

Current Child Development and Parental Conflict Research challenge certain Legal Assumptions

The United States has the highest rate of divorce in the industrialized world. It is estimated that 25% of the adults in this country between the ages of 18 and 44 are the product of divorced households.¹ While some children exhibit no ill effects studies have shown them to be at an increased risk of experiencing academic and social problems.² The risks continue in adolescence with "...[p]arental divorce and its associated stressors [being] associated with increased probability of teenage pregnancy, school dropout, and adult mental health problems."³ To ameliorate the detrimental impact of divorce upon children, state legislatures and judges have established rules governing the divorce process and imposed legal standards pertaining to schedules, decision-making, support, and mandatory interventions. On a case by case basis, judges determine the extent of post-divorce parental involvement, prescribe the method for resolution of parental conflict, determine the extent to which the child's voice will be heard, and establish parental authority over critical child-related decisions.

As is appropriate, lawyers and judges have historically looked to the therapeutic and medical community for direction in the development of legal policies affecting children. This article discusses how current research has challenged some of the child development and parental conflict theories upon which family law legislation, standards and guidelines for parental access and conflict are based.⁴

¹ Wallerstein, J.S., Lewis, J.M., Blakesless, S. (2000). *The unexpected legacy of divorce: A 25 year landmark study*. New York: Hyperion.

² Hipke, K.N., Wolchik, S.A., Sandler, I.N., & Braver, S.L. (2002). Predictors of children's intervention

³ Hipke, et al., p. 121, 2002.

⁴ The Washington State Parenting Act and its associated rules and guidelines are used in this article as an example of a common legal standard (Title 26 of the Revised Code of Washington).

Access, Control, and Influence

The laws concerning custody have changed throughout history to reflect the social standards, norms, and mores of the general population and the current experts on family matters.⁵ Because children were the legal property of the father, at one time fathers were automatically awarded custody of their children, until the nineteenth century when this legal presumption was overruled in favor of the maternal custody model.⁶ In the mid 1980's, the legislatures in most states enacted laws to overturn this "gender" bias. Yet, most children, especially under the age of six, are still placed with their mothers.⁷ Most legal participants believe that it is in the best interests of small children, especially under the age of three, not to be separated from their primary daily caregiver. This belief has been codified in many localities through judicial guidelines (For example, King County Superior Court Visitation Guidelines, 2000).

This standard is based upon an attachment theory that children under the age of three can securely bond to only one primary caregiver at a time without significant emotional distress and consequential psychological injury. Under this child development theory, the infant, or small child, should be placed in the sole custody of the primary caregiver, who is usually the mother, and access with the secondary caregiver, usually the father, must necessarily be limited to avoid the distress caused to the infant from being away from the child's primary caregiver and normal surroundings.⁸ Granted, most

⁵ Grych, J.H. & Fincham, F.D. (1992). Interventions for children of divorce toward greater integration of research and action. *Psychological Bulletin*, 111:3, 434-454.

⁶ Grych, J.H. & Fincham, F.D. (1992), *supra*.

⁷ Whiteside, M.F. & Becker, B.J. (2000). Parental factors and the young child's post divorce adjustment: A meta-analysis with implications for parenting arrangements. *Journal of Family Psychology*, 14:1. 5-26.

⁸ Pistotnik, B.A. 1996. *Divorce War: 50 strategies every woman needs to know to win*. Massachusetts Holbrook Adams Media Corporation; Bowlby, J. (1973). *Attachment and loss*. Vol 1. Attachment. New York: Basic Books; Bowlby, J. (1988) *A secure base: Parent-child attachment and healthy human development*. New York: Basic Books.

infants, and small children, prefer the parent who is the primary daily care provider (usually the mother), but this does not mean the father's relationship with the child is insignificant to the child's emotional development. Current child development research indicates that infants generally form attachments to both parents between six and seven months of age, provided that some threshold of daily interaction is established by both parents from birth.⁹ The positive attachment of the infant affixes to both, even though one parent spends less time with the infant. The sudden loss of the relationship causes anxiety and a profound sense of loss in small children, particularly those who were less than two years old. Infants and toddlers suffer more distress by the abrupt departure of a primary attachment figure than older children because of their limited cognitive, communicative, and self-regulatory capacities at this stage of their development. Most child development theorists today recommend that infancy through preschool children with established parental bonds have multiple contacts with each parent each week to minimize post-separation anxiety and maintain the continuity of the parental bond. This does not mean that the primary care giver relationship should be usurped, but rather that the secondary bonding relationship should also be a priority.

In the past, courts frequently gave preference to location-engendered stability (one home, one bed) over the child's relationship to both parents. This principal was premised upon the popular belief that overnight visits for infants and young children were not desirable.¹⁰ In the early 1990's W. Hodges, a leading child development, like many other experts in his field, stressed the importance that older babies who were attached to

⁹ Kelly, J.B., & Lamb, M.E. (2000). Using child development research to make appropriate custody and access decisions for young children. *Family and Conciliation Courts Review*. 38:3, 297-311.

¹⁰ Hodges, W. (1991). *Interventions for children of divorce: Custody, access, and psychotherapy*. New York: John Wiley.

their fathers should have time with their fathers, visitation should be frequent but limited to a few hours. Hodges believed that before the age of three, infants would be harmed from overnight visits.¹¹ This age-based limitation on overnight visits became a judicial standard in many states (See King County Superior Court Guidelines.)

This age-based limitation on overnight visits is not supported in current empirical studies, when the child has a secure and stable bond with the secondary caregiver. The current research indicates that infants and toddlers readily adapt to regular and stable alternative care taking arrangements once they become familiar with the routine.¹² Children under the age of three thrive, if the care taking arrangements are predictable and both parents are sensitive to the child's physical and developmental needs.¹³ Studies show that giving the other parent an opportunity to provide the more normal caregiving tasks fosters the child's trust and confidence in both parents and strengthen the child's attachment to both.¹⁴ (This is not true, however, for school age children, whose academic and social development requires a certain degree of location-based security.) In addition to strengthening the parent-child attachment bonds, regular overnights with the non-custodial parent allows them to stay abreast of the constant and complex changes in the child's development, requires that parents learn effective discipline techniques and gives the non-custodial parent an opportunity to reconnect with the child in a meaningful way. This type of interaction provides opportunities for real parenting and leans to a meaningful connection between parent and child, which will more likely lead to a true

¹¹ Hodges, *supra*.

¹² Kelly, J.B. (1997). The best interests of the child: A concept in search of meaning. *Family and Conciliation Courts Review*, 35 (4), 377-387.

¹³ Kelly and Lamb, *supra*.

¹⁴ Kelly, J.B., & Lamb, M.E. (2000). Using child development research to make appropriate custody and access decisions for young children. *Family and Conciliation Courts Review*. 38:3, 297-311.

relationship and lessening the feelings of loss in both the parent and the child. “[H]aving possession of the child during part of the month is neither positive nor negative in its own right. Rather, what transpires between the father and the child during that time can influence the child’s adjustment”¹⁵ The “best schedule” for a young child is not static. Once the child enters first grade, the focus of parents, judges, and evaluators needs to shift from a preoccupation with the number of overnights to a more complicated assessment of enrichment of parental time while preserving the child’s need to be involved with peers as they mature.¹⁶ The amount of time the non-residential parent spends with the child is not as important as what he or she does with the child when they are together. Any parent who spends time with their child has an opportunity to contribute a positive (or negative) influence on that child. “A particular schedule provides time and an opportunity, what transpires between parent and child is most important.”¹⁷

Custody, Control, and Decision-Making

In the 1980’s many states departed from the traditional custodial format of designating one parent as sole custodian. Several different arrangements became available to parents, allowing them to share to some extent physical control over their children, decision making power, and residential time. These plans were created with under the auspices of the need to allow equal or joint parenting to preserve the intimacy and closeness of the child to both parents, which would consequentially result in better

¹⁵ Whiteside, M.F. & Becker, B.B.J. (2000). Parental factors and the young child’s post divorce adjustment: A meta analysis with implications for parenting arrangements. *Journal of Family Psychology*, 14:1, 5-26.

¹⁶ Whiteside and Becker, *supra*.

¹⁷ Whiteside & Becker, *supra*., p.22.

adjusted children.¹⁸ Mothers generally want sole physical custody of their children and express a higher level of satisfaction of custody arrangements when they are the primary residential parent (Madden-Derdich, & Leonard, 2002). Fathers prefer joint legal custody arrangements because the legal recognition and psychological benefit of having a recognized right to control and influence their children's lives (Madden-Derdich, & Leonard, 2002).

Wallerstein, Lewis and Blakeslee (2000) recently published the results of their 25-year longitudinal study comparing the lives of children raised in "unhappy," but intact, families to those raised by parents who divorced. The results of their study revealed no significant differences between children raised under sole, joint custody, or equal residential agreements in their psychological adjustment. "Court orders can create the opportunity for a relationship, but the responsibility for cultivating a loving, concerned friendship with the child only begins there."¹⁹

Once the child enters the "school age" stage of development, their capacity for secure attachment is established, and other developmental needs must be taken into consideration in order for the child to develop a healthy sense of identity and self esteem.²⁰ As children enter school, their primary developmental goals begin to move away from parental attachment towards social, academic, and ego development. Children in families where parents have not been divorced are allowed to have a voice in how they will spend their social time, which school they will attend, and athletic activities they will pursue as they enter early adolescence. Unlike children of divorced parents, children in intact families tend to spend less time with their parents and more time with their peers in

¹⁸ 26 RCW 09, et seq.

¹⁹ Wallerstein, supra., p.314

²⁰ Wallerstein, supra.

social, athletic, and school-related activities as they mature.²¹ Children of divorced parents are frequently expected to spend more time with the non-residential parent as they enter late childhood and adolescence to the detriment of their peer relationships and personal activities, which are essential for developing a healthy sense of themselves and the formation of their identity.

The child's relationship with the non-primary residential parent may even be damaged by an inflexible schedule as the child matures because the child typically resents the rigidity of the schedule if it significantly interferes with his/her personal goals and social development. The parent who enforces the schedule to the detriment of the child's interests and goals will bare the brunt of his or her hostility.²² Unyielding custody arrangements, which are not periodically reviewed to address the developmental needs of the child as they become young adults or to review out-of-court agreements reached under the emotional and financial distress of possible litigation, frequently do not serve the "best interests" of the child as he or she develops and changes. Nevertheless, they are usually not easily or inexpensively changed or altered because of rules and guidelines which discourage modification of visitation schedule, because stability and routine are paramount for children of all ages. While routine and regularity are extremely important child development factors for small children, they are less significant for adolescents.²³

Parental Conflict

The detrimental effects of post-divorce, co-parental conflict is well documented in the empirical studies. In the study conducted by Wallerstein, Lewis and Blakeslee, they found a commonality in the experiences of the children after divorce, which indicated

²¹ Wallerstein, supra.

²² Wallerstein, supra. .

²³ Wallerstein, supra.

that the parental anger did not end and the intensity of fighting did not diminish for a significant number of the parents after the divorce.²⁴ Consequently, the search for ways to reduce parental conflict and reduce consequential stress on children led the legal and therapeutic communities to try alternative methods for dispute resolution.

In the 1980's, courts and evaluators began to recognize the benefit to families in providing alternatives to trial to resolve custodial arrangements, which are time consuming and costly both emotionally and financially. Mediation became the most frequently-used alternative. Experts believed that its use with parents involved in custodial and visitation disputes would reduce parental conflict after the divorce. The empirical, result-oriented studies buttressed the belief that mediation was a preferable because most parents reach agreements through the process (89%), drastically reducing litigation. Only 10% of those return to the courts with residential disputes (compared to 26% of the non-mediated couples) within two years of the final decree.²⁵ However, the hypothesis that parents who used a mediation model instead of an adversarial process to reach parenting agreements would fight less after the divorce has not been substantiated when tested.²⁶ This should not come as a surprise to legal practitioners, forensic evaluators, and judges who witness the dynamics of mediated agreements in court. The primary motivating force toward settlement has little to do with the "best interests" of the child. It is usually the emotional and financial costs of litigation that propel parents toward settlement.²⁷ Consequently, what the parents could not resolve through the

²⁴ Wallerstein, *supra*.

²⁵ Vestal, A. (1999). Mediation and parental alienation syndrome; considerations for an intervention model.

²⁶ Wallerstein *supra*.

²⁷ Wallerstein, *supra*., Pistotnik, *supra*. King, C.J. (1999). Burdening the access to justice: the cost of divorce mediation on the cheap. *St. Johns Law Review*, 3:2, 375-475.

judicial process, due to cost or weariness, they continue to battle over in the daily arena of the children's lives.²⁸ As a matter of fact, in 85% of "amicably resolved" parental dispute cases, at least a third of these parents continue to fight over parental matters at a potentially detrimental level after the divorce.²⁹

Emery, Laumann-Billings, Walron, Sbarra, and Dillon (2001) conducted a study on the relationship between parental conflict and alternative methods of dispute resolution. They conducted a twelve-year study on low income families who were randomly assigned to mediate or litigate their custody disputes. The results of their study confirmed that most parents reached an agreement through mediation (89%), drastically reducing the litigation, and that the agreements were more likely to provide for joint legal custody while maintaining the tradition of the mother as the primary parent. Contrary to prior studies, their results indicated that the reduction in the number of parents who returned to court within the first two years of mediated of parenting disputes was insignificant. However, those who mediated their agreements tended to report less parenting conflict and report more child-related discussions with the nonresidential parent. The process tends to open the door to "child" centered communication and change. Notwithstanding, aside from a change in parental perceptions, the empirical evidence indicated that mediation of parental disputes did not decrease the level of post divorce parental conflict. The results did suggest a correlation between mediation and enhanced post divorce psychological adjustment of the children. Non-residential parents who mediated also reported significantly more involvement with their children, tended to have more telephone contact, visit more frequently, and be more involved in making

²⁸ Wallerstein, *supra*.

²⁹ Wallerstein, *supra*; King, C.J (1999)

decisions involving their children. Despite the fact that parental conflict was not associated with the method of dispute resolution, this study offers strong proof that mediation results in the non-primary residential parents, having a higher level of contact, and involvement, with their children after divorce.

It is interesting to note the commonality of the prevalent subjects or factors involved in parental conflict in this arena. In the Madden-Derdich and Leonard study, the researchers reviewed data from two independent investigations conducted in 1995 and in 1996.³⁰ They compared the perspectives of parents through assessments in three areas: parenting skills, custody satisfaction, and conflict level. Three primary variables emerged as strong predictors of conflict between divorced parents:

1. Mother's dissatisfaction with father's child-rearing skills;
2. Divergent perceptions regarding mother's willingness to accommodate father's request for changes in visitation schedules; and
3. The degree of difference in either parents' perceptions of the other parent's satisfaction with the current custody arrangement.

Those who practice in this area can confirm the frequency in which these issues arise as an objection to shared parenting, or the cause of post-decree litigation. Psycho-educational classes on parenting may be a means of bridging the child-rearing gap, and, consequently, the source of the conflict. Providing for the periodic review of residential schedules as a matter of course, rather than a byproduct of conflict, to address the

³⁰ Madden-Derdich, D.A., & Leonard, S.A. (2002). Shared experiences, unique realities: Formerly married mothers' and fathers' perceptions of parenting and custody after divorce. *Family Relations*, 51:5, 37-45.

inevitable changes in the needs and desires of the parents and the child would be of great benefit to the child.

Conclusion

Courts wanting to protect children from post-dissolution adjustment risks need to take into consideration the current research on custody, access, and parental conflict which upholds one of the judicially established “best interest” standards and disestablishes others. Presently, small children and infants whose parents are divorcing would benefit from the court’s recognition that infants attach to both parents at an early age when daily contact is routine. Sudden separation from the father may negatively affect the child’s development of secure attachments, despite the fact that the mothers continue to spend the most time with the child. If daily contact with both parts is the established norm, infants and small children who experience the continued involvement of both parents develop healthier attachments. So long as there is a secure bond with the care provider, most infants and small children will adapt quickly to new surroundings once a routine is established. Therefore, there is no per se child developmental detriment which would support prohibition of overnight residential time for fathers of infants or small children.

Older children and adolescents would be better served by the courts if the rules and standards pertaining to parenting schedules could be periodically and inexpensively modified to address developmental changes, and give the child a voice in determining the schedule, especially

as they enter adolescence. In the design of the schedule, the focus needs to change from the number of nights to be spent with each parent to the quality of each parent's relationship with the child. Both parents need enough time to sustain a meaningful relationship. However, it is what the parent chooses to do with the time that will determine the quality of the relationship when they are young and what the child wants to do with the parent when they are older.

Mediation has been shown to be an ineffective tool for reducing parental conflict. Nevertheless, it is an effective bridge to enhanced child-centered communication and discussion. Its continued use, therefore, is in the child's best interests. However, new judicial interventions for high-conflict families need to be designed which focus on the etiological factors underlying parental conflict, particularly in the areas of the fathers' child rearing skills, mothers' accommodation of schedule changes, and parental perceptions of custody satisfaction.

Judges, lawyers, and evaluators have diligently sought input from child development experts in their attempts to protect children from the established risks of domestic conflict. Since the judiciary is the only institution who has the opportunity and authority to intervene on behalf of the increasing number of children whose parents are divorcing, their continued commitment to, and creation of, new, potential risk-reducing interventions is essential for the protection of this most vulnerable population.