

THE COSTS AND PITFALLS OF INDIVIDUALIZING DECISIONS AND INCENTIVIZING CONFLICT: A COMMENT ON AFCC'S THINK TANK REPORT ON SHARED PARENTING

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The AFCC Think Tank on Research, Policy, Practice, and Shared Parenting is quite groundbreaking, had an all-star cast, and the issues could hardly be more important to our organization. Yet, many will regard the final report from the think tank as disappointing because, simply, it fails to say very much. I argue that the reason is that the think tank gave too little consideration to two interlocking costs to the families. First are the costs associated with individualizing decisions on a case-by-case basis. Much as it may be desirable, we may really not know how to properly individualize, tailor, or custom-fit parenting plans to achieve the best possible outcomes in each case. So, the effort and expense and time and trouble taken in the futile pursuit of case-specific decisions come with little corresponding benefits. Better to have a starting place that covers the majority of cases and families, with, of course, the ability to deviate when the fit is obviously bad. The general public strongly believes that shared parenting is that starting place and that any other position is biased. The second cost is that vagueness and ambivalence will ultimately be iatrogenic for families by leading to greater conflict. Various proposals under consideration differently incentivize parents to engage in that conflict. Presumptions, of any flavor, generally minimize such incentives. A shared parenting presumption would minimize that incentive most of all.

Key Points for the Family Court Community:

- We do not know enough to validly individualize custody arrangements.
- Vagueness and ambivalence incentivize conflict between the parents, which we do know is deleterious.
- A shared parenting presumption is strongly viewed by the public as the correct starting place and that any other position is biased.
- The buzz among divorce professionals about what is “the best”—and/or the most judge preferred—arrangement exerts heavy influence on the arrangements most parents eventually settle upon.
- The think tank provides an extremely useful agenda for future research.

Keywords: *Approximation Rule; Custody; Custody Evaluation; Interparental Conflict; Shared Parenting; and Think Tank.*

It is an honor for me to be asked to comment on the final report from the AFCC Think Tank on Research, Policy, Practice, and Shared Parenting (Pruett & DiFonzo, 2014). This AFCC effort is quite groundbreaking, and the issue of shared parenting policy could hardly be more important to our organization. The idea of bringing together an all-star cast of scholars, researchers, practitioners, decision makers, and policy makers for an extended meeting to attempt to thrash out areas of consensus and disagreement on this critical issue was a brilliant one. The choice of members was careful and deliberate, attempting to cover the waterfront of both areas of expertise and divergent viewpoints. Based on my familiarity with many of the members, this effort was extremely successful.

Of course, one must ultimately weigh the value of the report not on the membership of the think tank, no matter how illustrious and eminent; nor on the reporting, no matter how faithful Marsha and Herbie's summary was to the debate; nor on the enterprise itself, no matter how timely, visionary, and necessary. Instead, we must evaluate the report on its content, on its recommendations, and on its take-home message for policy makers and fellow professionals. It will not surprise me if, here, many

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will regard the report as disappointing. Simply, *it fails to say very much*. It notes so often that “consensus was not achieved” that the ultimate take-home message is vague and bland. Decision makers and professionals looking for updated guidance on how to proceed will not find anything to change their preconceptions here. It ends up saying basically: *the issue of shared parenting is a really good question, but we cannot, at this point at least, agree on how to advise you*.

It could very well be that this is the nature of the beast. The issue of shared parenting is perhaps sufficiently complicated and nuanced or the research sufficiently equivocal or preliminary that more definitive statements are precluded. Certainly, that would have to be the position taken by the majority of the think tank participants. But I wish here to pursue a different stance: that the think tank, despite the eminence and expertise of its participants and the openness of the process, failed to fully appreciate certain factors that would have changed the document. In particular, I wish to argue that the think tank gave too little consideration to two interlocking *costs* to the families: the costs associated with individualizing decisions on a case-by-case basis and the costs that vagueness and ambivalence will ultimately be iatrogenic for families by leading to greater conflict.

THE COSTS AND PITFALLS OF INDIVIDUALIZING DECISIONS

The report claims throughout that parenting arrangements must be “individualized,” “tailored,” “case specific,” and “case by case.”¹ This is in some ways a self-evident truism, a no-brainer. Tailoring a plan to the individual is, in almost all instances, in almost any domain of human affairs, preferable to wholesale uniformity. Because people have various sizes of feet (and everything else), footwear (and anything else they need) cannot come in just one size. So why do we so often *not* individualize in human affairs? Why do we so often employ across-the-board decisions instead?

One common reason is undoubtedly political. If one is going to individualize outcomes, doing so frequently sets off a battle of all against all. The messy political battles that result are awkward, unkempt, uncomfortable, and ultimately provide no guarantee that the best possible allocation was put into effect even after all that travail.

But another reason that, arguably, prevails in family law is simple lack of expertise and/or its associated costs. The agreement that one size does not fit all begets the corresponding necessity of determining with accuracy, reliability, and validity what anyone’s correct “size” is. With respect to parenting plan issues, this translates into somehow knowing what arrangement is the best fit for each individual family. How certain are we that, if we take the care and absorb the costs of individualizing, we will end up with the proper size that does fit each case well?

This, it turns out, is a matter of some dispute and of disciplinary differences. Custody evaluators (a term that I suppose will need to be replaced as the term “custody” gets mothballed) certainly claim that they have the necessary expertise (Gould & Martindale, 2007; Gould & Stahl, 2000; Stahl, 1994; Stahl, 1999) and have mostly convinced the judiciary of it. But skeptics in the legal profession (Bow & Quinnell, 2004; Bow & Quinnell, 2002; Kelly & Ramsey, 2009; Tippins & Wittman, 2005), and even within the mental health community (Emery, Otto, & O’Donohue, 2005), abound.

Stevenson, Braver, Ellman, and Votruba (2012) reviewed the dimensions that custody evaluators most commonly assess and found a large disconnect with the dimensions that research has found actually matters to family outcomes. For example, intelligence quotient tests and the Minnesota Multiphasic Personality Inventory are by far the most common tests used in custody evaluations (Ackerman & Ackerman, 1997), but these instruments have no demonstrated validity in that context, because they do not assess the qualities most important to parenting issues (parenting capabilities and conflict management attitudes and skills). Projective tests (e.g., the Rorschach Inkblot Technique, Thematic Apperception Test, and Sentence Completion Test) are the instruments next most often used by evaluators (Ackerman & Ackerman, 1997). These instruments have almost no empirical support for their validity in any domain (Erickson, Lilienfeld, & Vitacco, 2007), yet remain largely unchallenged for use in custody evaluations (Shuman, 2002). The Bricklin Scales (Bricklin, 1984) are also widely used and were developed specifically for this arena, but there is a near-complete absence of

data supporting their reliability and validity (Emery et al., 2005). Hence, unfortunately, the suspicion of many is that the claims to Solomonic wisdom of custody evaluators are merely self-aggrandizement and self-justification and accounted for by their profit motive. There has never been a study, so far as I am aware, of inter-rater (i.e., inter-evaluator) agreement on how to resolve a custody case. One is sorely needed. In its absence, cynics remain free to contend that different evaluators (with different biases, perhaps) would recommend differently in identical cases. This lack of agreement itself, let alone the lack of predictive validity that the preferred solution portends better outcomes for the family than rival choices, renders suspect the preference for individualizing when we have no sound or principled basis for doing so.

In contrast, the judiciary and legal scholars have been comparatively modest and humble in their claims to omniscience about selecting the parenting arrangements that best “fits.” Talk to family court judges, and you will find them unsure and unconfident about their sizing abilities and tools. They make such decisions only when they have to and only *because* they have to. But they really prefer not to and wish instead to defer to others, mostly to the parents themselves. They care little that the settlement or mediation process might lead to arrangements that the parents have clearly been pressured into and neither thinks fits their family, as long as the judges themselves do not have the responsibility. Alternatively, they acquiesce to “experts” who profess to have the secret knowledge enabling a wise choice.

Legal scholars, too, have commonly bemoaned the discretion that devolved to the judiciary when the individualized best interest of the child became the standard. Chambers (1984), for example, noted that it is difficult if not impossible for a judge to acquire reliable enough information about the parent and child to make confident predictions about what custody arrangements are the best. And even if they could, the parents are commonly unable to predict how the judge will decide (Chambers, 1984), which perception, in turn, complicates and extends the conflict and litigation, propagates character assassinations, and disadvantages the more risk-adverse party (Mnookin, 1984). For example, Woodhouse (1999) wrote, “this unpredictability encouraged parents to litigate custody disputes rather than settle them” (p. 820). Similarly, Warshak (2007) argued, “[t]he ambiguity invites each parent to engage in a full-scale attack on the other’s worth, as a caregiver and as a human being” (p. 601).

Accordingly, legal scholars have been in the forefront of articulating alternative standards that remove both discretion and individualization. Thus, the Primary Caretaker Rule (Chambers, 1984; Crippen, 1990; Neely, 1984) was one of the first serious proposals to walk back individualized custody jurisprudence and substitute easier-to-recognize guideposts. The Approximation Rule (Scott, 1992; Scott, 2002; American Law Institute, 2002) was the successor and most recent effort along these lines, attempting to identify a more easily calibrated dimension on which to base parenting time arrangements. The proposal has its supporters (Emery, 2007; Kelly & Ward, 2002; Maccoby, 2005; O’Connell, 2007) and critics (Braver et al., 2011; Lamb, 2007; Riggs, 2005; Warshak, 2011).

Bottom line: much as it may be desirable, we may really *not know how* to properly individualize, tailor, or custom-fit parenting plans to achieve the best possible outcomes in each case. If this is true, the effort and expense and time and trouble taken in the futile pursuit of case-specific fittings come with little in the way of corresponding benefits. And, in such a case, it is better to have a rule or starting place that covers the majority of cases and families, with, of course, the ability to deviate when the fit is obviously bad.

The general public strongly believes that shared parenting is that starting place and that any other position is biased. For example, 85% of Massachusetts voters supported a 2004 nonbinding ballot proposition with this language:

There should be a presumption in child custody cases in favor of joint physical and legal custody, so that the court will order that the children have equal access to both parents as much as possible, except where there is clear and convincing evidence that one parent is unfit, or that joint custody is not possible due to the fault of one of the parents. (<http://www.fatherhoodcoalition.org/cpf/inthenews/2004/shared%20parenting%20initiative%20results%20chart.htm>).

In Fabricius, Braver, Diaz and Velez (2010), we presented that exact language to a representative sample of citizens and found virtually unanimous endorsement of the proposition. Braver, Ellman, Votruba and Fabricius (2011) presented neutral but hypothetical scenarios about “two average normal parents” to laymen and found that 69% would award exactly equal time to the two parents. (In a follow-up study by Votruba, Braver, Ellman, and Fabricius (in press) that figure rose to 77%). We also asked citizens what they thought was “the ‘slant’ of the legal system regarding divorced parents”; only 16% saw the system as unbiased and virtually everyone else (males and females alike) viewed the current system as slanted in favor of mothers.

COSTS AND PITFALLS OF INCENTIVIZING CONFLICT

There is widespread recognition that, among the several factors that evidence has consistently shown powerfully impact the long-term well-being of the family members, the one most directly under the law’s control is interparental conflict (Fabricius et al., 2010; Kelly & Emery, 2003; Braver & Lamb, 2012; Braver, Shapiro, & Goodman, 2005). So I am chagrined at the think tank report’s seeming lack of awareness that various proposals under consideration differently *incentivize* parents to engage in that conflict (I am not speaking here of only legal conflict, but instead the parents’ arguments and fighting). Presumptions, of any flavor, generally minimize such incentives. A shared parenting presumption would minimize that incentive most of all.

Some writers (e.g., Amato, 1993; Emery, 1999) have gone in the opposite direction and advocated precluding shared custody and/or limiting parenting time for the nonprimary parent when the conflict level is high. For example, Stahl (1999), in his guide for professional custody evaluators, opined, “high conflict parents cannot share parenting” (p. 99). Similarly, Buchanan (2001) wrote that, “when parents remain in high conflict, joint custody is . . . ill-advised” (p. 234). But Fabricius et al. (2010, p. 275) provided several reasons why such a policy is unwise, including this notion:

Imagine a parent driving two children in the backseat of her car. The children are squabbling and quarreling, driving the mother to distraction. Finally, in exasperation, she pulls over, stops the car, turns around, and says: “That does it. Johnny, since you are not the ‘primary’ child, you are out of here. You are banished from the car and hereafter from the family.” Such a practice is ludicrous to imagine; instead, any good parent will take some action intending to quiet the conflict while retaining both children. Our policy regarding parenting time in a high-conflict family should be analogous.

What policy will instead deincentivize conflict? One, for example, is eliminating the blanket opportunity for one parent to unilaterally veto shared custody. Another is the friendly parent provision. Kelly and Emery (2003) noted that “it is not uncommon to find one enraged or defiant parent and a second parent who no longer harbors anger, has emotionally disengaged, and attempts to avoid or mute conflict that involves the child” (p. 353). The moral intuition of the lay citizen, in such instances, is to identify the primary instigator of conflict and reduce that parent’s parenting time (Braver et al., 2011). Such a policy would make it worthwhile for the angry parent to bury the hatchet.

CONCLUDING COMMENTS

I also would like to comment here on a seeming paradox. It is now reasonably well known that very few decrees (2–10%; Braver & O’Connell, 1998; Maccoby & Mnookin, 1992; Logan et al., 2003) are actually adjudicated by judges; instead, most parenting arrangements are (ultimately) decided by the parents themselves. So does it really matter what the law says or what presumption is in force? Of course it does, but only symbolically. Fabricius et al. (2010) provide strong evidence that the buzz among divorce professionals about what is “the best”—and/or the most judge-preferred—arrangement exerts heavy, perhaps decisive, influence on the arrangements most parents eventually settle upon.

I also want to share that I viewed the future research section of the think tank report as its most exemplary portion. There has been too much of a disconnect, I think, between what courts and professionals want to know about parenting arrangements and what researchers, myself certainly included, have chosen to study. But, in my own case at least, it is due to the lack of a sensible research agenda articulated by a wise and careful interdisciplinary panel. The last few pages of the report admirably fill that gap, and I for one intend to dig in.

NOTE

1. “Because one size never fits all, parenting time must be determined on a case-by-case basis” (Pruett & DiFonzo, 2014, p. 153). “The most effective decision making about parenting time after separation is inescapably case specific” (p. 153). “No prescription will fit all” (p. 154). “Tailoring individualized arrangements would be optimal” (p. 154). “A substantial minority espoused a case-by-case approach [to the issue of joint decision making]” (p. 154). “Courts should make decisions concerning parenting arrangements based on the specific and unique needs of individual children” (p. 167). “[We should] focus on the individualized circumstances that might affect child stability through shared parenting arrangements” (p. 167). “The court should make an individualized determination regarding parenting arrangements” (p. 167). “Determinations about parenting time after separation that involve third parties (mental health, legal) are inescapably case-specific” (p. 168). “[We should] avoid a template calling for a specific division of time imposed on all families” (p. 168). “In lieu of a parenting time presumption, a detailed list of factors bears consideration in each case” (p. 168). “[We] agreed upon the importance of . . . individualiz[ing] shared parenting determinations” (p. 168).

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