**Does Social Science Research Support a Presumption of 50-50 Physical Custody?**

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 Each year for the past several years, New Jersey legislators have proposed bills that would create a presumption of equal parenting time in custody matters. Although the presumption is rebuttable, the proposed bills establish that the presumption can be overcome only by showing by “clear and convincing” evidence that equal or substantially equal physical custody would harm the child. The Family Law Section of the New Jersey State Bar Association (“FLEC”), the New Jersey chapter of the Association of Family and Conciliation Courts (NJ-AFCC), and the New Jersey Matrimonial Lawyers Alliance (“MLA”) have submitted to the legislation’s sponsors, written opposition to this presumption.

 New Jersey law has long recognized that both parents should have significant involvement in the rights and responsibilities of raising and caring for children, appropriately focusing on the best interests of the child without dictating a specific result or formula. Our existing statutory framework focuses on the best interests of children by allowing mental health professionals, legal professionals and judges to apply their knowledge and expertise in contested cases to consider factors enumerated by statute and establish the custodial arrangement most suited to promote the best interests of children in each family.

 Research on outcomes for children in different parenting time arrangements has emerged only over the last few decades given that shared parenting is pretty much a recent phenomenon. Until the late 19th century, fathers were awarded custody of children, even when mothers left to escape abusive marriages. The pendulum swung in the 20th century, based on the Tender Years Doctrine[[1]](#endnote-1) and the reality that, in most households, mothers stayed home and had primary responsibility for raising children. Anti-suffrage posters depicted the decline of families if women were granted the right to vote, warning fathers that they would suffer the fate of having to care for young children, a task viewed as women’s work and unmanly, as depicted in the following cartoons from that era.





 Divorce was fairly uncommon before the 1960s and 1970s, and carried a highly negative stigma. With women’s liberation, more women joined the job market and more households consisted of two working parents. With two parents working, child-rearing became less the domain of mothers, and more of a shared responsibility. Even for families in which women had not worked during the marriage, the economic realities of post-divorce life required them to go to work. As fathers have become more involved in raising children, shared parenting has become increasingly common, although in the majority of cases, children still live primarily with their mothers.[[2]](#endnote-2) As these societal norms have shifted over the last several decades, legislatures and courts have had to grapple with different realities and a wide range of family structures in determining child custody arrangements.

 While legislatures in several states within the U.S., as well as elsewhere in the world, have enacted statutes creating either a presumption or a preferred policy of “shared” parenting, these do not go so far as to mandate a specific schedule or an equal sharing of time. For example, Australia is often cited as a jurisdiction requiring 50-50 parenting time, but that is not, in fact, the case. To the contrary, Australia law creates a presumption of equal shared parental *responsibility*, but not of equal time. Instead, as a matter of policy, rather than statutory presumption, judges are to “consider” entering orders for equal or substantial and significant care-time arrangements.[[3]](#endnote-3)

Research on the Impact of Joint/Shared Custody versus Sole Custody

 Given the relative recency of a significant level of shared custody cases, academicians and researchers have begun to study and compare the effects of various custody configurations during the last three or four decades. Numerous studies designed to evaluate or measure child outcomes in varying custody arrangements have been published in journals not only in the United States, but in other countries as well. These studies vary greatly in methodology, size of the population sampled, and adequacy of statistical reporting.

 Many of the studies compare children raised in shared or joint parenting arrangements with those raised in sole or more traditional custody arrangements in which the child is mostly or exclusively with the mother. Shared parenting is not always defined in the same way – in some instances it is considered 25% or more time with the non-custodial parent (usually the father), and in other instances it may be 35% or more. In some instances, shared parenting refers to responsibilities, not necessarily time-sharing.

 No studies were found that compared children raised in equal parenting time situations with children raised solely by one parent, or jointly by both parents in an arrangement that is significantly less than 50-50. One social science researcher (Kruk) makes the case for 50-50 custody by suggesting sixteen (16) arguments in favor of equally shared parental responsibility.[[4]](#endnote-4) He argues that shared parenting: preserves and enhances children’s relationships with both parents and parents’ relationships with the children; decreases parental conflict and prevents family violence; considers child preferences and parental preferences; reflects a continuation of pre-separation caregiving arrangements; reduces litigation by eliminating arguments about the mathematics of the schedule; provides incentives for negotiation, mediation and development of parenting plans; simplifies judicial decision-making; reduces the risk of parental alienation; eases enforcement of parenting orders and reduces non-compliance; addresses social justice issues; is empirically sound, which the “sole custody” model is not empirically supported. In support of these arguments, Kruk cites over 100 references, including many studies as well as statistics and commentaries. On closer look, however, those sources do not support Kruks’ conclusion. They do not conclude, and most do not even suggest, that equal parenting time is a presumptively appropriate model for custody matters. Much of the work cited in the article does not so much discuss equal parenting time as highlight the importance of significant involvement of both parents in raising and caring for children.

 Seemingly less biased articles have been written analyzing prior research in order to test hypotheses about whether children in joint physical custody arrangements show better outcomes than children raised primarily or exclusively by mothers. One researcher conducted a meta-analysis of 33 studies that had been conducted by various researchers over a period of several years to test this hypothesis.[[5]](#endnote-5) While the studies analyzed in the article did not demonstrate a causal relationship between shared custody and better child outcomes, they also did not support claims that children in joint custody arrangements are more exposed to parental conflict or have a greater risk of negative outcomes due to having to adjust to living in two households. Thus, the author concluded, joint custody has not been shown to be harmful to children’s well-being and may, by allowing for on-going close relationships with both parents, help overcome the difficulties a child experiences by the absence of a parent and other stresses of the divorce process. The author also noted the possibility that exposure to parental conflict might be greater in joint custody arrangements, potentially offsetting some of the benefits. This does not necessarily mean that there is more conflict between parents; rather, it is the child’s exposure to the conflict that would potentially offset those benefits.

 Yet another researcher (Nielsen) analyzed forty (40) studies examining the impact of shared parenting in which children spent at least 35% time with the noncustodial parent versus sole residence, in which children lived primarily or exclusively with their mothers.[[6]](#endnote-6) All forty studies concluded that shared parenting bore a relationship to better outcomes for children regardless of age. Six of the studies focused on infants, toddlers and preschoolers, finding no convincing evidence linking shared physical custody to negative outcomes for very young children. Generally, outcomes were more negative for children when there was a history of violence or the children disliked or had difficulty getting along with their fathers. This is not surprising, since better parent-child relationships in any family configuration would be likely to lead to better short- and long-range child outcomes.

 One issue that is debated by researchers and warrants further study is the impact of parental conflict on the viability of shared parenting. A feature of the most recent version of proposed equal shared custody legislation in New Jersey was the elimination of “the parents’ ability to agree, communicate and cooperate in matters relating to the child” from the factors a judge may consider in devising a parenting plan.[[7]](#endnote-7) Thus, the issue of parental conflict would effectively be omitted altogether from the determination of parenting time, other than in some domestic violence cases.

 Many couples who require courts to determine custody and parenting time tend to be high conflict couples who not only cannot agree on a parenting schedule, but are limited in their ability to communicate, co-parent (or even parallel-parent) or otherwise cooperate in raising their children. Conventional wisdom has been that equal, or substantially equal, parenting schedules should not be imposed on families in the hope that everyone will learn to get along. In many instances, however, the presence of conflict at the time of separation does not reliably predict that the conflict will continue into the future. Over time, some couples do figure out how to get along.

 In a review of two Australian studies, McIntosh and Chisholm noted benefits to fathers and children in situations providing an environment of “low acrimony and cooperation” with the other parent, and further concluded that children who were not caught up in their parents’ conflict showed a “greater capacity to cope with existing parental tensions.”[[8]](#endnote-8) They caution against frequent transitions between high conflict parents who cannot conceal their feelings from the children, and note that conflict can adversely affect their parenting ability, and can result in greater “likelihood of harsh styles of discipline and diminished emotional responses,” to the detriment of the child’s emotional security and social functioning.

 On the other hand, other researchers suggest that more parenting time with both parents is needed to counteract the negative impact of conflict on children.[[9]](#endnote-9) Responding to suggestions that noncustodial parents should not have significant overnight time, some urge that overnights may be important in establishing and maintaining the parent-child bond, as there appear to be no increased benefits to father-child relationships as a result of more daytime visits, which do not make up for fewer overnights.[[10]](#endnote-10)

 Some researches urge that the level of conflict between parents may be given too much emphasis.[[11]](#endnote-11) As noted, a high level of conflict during the divorce process often diminishes post-divorce and is not necessarily a reliable predictor of future behavior. High conflict often goes hand in hand with insensitivity to children and compromised parenting skills. Thus, it may not be the conflict that leads to negative outcomes for children so much as it is emotionally unavailable or otherwise inadequate parenting.

 A 2013 review of research on the subject of shared residential custody examined 24 studies from around the world.[[12]](#endnote-12) One problem when assessing the impact of conflict is that the term “high conflict” means different things to different people and covers a wide range of behaviors and problems, some of which may be most pronounced at the time custody decisions are being made, but do not reliably predict future conduct. The studies reviewed indicate that parents in shared custody arrangements were more likely to have child-rearing conflicts, but this is to be expected when both parents are engaged in parenting, whether separated or living together.

 More recently, Nielsen, in a 2017 article, reviewed 17 studies that took into account parental conflict when comparing outcomes for children in joint custodial vs. sole custodial families.[[13]](#endnote-13) Some of the studies could not account for any differences in outcomes for children in these two groups because no significant differences in conflict were observed. Only one of the 17 studies linked joint physical custody to worse outcomes for the children. Of the other 16 studies, one examined the long-term relationship between conflict, parenting schedules, and the relationships that children, now as young adults, had with their parents, finding that the children who had frequent overnights with their fathers at an early age (1 – 4) had better relationships with both parents than those children who had less frequent overnights. Although Nielsen concluded that shared parenting time was linked with better outcomes for children, she still notes that, “[t]o be clear, these studies did not conclude that high, ongoing conflict had no impact on children” or that joint physical custody mitigated the effects of intense conflict on children.[[14]](#endnote-14)

 Nielsen presents three premises: 1) children benefit from more time with noncustodial fathers; 2) overnights matter more than daytime visits; and 3) children dislike arrangements in which they live with their mothers and see their fathers only on alternate weekends. From her review of research, she concludes that more time with non-custodial fathers correlates with positive outcomes for children such as higher self-esteem, less delinquency and drug use, and less likelihood of dropping out of high school. Children raised in shared residential custody arrangements had better outcomes than those who lived with their mothers.[[15]](#endnote-15) Although teenagers exposed to their parents’ conflict were more likely to feel “caught in the middle” overall, children benefited from having a closer relationship with both parents. And, although children were “more stressed, anxious and depressed when there were large discrepancies in their parents’ parenting styles,” these problems were much worse for children who had little time with their fathers than it was for children whose parents had shared custody.

 When studies took into consideration children’s views, young adults who had lived in shared residential custodial arrangements (i.e., 30-50% time with fathers) felt that this had been in their best interests. In contrast, children raised primarily in one household (generally by mothers) with limited contact with their fathers noted that, although it was often inconvenient (especially noted by teenagers), they liked the arrangements and appreciated having close relationships with both parents.[[16]](#endnote-16)

 There is little empirical research on parenting time with very young children (infants and toddlers). Of the handful of studies that have been conducted, the results are contradictory and limited, and therefore provide an inadequate basis for determining policy.[[17]](#endnote-17) Involvement of fathers with young children is considered a factor in promoting later positive father–child relationships. Thus, both parents’ involvement is important in the early years, just as it is important for children at any age. For infants, security and stability are key considerations that can be affected by the conflict-laden transition parents make, while at the same time the child’s developmental needs require consistent nurturance and support, including consistent nighttime routines. The impact of the loss of a caregiver will depend on “how distinct or overlapping the caregiver roles were at night prior to separation.” If both parents served in this role, the impact of separation and shared parenting is less likely to create issues than if only one parent provided this care. Whatever the arrangements, attention to the child’s developmental needs and “sensitive caregiving” are “critical to maximize the child’s immediate and long-term well-being.”[[18]](#endnote-18)

 While there appears to be a general consensus that shared parenting results in better outcomes for children, many of those cases involve parents who voluntarily elected shared parenting.[[19]](#endnote-19) Those same results may not be evident for couples who are mandated to share parenting responsibilities and time. While shared parenting yields benefits for children, there is no consensus or evidence as to the extent or ways in which the actual allocation of time makes an impact. There is no empirical basis on which to form a presumption that 50-50 or any proscribed time-sharing formula is in children’s best interests or should be imposed on families across the board.

**Social Science to Inform Policy-Makers and Decision-Makers**

 In 2013, a multi-disciplinary group of 32 family law experts convened for an intensive three-day think tank to review issues surrounding shared parenting, reviewing existing research and examining how to provide better information and guidance to custody decision makers (policy-makers, judges, and parents).[[20]](#endnote-20) The group reached consensus on several issues, including the following:

 - Social science strongly supports shared parenting when parents can agree to it.

 - Children of all ages have improved prospects when they have healthy, loving relationships with both parents.

 - Shared parenting is generally not in children’s best interests when there is high conflict between parents; however, some families can manage conflict, sometimes with assistance, and are able to implement shared parenting without causing harm to the children, which further highlights the importance of making determinations on a case-by-case basis.

 - Case-specific decision making about shared parenting is “inescapably” most effective.

 - Further research is needed to provide reliable information to custody decision-makers

 - Available research is sometimes misinterpreted or inaccurately represented when advocating positions to legal and policy decision-makers.

 When using research to inform policy and decision makers, it is important to review the studies rather than rely on articles or summaries. Reliance should be placed on peer-reviewed studies. Peer review seeks to minimize bias by having experts conduct in-depth reviews and critiques of research, to point out and correct methodological or other deficiencies. Books, reports, articles and summaries that have not been peer-reviewed should be viewed with skepticism. The more trustworthy studies are those that obtained information from both mothers and fathers. It is similarly important to understand the sample that was interviewed as it relates to the decision to be made. For example, comparing the experiences of children in sole custody situations who never lived with their fathers to children who had lived with their fathers prior to separation will likely produce results that are unrelated to overnight parenting time.

 The results and findings of research should be communicated to judges and lawmakers engaged in making decisions and policies about custody, as well as to practitioners working with families engaged in custody disputes. There is no empirical evidence that any formulaic allocation of parenting time should presumptively be imposed on families or is in the best interests of children. The research is not geared to determine specific schedules. Rather, studies provide important information about children’s needs for parental involvement, the importance of frequent contact, the impact of conflict and other relevant factors that can inform decision-makers to fashion appropriate policies and parenting time plans.

1. Some states went so far as to legislate the Tender Years Doctrine, creating a statutory preference for awarding custody of young children to mothers. See, Klaff, R.L., “The Tender Years Doctrine: A Defense,” 70 *Cal. L. Rev*. 335 (1982) for a comprehensive history of the doctrine. [↑](#endnote-ref-1)
2. Nielsen, L., “Shared Physical Custody: Summary of 40 Studies on Outcomes for Children,” *J. of Divorce & Remarriage*, Vol 55, 613-635, 2014. [↑](#endnote-ref-2)
3. *See*, “Evaluation of the 2006 Family Law Reforms,” Australian Institute of Family Studies, Australian Government, 2009 at <https://aifs.gov.au/publications/evaluation-2006-family-law-reforms/5-family-dispute-resolution> [↑](#endnote-ref-3)
4. Kruk, Edward, “Arguments for an Equal Parenting Responsibility Presumption in Contested Child Custody,” *The Am. J. of Fam. Therapy*, 40:33-55 (2012). [↑](#endnote-ref-4)
5. Bauserman, R., “A Meta-analysis of Parental Satisfaction, Adjustment, and Conflict in Joint Custody and Sole Custody Following Divorce,” *J. of Divorce & Remarriage*, Vol. 53(6), 464-488, 2012. [↑](#endnote-ref-5)
6. Nielsen, L*., supra.* [↑](#endnote-ref-6)
7. S.3479 and A.5189 (2017 NJ Legislative Session) [↑](#endnote-ref-7)
8. McIntosh, J. and Chisholm, R., “Shared Care and Children’s Best Interests in Conflicted Separation: A Cautionary Tale from Current Research*, Australian Family Lawyer*, Vol. 20(1), 1-11 (2006). [↑](#endnote-ref-8)
9. Fabricius, W., and Suh, G., “Should Infants and Toddlers Have Frequent Overnight Parenting Time with Fathers? The Policy Debate and New Data,” *Psychology, Public Policy and Law*, Vol. 23(1), 68-84 (2017). [↑](#endnote-ref-9)
10. Cashmore, J., Parkinson, P., and Taylor, A., Overnight Stays and Children’s Relationships with Parents After Divorce, J. of Health and Social Behavior Vol. 29, 707-733 (2008). [↑](#endnote-ref-10)
11. Nielsen, L., “Re-examining the Research on Parental Conflict, Coparenting, and Custody Arrangements,” *J. of Psych., Public Policy and the Law*, Vo. 23. No; 2, 211-231 (2017) [↑](#endnote-ref-11)
12. Nielsen, L., “Shared Residential Custody: Review of the Research (Part I of II), *Amer. J. of Fam. Law*, Vol.27, 61-71 (2013). [↑](#endnote-ref-12)
13. Nielsen, L., “Re-examining the Research on Parental Conflict, Coparenting, and Custody Arrangements,” *supra.* [↑](#endnote-ref-13)
14. *Nielsen, L., “*Re-examining the Research on Parental Conflict, Coparenting, and Custody Arrangements*,” supra*. at 222. [↑](#endnote-ref-14)
15. Nielsen, L., “Shared Residential Custody: Review of the Research (Part II of II), *Amer. J. of Fam. Law*, Vol.27, 123-137 (2013). [↑](#endnote-ref-15)
16. *Id.* At 131-132. [↑](#endnote-ref-16)
17. Fabricius, W.V., and Suh, G.W., *supra*. [↑](#endnote-ref-17)
18. Pruett, M.K., and DiFonzo, J.H., “Closing the Gap: Research, Policy, Practice and Shared Parenting – AFCC Think Tank Final Report,” *Fam. Ct. Rev*., Vol. 52(2), April 2014, 152-174. [↑](#endnote-ref-18)
19. Pruett, M.K., and DiFonzo, J.H., *supra*. [↑](#endnote-ref-19)
20. Pruett, M.K., and DiFonzo, J.H., *supra*. [↑](#endnote-ref-20)