parental Separation and Overnight Care of Young Children, Part II. Putting Theory into Practice." McIntosh, J., Pruett, M., & Kelly, J. In Press. Family Court Review, April 2014.

2. The need to take into account the pre-existing pattern of contact the child has had with each parent.

3. The desire to protect already-formed attachments while promoting other attachments (mainly with dads), and the need for all children to have at least ONE secure attachment from birth on. Many researchers have found that the availability of at least one secure attachment figure may be the most important factor predicting children's resilience and ability to cope with the demands of life.

4. The need to consider mitigating factors such as domestic violence, mental illness, children's temperaments, alcohol or drug abuse.

5. The position that shared placement doesn't necessarily imply "50/50" plans.

6. The conclusion that imposing a universal 'one size fits all' template, including a blanket restriction against all overnights, is not in children's best interests.

7. The observation that the quality of a parent's relationship with their child is more important than the time spent, although a certain and as yet undefined period of time is certainly needed to ensure the opportunity for quality interactions to occur.

8. The goal of encouraging parents to achieve agreement without the need for litigation; i.e., making use of counseling or ADR approaches.

9. The important need for parents to develop effective communication and co-parenting skills.

PRACTICAL SUGGESTIONS:

In conclusion, the following suggestions for reconciling these two positions ("security of infant's attachment to the primary parent" vs. "promoting joint parenting to ensure ongoing father involvement") are offered:

1. Discover the **previous pattern of contact and comfort-seeking** the young child has had with each parent as a starting point for moving to a more shared arrangement. The presumption here is that moving towards a more shared placement plan is in parents' and child's best interests, assuming that a shared plan wasn't already in place.

2. Help parents understand the difficulty the other parent has for spending extended periods of time away from their child.

3. **Rule out contraindicating factors:** (history of domestic abuse, alcohol or drug involvement, mental health issues, the presence of alienation or overly restrictive gatekeeping), and make the necessary referrals for addressing these compromising factors.

4. Assess the **level of cooperation and communication** between the parents and provide interventions for improving same. This may be one of the most critical factors predicting successful child outcomes.

5. Assist parents in **accepting ongoing advice and guidance from each other** regarding the infant's needs in a non-defensive manner. This includes regular sharing about the infant's routines, behavior, and health, and to the extent possible assuage each other's concerns about the child's development when in the care of the other parent.

6. Consider the **logistical factors** involved (work schedules, distance between homes, etc).

7. **Appoint a child development specialist** to assist the parents in "step-ups," increase time with the less-involved parent depending on the child's readiness rather than using some fixed schedule imposed by the courts.

8. Educate parents regarding the need for **structure, routine, and predictability** while recognizing the need to maintain flexibility when defining placement schedules.

9. Assist parents in **developing interventions** (mediation, child-centered assessments, parent education) to avoid unnecessary use of legal interventions.

It is hoped that this list is a beginning, and provides a basis for ongoing discussion regarding how to help parents design placement plans that are both in children's AND parents' best interests.

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I would like to thank both Jennifer McIntosh and Richard Warshak for reviewing this document and providing their editorial critique. Most, but not all, of their suggestions have been included herein, and this article does not assume that they fully agree with how their respective positions have been portrayed. As new research becomes available, this document will be revised accordingly. Also thanks to Ben Garber for his editorial review of this article.

States with Parenting Plans

State	Entity Developed/Issued Plan	Proposed Parenting Plan/Schedule
Alaska Alaska Court System Model Parenting Agreement	Alaska Court System – Superior Court Judge	**INFANTS TO AGE 3** Two visits per week max of 3 hours OR Two nights of 3 hour placement and 1 overnight per week OR Two overnights per week w/no additional placement **AGE 3 TO 5** Minimum of alternate weekends to maximum of alternate weeks in each home
Arizona Planning for Parenting Time: Arizona's Guide for Parents Living Apart	Arizona Supreme Court	**BIRTH TO 2 YEARS** Frequent contact for shorter periods of time throughout the week with each parent and stable schedule and routine. May include one overnight each week if the parents have cared for child equally, know overnight care, live close to one another, can communicate and cooperate with one another. An equal parenting time schedule can be used where the child isn't away from the other parent more than two (2) consecutive days **ONLY** if the parents can agree on this plan. **2 TO 3 YEARS** Two periods of three to six hours and one overnight each week. May work up to one period of three to six hours and two consecutive overnights each week. An equal parenting time schedule can be used where the child isn't away from the other parent more than two (2) consecutive days **ONLY** if the parents can agree on this plan. **3 TO 5 YEARS** Two consecutive overnights every other week. May work up to four consecutive overnights during week 1 and one overnight during week 2. An equal parenting time schedule can be used where the child isn't away from the other parent more than two (2) consecutive days **ONLY** if the parents can agree on this plan.
Indiana Indiana Parenting Time Guidelines	Domestic Relations Committee of the Judicial Conference of Indiana	**BIRTH TO 4 MONTHS** Three (3) non-consecutive days per week of two (2) hours. Overnight only if the non-custodial parent has regularly cared for child prior to separation – if not, parenting time shall not include

State	Entity Developed/Issued Plan	Proposed Parenting Plan/Schedule
		overnights until child turns 3 years old. Not to exceed one (1) 24 hour period per week. **5 MONTHS TO 9 MONTHS** Three (3) non-consecutive days of three (3) hours per day. Child returned at least one (1) hour before evening bedtime. **10 MONTHS TO 18 MONTHS** Three (3) non-consecutive days per week with one day a "non-work" day for eight (8) hours. The other two (2) days shall be for three (3) hours. Return child at least one (1) hour before evening bedtime. **19 MONTHS TO 36 MONTHS** Alternate weekends for ten (10) hours each day and one (1) day during the week for three (3) hours returning child at least one (1) hour before evening bedtime. If this schedule has been followed for at least nine (9) continuous months, non-custodial parent may exercise overnight parenting. **3 YEARS AND OLDER** Alternate weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m. and one (1) night during the week up to four (4) hours, but no later than 9:00 p.m.
Massachusetts Planning for Shared Parenting – A Guide for Parents Living Apart	Massachusetts Chapter of the Association of Family and Conciliation Courts	**BIRTH TO 12 MONTHS** Three (3) time periods of two (2) to three (3) hours during the week OR Two (2) weekday periods and one weekend contact of four (4) to eight (8) hours OR Two weekday contacts of three (3) to four (4) hours and one longer weekend contact to possibly include an overnight if that parent has previously cared for the child overnight. **12 TO 24 MONTHS** Three (3) time periods of four (4) to six (6) hours during the week OR Two four (4) to six (6) hours and one longer weekend contact that may include an overnight OR Two four (4) to six (6) hours and one longer weekend contact including an overnight **24 TO 36 MONTHS**

State	Entity Developed/Issued Plan	Proposed Parenting Plan/Schedule
		Three (3) time periods of four (4) to six (6) hours during the week OR Two four (4) to six (6) hours and one longer weekend contact that may include an overnight OR Two four (4) to six (6) hours and two weekend overnights **3 TO 5 YEARS** One (1) to two (2) periods of four (4) to six (6) hours and one overnight OR One (1) mid-week contact of four (4) to six (6) hours and two consecutive overnights OR Split week and weekend
Michigan Michigan Parenting Time Guideline	State Court Administrative Office	Alternate weekends from 6:00 p.m. Friday until 6:00 p.m. Sunday and one (1) weeknight from 6:00 p.m. until 8:30 p.m.
Oklahoma Co-Parenting Series Developmentally Appropriate Parenting Plans	Oklahoma Cooperative Extension Service	**BIRTH TO 3 YEARS** Children this age have short attention spans and limited memory thus frequent brief visits are best. They should not go more than two or three days without seeing the other parent. **3 TO 5 YEARS** Can spend a few days away from either parent.
Oregon Parenting Plan Materials	Oregon Judicial Department	**BIRTH TO 12 MONTHS** Three (3) periods of three (3) to six (6) hours spaced throughout the week and several variations of increased time with no overnights OR Two (2) periods of three (3) to six (6) hours and one (1) overnight each week. **12 TO 36 MONTHS** Previous plans from birth to 12 months OR one daytime period of three (3) to six (6) hours and two non-consecutive overnights each week. **3 TO 5 YEARS** One (1) or two (2) night weekend on alternate weeks, plus one (1) evening every week OR three (3) night weekend on alternate weeks, plus one (1) overnight on the other week OR split week and weekend
South Dakota	South Dakota Unified Justice System	**BIRTH TO 6 MONTHS**

State	Entity Developed/Issued Plan	Proposed Parenting Plan/Schedule
South Dakota Visitation Guidelines		Three (3) two (2) hour visits per week with one (1) six (6) hours weekend visit OR Three (3) two (2) hour visits per week with one (1) overnight not to exceed 12 hours if the child is not breast feeding and the non-custodial parent is capable of providing primary care. **6 TO 18 MONTHS** Three (3), three (3) hour visits per week with one weekend day for six (6) hours and overnight not to exceed 12 hours OR Spends time in alternate homes with more time in the primary home and two (2) or three (3) overnights spaced regularly throughout the week. This arrangement requires an adaptable child AND cooperative parents. **3 TO 5 YEARS** One (1) overnight on alternate weekends and one mid-week visit in which child is returned to custodial parent at least one-half hour before bedtime OR Two (2) or three (3) nights spaced throughout the week

Are joint custody and shared parenting a child's right?

5 October 2018, by Michel Grangeat, Edward Kruk, Malin Bergström And Sofia Marinho

In France, nearly three-quarters of the children of divorced couples see their fathers only one weekend every fifteen days. Credit: Pixabay, CC BY

Many families with children separate all around the world. In France, for instance, nearly 200,000 children per year are affected by the divorce of their parents. After divorce, just over seven out of ten children (73%) live only with their mother and visit their father on alternate weekends. This phenomenon begs the question of the short- and long-term fate of these children, particularly in light of research showing that the active involvement of both parents in children's lives is vital to their development and well-being.

The United Nations Convention on the Rights of the Child (1989), as well as the European Union Charter of Fundamental Rights (2011, Article 24), mandates that children should be allowed to maintain meaningful relationships with both of their parents. In parallel, the father's involvement in rearing and childcare tasks in the family has grown significantly in recent decades, which in association with the salience of mothers' engagement in labour market participation, has called for new family arrangements that need to be taken into account in public policies.

Most importantly, recent studies have clearly demonstrated that children's ongoing relationships with both parents are vital, regardless of children's age and situation. These convergences raise the question about needed reforms in social-legal policies and the therapeutic practices focused in post-divorce/separation relationships and living arrangements, in order to improve the welfare, development, and the "best interests" of children whose parents live apart. Additionally, they point out to the importance of raising public awareness about the importance of carrying out these reforms.

The right to maintain regular relations with both parents

The Convention on the Right of the Child, Article 9-3, emphasizes "the right of a child separated from both parents or one of them to regularly maintain personal relationships and direct contact with both parents, unless it is contrary to the best interests of the child."

This right is most salient to situations of parental separation, referred to in Article 9-1, which states that, "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."

However, neither children's rights nor the definition of their best interests is a straight forward definition, either in the Convention or in family laws. These concepts need to be interpreted according to the unique situation and circumstances of each child. This interpretation falls under the responsibility of the judges, but it is also the concern of international organizations focused on the well-being of children. Thus, a 2014 conference under the aegis of the

Council of Europe concluded that: "There is no comprehensive definition of the concept ['best interests of the child'], and that its vagueness has resulted in practical difficulties for those trying to apply it. Some suggest that 'best interests' should therefore only be used when necessary, appropriate and feasible for advancing children's rights, whereas others see the flexibility of the concept as its strong point."

We advocate a "best interests of the child from the perspective of the child" approach to replace the current standard, taking into account the results of child-focused research on the consequences of parental divorce on children's well-being.

The balance between work and family life

The recognition that the child benefits from both the care and close relationships with both parents reflects changes toward more equal divisions of parenting and domestic tasks between mothers and fathers, as well as in the role of each in work-family articulation, in the context of the dual earner family model. This means that the male breadwinner/female housewife and caregiver family model has become obsolete either as a family practice or as a basis for family policies.

Social and political advances have resulted in girls' access to higher education and women's integration into the professions. Undeniably, further progress remains in this regard. For instance, maternity leave should be adapted to allow for better retention in employment, and paternity leave should be extended to allow fathers to build, maintain or strengthen ties with babies and very young children.

Current psychological research demonstrates that there is no competition between children's attachment to the father and mother. Instead, children are predisposed to build and enjoy multiple attachment bonds. Mothers are not necessarily, by nature, more sensitive and responsive to children than fathers. A key factor in the development of attachment bonds is the amount of time spent interacting with the child: the more the parent is engaged in the care of the infant and child, the more sensitive and responsive the parent becomes to the child's signals.

A balance between work, family and personal life, allowing both parents to build a secure bond with their child, reinforces the application of Article 9-3 of the UNCRC. Since the children have established significant relationships with both parents, they must have a residential arrangement that allows them to maintain and preserve these relationships after divorce/separation.

The consequences of residential arrangements on health and welfare

Current research converges in the results on the consequences of different residential arrangements of children whose parents have separated. The large-scale studies conducted in recent years are enlightening.

Research from Sweden and other jurisdictions shows that young children (3-5 years old) who live in equal shared parenting have a level of well-being equivalent to that of the children from intact families. Parents and teachers, on the other hand, note psychological problems in children living mainly with one parent. Identical results are shown with teenagers aged 12-15. These results are independent of the socio-cultural level of parents. A study with 5,000 teenagers aged 10-18 confirms and clarifies these results: neither children in equal shared parenting nor their parents are disadvantaged or hampered for changing frequently their place of residence. In Norway, a study with more than 7,000 teenagers aged 16 to 19 does not show significant differences between teenagers living in equal shared parenting or nuclear families in terms of their physical health, their emotions and their social behaviour.

On the other hand, in all cases and on almost all indicators, children and teenagers living in a single parent residence are disadvantaged. This does not mean that only sole residence is the cause of this situation.

Studies conducted in the United States show that these benefits are also valid for very young children, under three years. Regardless of the level of conflict of the parents, their degree of study or

income, the more the baby (1 year) or toddler (2 years) spent nights with his or her father, up to 50%, the more relationship with both his or her parents at the age of young adult (19 years) is healthy and balanced.

The best interests of the child in the 21st century

International organizations and national courts are focused on preserving the well-being and best interests of children. However, many constraints to child well-being persist, and keep infants, toddlers, children and teenagers within a mother-centred mode of care and education in post-divorce/separation families. These barriers work to the detriment of children, fathers and mothers.

The maternal deference standard is unfavourable to children, and seems contrary to article 2-2 of the UN CRC, which states that, "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status [...] of the child's parents."

Parents' and professionals' reflections and decisions might be more relevant, if professional practices and legal judgments prioritize the terms of residence that allow the child to have "personal relationships and contacts with both parents' to the maximum degree possible.

The concept of the "best interest of the child in the 21st century' will be the focus of discussion and debate at the Fourth International Conference on Shared Parenting, to be held in Strasbourg, at the Palais de l"Europe, on 2018, November 22 and 23.

Provided by The Conversation

From: Chad Johnson <mastercj20.cj@gmail.com>
Sent: Thursday, October 11, 2018 3:34 PM
To: Rep.Rob.Brooks <Rep.Rob.Brooks@legis.wisconsin.gov>
Subject: Child Placement and Support Reform

Good Afternoon Sir,

My name is Chad Johnson and I'm writing you this email because I'm concerned and frustrated with how Placement/Support is handled. I have two sons. One that I can see and another that I can't see. I have been through the process with the courts. If a guy is court ordered to pay support then he should be able to have scheduled visitation with his child right away. I have been paying one of my sons mothers for a year now and haven't been able to see my son. Ive had consultations with a few lawyers. Two lawyers have wanted $ 5,000 dollars to pick up my case. How can any guy afford that? I've tried many different scenarios that could work but wont because I don't have thousands of dollars. Alot of guys give up because they are unable to afford as much as the courts and lawyers want. It is unfair to the child and father. In some cases the father wants out but some still want to be in their kids lives. There was a 22 year old female in shawano this past week who wanted to bury her 2 month old baby after he passed away. Not sure if you saw it in the news but if the dad was in the picture maybe it wouldn't of happened. I hope that one day this all turns around and its equal to both parents. More fathers in their kids lives is what I would like to see sir. I don't agree at all with how the system is and hopefully there is some kind of movement in madison on reform. I'm an OIF vet and served my country well. This is not how it is supposed to be and its not right. Thank you for your time.

Regards,
Chad Johnson

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VIA E-MAIL

October 22, 2018

Representative Robert Brooks
Room 309 North
State Capitol
PO Box 8952
Madison, WI 53708

Re: 2018 Legislative Council Study Committee on Child Placement and Support

Dear Chairman Brooks:

I'm writing on behalf of the Wisconsin Chapter of the American Academy of Matrimonial Lawyers; I currently serve as Chapter Vice President. Members of the Wisconsin Chapter represent both fathers and mothers in family law actions throughout the state and many also serve as neutral mediators helping families resolve disputes by agreement. All Chapter members are committed to improving the practice of family law in ways that protect the welfare of the family and society.

At our most recent Chapter meeting, we discussed the work of the Study Committee. There are some ideas under discussion – – like the proposal to allow prospective contingent orders for modification of placement – – that our members support. There are others that elicited differing views, and we take no position on them. There is one proposal that we unanimously oppose.

We oppose the proposal to establish a rebuttable presumption that equal periods of placement are in a child's best interests. Our opposition is based on the available social science research in this area, and our collective experiences in the field.

As the law currently provides, placement is properly viewed as something a child is entitled to, provided physical placement does not endanger the child's physical, mental or emotional health. Section 767.41(4)(b), Stats. This puts the focus on the benefit the child derives from regularly occurring, meaningful periods of physical placement with each parent. While the law expresses a desire to maximize time with each parent, the primary emphasis is always on the child's best interests.

The current law follows the social science research, which strongly supports shared parenting in many circumstances. The research does <u>not</u> support a presumption for equally shared placement.

(Throughout this letter, I refer to "the social science research." I have not included citations to specific research, both for the sake of brevity and because I believe the Committee will hear from people who are much better equipped than I am to discuss that research. I would be happy to provide more information about the research I am relying on, should the Committee be interested in that information.)

The social science research recognizes that a child's developmental needs – especially those for stability and continuity in protective relationships – evolve over time. A presumption of equally shared placement, without regard for the stage of a child's development, replaces that finding with a presumptive "one size fits all" arrangement.

Very few placement disputes are decided by a court; most cases are resolved by an agreement between the parents. However, placement negotiations are heavily influenced by the direction the Legislatures give to family court judges. A change in the law will impact placement negotiations. It will needlessly generate conflict, and the social science research shows that conflict between parents is harmful to children.

The current law encourages parents to negotiate towards an outcome that is centered around the child's best interests. While parents may disagree on what arrangements will advance the child's best interests, they will almost universally agree that they want to do what's best for the child. "Best interests" is what mathematicians refer to as a "non-zero-sum game" or a "win-win proposition"; there are a wide range of possible outcomes. While each parent may have their own needs and interests that affect the way they negotiate, any placement proposal is evaluated on how it affects the child.

The creation of a presumption of equal placement changes the negotiations from a non-zero-sum game to zero-sum game. In a zero-sum game, there is a winner and a loser. Both parents will focus on the division of time – – which is a fixed number – – rather than how a proposed placement arrangement benefits or harms the child. Parents will bargain about positions – – that is, their statutory "entitlement" to equal placement – – rather than engage in discussions about what is best for their child.

This would have the unintended consequence of increasing conflict between the parents. A parent who could otherwise conclude that having less than 50% of the placement time is the best arrangement for the child might refuse to even consider such an arrangement, because the law defines it as a "loss," something less than the parent would get if the case went to trial. Conversely, the other parent might hold out for more than 50%, knowing that the risk of getting awarded less than that is very small. By shifting the focus from the child's best interest to simple math, the presumption of equal placement incentivizes conflict by minimizing the risk of doing battle.

I understand the Committee has had the benefit of hearing from Professors Cancian and Meyer from the University of Wisconsin's Institute for Research on Poverty. Their work shows that,

without the push of a presumption of equal placement, parents in Wisconsin have nevertheless embraced the idea of shared parenting. In 1989, only 12% of the cases they looked at resulted in a shared parenting arrangement, as that term is used in Wisconsin. By 1998, the number had grown to 30%; it was 40% in 2003, and 50% in 2010. When given the opportunity, many families will craft a shared placement arrangement that suits their situation.

Our Chapter members believe that there is no "one-size-fits-all" shared parenting arrangement. What is best will vary from family to family and will even vary for an individual child at different stages of development. The adoption of a rebuttable presumption of equal placement unnecessarily exposes children to the risk of parental conflict, with no corresponding benefit.

Thank you for taking the time to consider our input, and for your work on what we know can be a contentious issue. If there is any additional information I could provide you, please contact me.

Sincerely,

DUXSTAD & BESTUL, S.C.

Daniel P. Bestul

DPB:dpb

cc: Wisconsin Chapter AAML members
Committee Staff
Margit Kelley (via e-mail)
Rachel Letzing (via e-mail)
Kelly Mautz (via e-mail)

memo

Wisconsin Coalition Against Domestic Violence
1245 East Washington Avenue #1245
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chaset@endabusewi.org

Date: October 22, 2018
From: Chase Tarrier, Public Policy Coordinator
Adrienne Roach, Policy and Systems Analyst
Re: Presumption of Equalized Placement

This memo outlines End Domestic Abuse WI's opposition to any policy proposal that would create a presumption of equalized placement in Family Law cases. End Domestic Abuse Wisconsin (End Abuse) is the statewide organization that represents domestic violence survivors and local domestic violence victim shelters and service providers.

We would like to thank the Study Committee members for their consideration of our perspective on this issue. In addition to articulating our concerns about a presumption of equalized placement in Family Law cases, this memo will include an overview of a recent research project undertaken by End Abuse in collaboration with various partners that work in, or tangent to, the Family Law system. The preliminary findings of the forthcoming report based on this research are included in this memo and further articulate our concerns regarding any policy, such as a presumption of equalized placement, which limits judicial discretion in sensitive cases that are likely to include some form of abuse or interpersonal violence.

While we recognize and agree with research demonstrating the benefits of shared parenting in families with healthy power dynamics, we are concerned that a presumption of equalized placement will further limit the ability of courts to differentiate cases in which shared parenting (or equalized placement, specifically) is unsafe.

The consequences of a less nuanced approach are too serious to ignore. A lack of careful accounting for the dynamics of domestic abuse within a family can result in a child's continued, prolonged exposure to the abuse. A child's exposure to domestic violence is an *"Adverse Childhood Experience"* and can affect their healthy growth and development, as well as lead to chronic illnesses and other challenges in adulthood that can even lead to an early death.[1] In addition to the broad concerns outlined above, the following are specific issues that must also be considered before moving forward with a presumption of equalized placement in Family Law cases:

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[1] Centers for Disease Control and Prevention. 2016. *About the CDC-Kaiser ACE Study.* June 14. Accessed October 17, 2018. https://www.cdc.gov/violenceprevention/acestudy/about.html

1. **Equalized placement is likely to apply to cases that involve family violence.**
   Most cases are settled without court involvement or at some point during mediation.[2] Approximately 4-5 percent of divorcing or separating families ultimately go to trial, with most cases settling at some point earlier in the process. A presumption of equalized placement would only apply to this small percentage of cases which are far more likely to involve some form of family violence. Academic researchers have shown in numerous studies that a high percentage of contested custody cases involve intimate partner violence.[3] To protect families and children, courts must be engaged and strive to do their best to discern the best arrangement for children and their parents. Conforming to a rigid, simplistic formula will impede on judges' ability to weigh the unique details of each case to ensure the best, safest outcomes.

2. **Rigid application of equalized placement would put victims and their children in dangerous contact with abusers.**
   Wisconsin's current Family Law system often does not recognize or account for the dangerous dynamics of domestic violence and abuse in families, even in cases with a documented, criminal history of violence (see section on End Abuse's Family Law Research Project). Mandating that all parents be presumed fit for 50 percent placement, unless proven otherwise, is extremely dangerous. Equalized placement gives abusers the opportunity and means to continue to harass, threaten, monitor, stalk and emotionally and physically abuse their victims. Additionally, equalized placement puts children in the middle of the abuser's attempt to maintain power and control over the victim. Studies indicate that joint custody arrangements where domestic violence is identified is rarely in the best interest of the child.[4]

3. **Courts need every opportunity to differentiate high-risk cases.**
   To be clear, the dynamics of domestic abuse are complex. Not every parent who has ever been abusive to their partner should be denied placement with his or her child, but vulnerable children in high-risk cases deserve to have family courts closely evaluate family violence. A presumption of equalized placement offers a simplistic solution for the most difficult custody cases. Creating a one-size-fits-all placement presumption will tie victims and their children to dangerous abusers. As a result, many will never find safety and will be exposed to on-going harassment, terror, and constant threats of violence or death.

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[2] Lederman, Leandra. 1999. "Which Cases Go to Trial: An Empirical Study of Predictors of Failure to Settle." *Case Western Reserve Law Review* 317, Note 2.

[3] Jay G. Silverman, Cynthia M. Mesh, Carrie V. Cuthbert, Kim Slote, and Lundy Bancroft. 2004. "Child Custody Determinations in Cases Involving Intimate Partner Violence: a Human Rights Analysis." *American Journal of Public Health* pg. 951.

[4] Daniel G. Saunders, Karen Oehme. 2007. Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns (Revised 2007). October. Accessed October 17, 2018. https://vawnet.org/material/child-custody-and-visitation-decisions-domestic-violence-cases-legal-trends-risk-factors.

4. **An equalized placement formula can be harmful to children in ways that are unrelated to domestic violence.**
   A presumption of this kind is not a minor adjustment to Wisconsin's child custody and placement law; it is an unprecedented inversion of the values and principles enshrined in our statutes. Currently, courts must consider the best interest of the child first, and then maximize the amount of time the child spends with each parent in a way that is consistent with the best interests of the child. The presumption of equalized placement relegates consideration of the child's interest to an afterthought by redefining 'best interest' entirely. In addition, parents will no longer be told to cooperate and agree to what is in their child's best interests. Instead, the message will be that each parent has a right to 50 percent placement. Any parent who thinks some other arrangement would be better for the child would be essentially forced to try to prove the other parent unfit. This is no way to advance the goal of cooperation or the interests of children.

With these specific concerns regarding a presumption of equalized placement in mind, it is worth examining the data that supports our perspective on this issue.

End Abuse's 2017/2018 Family Law Research Project

For nearly forty years, the policy work of End Domestic Abuse WI has been grounded fundamentally in the experience of survivors and the advocates that serve them. Throughout that period, survivors and advocates have consistently reported that one of the main challenges survivors continually face is navigating the often unfriendly, rigorous, and officious family law system to keep themselves and their children safe. Over the years, horror stories about survivors' experiences in court have spurred us to reflect on the family law system and search for innovative solutions to address the obstacles facing victims of domestic violence. We have heard both from survivors directly, as they struggled to represent themselves in court, as well as from their counsel and the advocates supporting them. However, aside from this collection of stories, we had no other concrete evidence to help us understand why family law outcomes are often so contrary to the safety needs of survivors and their children.

Therefore, we set out to collect data to understand how courts apply current law, such as 2003 WI Act 130[5], in family law cases with a history of domestic violence, taking great care in selecting which cases to review. We examined a period from 2008-2015, matching parties in criminal cases with domestic violence-related criminal convictions no less severe than misdemeanor battery with subsequent family law cases to determine child custody and placement between the victim and the criminal defendant. We used the Wisconsin Circuit Court Access Platform (WCCA, also known as CCAP) to identify the matches in a random selection of twenty counties from all ten judicial districts across the state. Small, medium, and large counties were all included in the sample, from the smallest, Ashland County, to the largest, Milwaukee County. We trained volunteers to review the public case files and identify concrete data such as

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[5] Wisconsin State Legislature. *2003 Wisconsin Act 130.* March 12, 2004. https://docs.legis.wisconsin.gov/2003/related/acts/130.

the date of the final order and the final order outcome. We also included other less concrete variables, such as child involvement in the criminal case. Volunteers and staff read criminal indictments for documented information on whether the child witnessed or also experienced the violent offense. Additionally, we recorded documented lethality factors in the case, such as the abuser's access to a gun, or whether the abuser threatened to kill the victim. After months of data collection, we reviewed a total of 361 family law cases with a criminal history of domestic violence. Over the last several months, we spent substantial time analyzing the data collected from these 361 cases. Due to the importance of the matter at hand, we have decided to share our preliminary results with this committee prior to releasing our formal report.

Family Law Data Collection – Relevant Findings

1. The court ordered sole custody to the victim less frequently (46%) than joint custody (50%), despite the exception to the joint custody presumption under current law for DV victims.

2. The court ordered safety provisions, a tool provided to the court under current law in cases involving domestic violence (such as ordering supervised placement or requiring the exchange of the child in a protected setting) in only 20% of the cases reviewed.

3. The court made formal DV findings (another tool provided to the court under current law to ensure safety in domestic violence cases) in only 8% of the cases reviewed.

4. Even in cases with a history of domestic violence, the court rarely ordered sole placement to the victim (14 out of 328 cases with documented placement orders). Moreover, in nine of those fourteen cases, the abuser was in prison, therefore making physical placement impossible.

5. Primary placement with the victim was the most common order, at 66.8% of all cases with documented placement orders. Primary placement still requires some degree of interaction between the victim and the abuser, such as determining how and when to exchange the child. Nevertheless, the court ordered safety provisions in only 25% of the cases in which the victim had primary placement.

6. After primary placement with the victim, the most common court order was 50/50 placement, in just over 12% of the cases with documented placement orders. In addition, the court ordered safety provisions in only 10% of those cases, or four of the 41 cases with 50/50 placement.

7. In cases with documented child involvement in the criminal case, the court ordered safety provisions in only 20% of the cases reviewed, and the placement outcomes were about the same, with awards of 50/50 placement differing by about three percentage points.

8. More than two-thirds of the cases reviewed (260 cases) had documented lethality factors in the criminal case file. Of those 260 cases, 123 included the most dangerous factors, meaning the abuser either threatened the kill the victim, used a weapon or threatened to use a weapon against the victim, or the victim feared the abuser would try to kill him or her.

9. Of the 123 most potentially dangerous cases, the court made a DV finding in the family law case in only 13 cases (11%), ordered safety provisions in only 25 cases (20%), and the placement outcomes did not dramatically differ from the norm.

There is no doubt that these preliminary findings illustrate the need for changes to the family law system. However, what they also indicate is that a presumption of equalized placement could have devastating consequences for domestic violence victims and their children. The court does not appear to be regularly, or systematically, using the tools currently at its disposal to evaluate complicated cases involving domestic violence. We fear that a more rigid, simplistic formula, such as a presumption of equalized placement, will only exacerbate this problem. Judges will be even more likely to order 50/50 placement in cases with a history of domestic violence. Our findings indicate that the court already orders 50/50 placement too often in cases with a documented criminal history of domestic violence. We are also concerned about the cases that do not have a criminal history of domestic abuse, but where the dynamics of domestic abuse are active and just as dangerous.

In conclusion, End Abuse urges you to oppose any proposed legislation to change the best interest of the child presumption to a presumption of equalized placement, or any other proposal that would direct the courts away from making critical and individualized decisions based on the best interest of the child. Any such legislation would further limit the courts ability to adequately account for the safety needs of domestic violence victims and their children. It would also have harmful consequences for other children in contested custody cases because the courts will no longer be permitted to put the best interests of children first.

Thank you for considering our views. Please feel free to contact Chase Tarrier, Public Policy Coordinator at 608.237.3985 or chaset@endabusewi.org for additional information.