

## **MEMO TO: SENATE JUDICIARY COMMITTEE**

**FROM: LINDA D. ELROD**, Richard S. Righter Distinguished Professor of Law and Director, Children and Family Law Center, Washburn University School of Law; Past chair, American Bar Association Family Law Section; Past chair, Kansas Bar Association Family Law Section; Editor-in-chief, *Family Law Quarterly*, scholarly publication of ABA Family Law Section from 1992-2016, now Editor Emeritus and Board member; author KANSAS FAMILY LAW (Thomson Reuters 2018-19 ed.); CHILD CUSTODY PRACTICE AND PROCEDURE (Thomson Reuters 2019 ed.); and a national textbook on FAMILY LAW (West Academic 2018 ed.).

### **RE: TESTIMONY in Opposition to SB 157**

I am opposed to an equal parenting time presumption, even in temporary proceedings, because I believe the potential to harm children exceeds any value to parents.

A child's needs and well-being should be the primary concerns of the legislature. I agree that parents should remain as parents whether they live together or apart. I recommended and supported the joint custody preference nearly forty years ago. That, however, does not mean that a child should presumptively live with each parent an equal amount of time.

A presumption of equal time is not necessarily in the best interests of all children, especially when the parents cannot or will not cooperate with each other. Shared or joint physical custody can work when the parents are committed to making it work. Shared residency or joint physical custody can harm children when it is imposed on high conflict parents. It can also harm children when financial support is reduced to a lower income parent's household.

A presumption forces the parent who does not want shared parenting, often the victim of emotional or physical abuse, to prove why there should not be shared residency. The emotional and financial costs as well as the time to hear these cases will harm Kansas children. Kansas statutes provide sufficient guidance for judges to use the existing preference for joint custody, the presumption in favor of the parents' agreement, and numerous factors if the parents do not agree. Some of my reasons for opposing SB 157 are:

#### **1. EACH CHILD IS UNIQUE**

*"[t]he only absolute in the law governing custody of children is that there are no absolutes." Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 93 (1982).*

Each child has a right to be treated as an individual. A judge should determine custody between parents who cannot agree according to the best interest of the child. That means no presumptions but a detailed analysis of the needs of the child and the ability of each parent to meet those needs. One child might adapt very well to two households. Another

child may only thrive on (and need) a routine - same bed, same toys, same schedule daily. It depends on the parents and the health, age, and sensibilities of the child involved. As one court indicated:

[I]n light of the changing nature of the structure of families and challenges to the sweeping application of psychological parent attachment theory, we believe the joint physical care issues must be examined in each case on the unique facts and not subject to cursory rejection based on a nearly irrebuttable presumption ... *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007).

The child should be entitled to some stability in his or her life. A presumption for joint physical custody is a parents' rights argument rather than a child well-being argument. Joint physical custody might require a child to change schools often or travel long distances. One court noted the problem:

. . . attending school in the same school system is generally in the best interests of the child, because alternating schools [may] result in psychological and educational problems posed by different schools . . . a child knowing that he will alternate schools will be less likely to establish strong friendships with other children, to participate in school activities and sports, and to gain a meaningful and useful education. *Fisher v. Fisher*, 535 A.2d 1163, 1166 (Pa. Super. 1988) (reversing joint custody award that had child alternating school years between Philadelphia and St. Louis).

Joint physical custody often imposes too much of the burden of the travel on the children. A *Newsweek* editorial in Feb. 2002 was written by a young man lamenting that every time there was break or vacation time when his friends were doing fun things, he was travelling back and forth to see his parents. While he loved his parents, he felt like he missed out on a normal childhood. He stated, "After all those back-and-forth flights, I've learned not to get too emotionally attached." Nick Sheff, *My Long-Distance Life*, NEWSWEEK, Feb. 15, 1999. See also ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2006) (interviews with 1500 children showing that children of divorce increasingly find themselves caught in a no man's land between the two worlds of their parents; these children become "little adults" and lack a unified sense of home. Because they travel between two homes, these children keep their guard up and are always watching to see what the rules are at Mom's and how things are different at Dad's house.).

Contrary to what some have argued, the studies are inconclusive as to whether equal time parenting helps children. Stephen Gilmore, *Contact/Shared Residence and Child Well Being: Research Evidence and Its Implications for Legal Decision Making*, 20 INT'L J.L. POL'Y & FAM. 344, 352-53 (2006) (research to date on the benefits of joint physical care are inconclusive and has produced mixed results). In fact, even some strong advocates for joint custody have admitted that the research shows that one good authoritative parent is sufficient and the frequency of time is not as important as the relationship created.

## 2. HIGH CONFLICT PARENTS SHOULD NOT HAVE JOINT PHYSICAL CUSTODY

*[A trial court's] blind hope that a joint custody agreement will succeed, or that forcing the responsibility of joint decision-making upon warring parents will bring peace, is not acceptable." [T]he capacity of the [parents] to communicate and reach shared decisions regarding the children's welfare is of paramount importance. Reichert v. Hornbeck, 63 A.3d 76 (Md. Ct. Spec. App. 2013).*

Joint physical custody or shared residency works best for parents who are cooperative, flexible, and willing to put their children's needs above their own. Parents who truly care about their child will want what is in that child's best interests. Joint physical custody can be a dangerous tool in the hands of the emotionally undivorced, especially if one parent is trying to control the other. As one expert researcher stated:

[J]oint physical custody is the best and worst arrangement for children. It's the best when parents can cooperate enough to make joint physical custody work for children. It's the worst when joint physical custody leaves children in the middle of a war zone. Robert Emery, *Joint Physical Custody*, PSYCHOLOGY TODAY, May 18, 2009, available at <http://www.psychologytoday.com/blog/divorced-children/200905/joint-physical-custody>.

Several national think tanks, including one on joint custody, have concluded that joint custody, legal or physical, should NOT be imposed in high conflict situations, especially when there is domestic violence. See Marsha Kline Pruett & Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting*, 52 FAM. CT. REV. 152 (2014) (joint custody should not be ordered in high conflict situations); Allen Bailey, *Prioritizing Child Safety as the Prime Best Interest Factor*, 47 FAM. L. Q. 35 (2013). See also Buchanan & Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 439 (2008) (arguing that there should not be a presumption or undue pressure for joint physical custody, especially in high conflict cases). See also Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495 (2001) (not in child's best interests to award equal time in high conflict cases).

Imposing joint custody in high conflict cases leads to repeated litigation which is also harmful to children. See Hongyang "Brian" Li v. Yi Ding, 519 S.W.3d 738 (Ark. App. 2017); Lee v. Fitts, 47 N.Y.S.3d 468 (App. Div. 2017). Some parental conflicts continue for years. For example, a New York court noted about a five year battle involving several children: "The conflict in this family is at a high frequency, at a high intensity and of longstanding duration." \* \* \* this long-standing divorce [custody] battle, . . . makes its movie namesake seem like a snowball fight. . ." *Kramer v. Kramer*, 2015 WL 4635732 (N.Y. Sup. Ct. 2015) (unpublished).

### **3. CHILD SUPPORT REDUCTIONS OFTEN HARM LOWER INCOME PARENT**

Under the Kansas Child Support Guidelines, Adm. Order #287, joint physical custody can result in application of the shared expense formula. The child support guidelines require a judge to determine if shared parenting is in the best interest of a child. Kan. Sup. Ct. Adm. Order #287 III.B.7.a. Shared Expense Formula requires that the court consider if parents can:

- a. communicate well,
- b. are highly cooperative co-parents
- c. have the ability and willingness to keep accurate records for the period of time necessary to raise their children,
- d. will share the children's direct expenses in a timely manner,
- e. have similar values and tastes,
- f. have considered the current and future needs of their children carefully, and are willing and able to resolve minor problems without the intervention of others.

A legislative presumption for equal residency will not take into account these important factors and may economically harm the lower income parent. It will also require new amendments to the child support guidelines. The impact of the adjustment on the child and the child's primary household is often great and results in the child having wildly different standards of living between the parents' houses. When the parent who gets the adjustment fails to spend the time as promised, it is difficult to adjust support. *See* Karen Czapanskiy, *The Shared Custody Child Support Adjustment: Not Worth the Candle*, 49 FAM. L. Q. 409 (Fall 2015); Jo Beld and Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM. L.Q. 165 (2003).

### **4. KANSAS HAS A PREFERENCE FOR JOINT CUSTODY AND A PRESUMPTION THAT AN AGREEMENT OF THE PARENTS IS IN THE CHILD'S BEST INTERESTS**

I agree with the existing presumption that the parents' agreement is in the best interest of the child. Parents usually do know their child better than anyone else. If, however, the parents cannot agree, the judge determines custody and residency using a best interests of the child standard. This standard requires a case sensitive analysis of what is in the child's best interests, not a legislative presumption.

The Kansas legislature has added numerous factors for a court to consider in an award of custody under K.S.A. 23-3203. The first factor is (1) each parent's role and involvement with the minor child before and after separation. A presumption in favor of equal parenting would allow a parent who had done virtually no parenting and had no relationship with a child (as in a paternity suit brought when the child was eight) to have equal parenting time. How is it in a child's best interest to be forced to spend equal time between the parent and

the only home the child has ever known and a stranger-to-the-child's place?

## 5. MISCELLANEOUS OTHER PROBLEMS

Among the other potential problems for children in equal time arrangements are:

- a. With very young children, ages 0-3, shared physical residency can interfere with bonding needed to create healthy adults. *See* George, Solomon, and McIntosh, *Divorce in the Nursery: On Infants and Overnight Care*, 49 FAM. CT. REV. 521 (2011); Pamela S. Ludolph & Milfred D. Dale, *Attachment in Child Custody: An Additive Factor, Not a Determinative One*, 46 FAM. L.Q. 1 (2012).
- b. Children feel they have mom's house and dad's house - not "my" house.
- c. Lack of stability in home environments leads to uncertainty about rules, expectations, discipline, differing sleeping arrangements.
- d. Loyalty conflicts can be exacerbated.
- e. The child may bear much of the economic hardship of divorce and separation because one household is underfunded.

*See* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of the Child in the Balance*, 42 FAM. L. Q. 381, 397-400 (2008).

In conclusion, we do know something about what children need to grow into healthy adults. If the child does not have the ideal intact, cohesive, nuclear family, a child needs at least one parent who is consistently nurturing, loving, teaching and coping. A child needs stability, relationships with friends and extended family. A presumption for equal time custody creates the opportunity for more turmoil, more conflict, and less stability for a child.