

“Countering Arguments Against a Presumption of Shared Physical Custody”

Content from 2 sources by the same author:

1. “The Equal Parent Presumption: Social Justice in the legal Determination of Parenting after Divorce” By Professor Edward Kruk, copyright 2013 Approximately \$28 on Amazon



2. Research article (peer-reviewed): Edward Kruk (2018) Arguments Against a Presumption of Shared Physical Custody in Family Law, Journal of Divorce & Remarriage, 59:5, 388-400, Article cost: \$43.00

To link to this article: <https://doi.org/10.1080/10502556.2018.1454201>

Critical Note: This paper was not created by the author (Professor Edward Kruk); it is paraphrased and summarized version.

Book Preface summary:

Child custody systems of law are antiquated but continue to dominate policy despite their demonstrated failure and lack of congruence with the now emerged societal norm of shared parenting responsibility. In accordance with public opinion, a scientific consensus exists within the divorce research community regarding the need for a humane alternative to the adversarial “sole custody” approach. Tragically, one of the flaws of the present system based on the discretionary “best interests of the child” principle is that judges make errors in judgement, which a rebuttable legal presumption of shared parenting responsibility can help reduce. For a significant number of children, if one parent creates a dispute, the societal norm is essentially denied within family court systems which continue to apply the outdated “primary parent” and “primary residence” model.

Equal shared parenting is truly a viable solution. It is evidence-based and child focused, and offers a legislative solution to the present conundrum that has resulted in millions of children suffering from emotional insecurity, and compromised physical, mental and emotional well-being (and the related societal costs).

Unfortunately, equal parenting has been marginalized by some bar associations and an abundance of lawyer-dominated task forces. The book is about law reform and the perspective offered is not of a legal scholar but of a child and family policymaker, social work teacher and practitioner, and researcher.

Research article summary (Opponent Waves 1, 2, 3):

Article summary introduction:

Despite strong public support and mounting empirical evidence in its favor, shared parenting as a presumption in family law has been met with skepticism among legal and mental health professionals. As research evidence on child and family outcomes supportive of shared parenting as a foundation of family law has proliferated, counterarguments to shared parenting have likewise evolved. Since the 1970s, after the introduction of the “best interests of the child standard” in family law internationally, a gender-neutral criterion replaced maternal preference statutes. This was intended to encourage greater sharing of parental responsibility of children after parental separation. Yet, three distinct “waves” of arguments against shared parenting have placed researchers and shared parenting advocates on the defensive.

It should be noted that arguments against a legal presumption of shared parenting have not followed a straightforward progression. Further, each of the waves of objections, although challenged by current research, persists in some quarters. The emergence of more robust research on children's outcomes in shared parenting families in a wide variety of circumstances, however, has now led to a watershed moment in which a consensus is emerging with respect to shared parenting as optimal to children's best interests and commensurate with their well-being.

Opponents Wave 1a: One common argument against equal shared parenting suggests that shared parenting is inherently unstable for children, who would be "yanked around like a yo-yo." Recurring transfers between homes, according to this view, would tax children's adjustment and create a feeling of instability and insecurity

This argument is based on old attachment theory has been amended to accommodate evidence that children form strong attachment bonds and relationships with both parents and show remarkable tenacity. Better studies have now concluded that two homes do not undermine stability and were rarely a concern of parents and children who had joint custody. Children feel "at home" in both environments and the value of being exposed to each parent's worldview better equips living in our society that is built on coexistence of both genders, groups, and a variety of sources of authority.

It is well established that children's level of stress is reduced and adaptation to parental separation is enhanced in shared parenting, using adjustment measures of physical, psychological, emotional, and social well-being,

Research has shown that children are no more likely to be securely attached to either gender parent and children can attach to both at the same time. Research also states that daytime "visits" cannot provide crucial for nurturing including bathing, soothing hurts and anxieties, bedtime rituals, comforting in the middle of the night, and the reassurance and security of snuggling in the morning after awakening. The benefits also held for parents who initially disagreed about overnights where the overnight parenting plan was imposed over one parent's objections.

Decades of research have documented young children's vulnerability after parental divorce:

- to depression
- confusion about the nature of families and interpersonal relationships
- a tendency to blame themselves for their parents' conflict and divorce
- regression in behavior and general development
- a fear of being sent away or replaced
- joyless play
- a preoccupation with trying to fit objects together
- a yearning for the absent parent.

Opponents Wave 1b. Opponents then argue that mothers should retain their role as the primary and that sole custody arrangements were merely the vital continuation of existing child caregiving arrangements. Breadwinner fathers were only seeking to avoid their child support obligations, invoking the "deadbeat dad" stereotype.

This argument fails to adjust for contemporary families and that employed mothers and fathers spend a comparable amount of time caring for their children. On average, employed mothers devote 11.1 hours to direct child and fathers 10.5 hours which is an incredibly close a 51% to 49% split. The claim that mothers are the primary caregivers of children before divorce are, for most families, outdated and contemporary conditions need to be considered:

- (a) the reallocation of mothers' time to market work outside the home (childcare time declines as work time has increased)
- (b) overestimations of actual time mothers spent with the children
- (c) smaller families have reduced total time with young children

(d) more preschool children spend time in day care and play group settings, regardless of the mother's employment status

(e) women's reallocation of their time has facilitated a relative increase in fathers' involvement in childcare

(f) technology such as cell phones has allowed parents to be "on call" without being physically present with children.

Opponents Wave 2a argument against equal shared parenting: Shared parenting exacerbates conflict and can lead to violence between parents who are already in conflict over child custody arrangements will increase their animosity because shared parenting presumably calls for a high degree of parental cooperation and perpetuate the conflicts that contributed to the couple's breakup. Thus, shared parenting is only suitable for parents with little or no conflict who get along relatively well as co-parents. Further, children in shared parenting arrangements are, it is argued, at greater risk of experiencing conflicting loyalties and becoming triangulated. Unfortunately, these views have had a profound effect in the field of child custody, as courts have ruled under the assumption that shared parenting is unworkable in situations where parents are in conflict and are therefore incapable of cooperation. Primary residence orders are thus routinely imposed in court-determined arrangements, unless parents can demonstrate their capacity to cooperate.

Proponents of equal shared parents can cite Kelly (2007), who noted that the amount of shared parenting time might not be as problematic for children as frequent "visits" in high-conflict families. She suggested limiting the frequency of exchanges between homes and arranging the transitions so that parents did not have direct contact with one another. It is also possible that conflict might decline more quickly when parents share the physical custody of their children, as one parent will not feel marginalized.

Opponents Wave 2b argument against equal shared parenting: It has also been argued that shared parenting **exposes women and children to family violence and child abuse**. Feminist legal scholars in particular have argued that shared parenting is routinely ordered in families where there has been a history of violence. Their research showed that an estimated that in roughly 75% of contested custody cases, the father has physically abused the mother: "Joint custody is an attempt of males to continue dominance over females ... an essential principle in the high conflict divorce arena is that joint custody and shared parenting plans are not viable resolutions".

Proponents of shared parenting take **domestic violence and child abuse issues very seriously**. This is why a **legally** rebuttable presumption of shared parenting would exclude cases of violence and child abuse and differentiate high conflict from violence. Witnessing violence is a form of emotional child abuse, and all children under a rebuttable presumption would be afforded this protection. Current "winner-take-all" sole custody plans could exacerbate interparental conflict and might lead to the high occurrence of "separation-related violence" during adversarial child custody proceedings. When neither parent is threatened by the loss of his or her children, conflict or violence are likely to diminish. The animosity that can be created by sole custody arrangements seems tailor-made to produce the worst possible outcomes. There is now strong empirical evidence, however, that children can benefit from shared parenting even when their parents do not have low-conflict, cooperative and shared parenting might create an incentive for parental cooperation. Shared parenting is beneficial for children in both low- and high-conflict situations. Except in situations where children are at risk of physical harm or negligent parenting, parenting time should not be limited in cases of high conflict, and high conflict should not be used to justify restrictions on children's contact with either of their parents. Several specialized interventions to help parents reduce conflict have been developed, including parallel parenting, therapeutic family mediation, parent education programs, and parenting coordination. A key strategy is keeping parents focused on their children's needs and enhancing parents' attunement to their children's needs.

Conflict is a normal part of everyday life, and to completely shield children from normal day-to-day conflict could in fact be doing them a disservice. Conflict presents an opportunity for resolution of disputes, healing, and reconciliation. Conflict is not inherently bad for children. It is persistent, unresolved conflict that drags children

into the middle that is harmful for children, and children need to be shielded from violence and abuse. In many high-conflict divorces, however, violence and abuse are not a factor. Children's safety in most divorces is best assured when both parents are actively and responsibly involved in their lives, and when social institutions support them in fulfilling their parental responsibilities.

Wave 3 argument: Currently, the best interests of the child remain the sole or primary criterion on which legal determinations of parenting after divorce are based in most legal jurisdictions. All agree that shared parenting might be beneficial for most children. Below are some of the Pros and Cons of establishing a legal presumption of shared parenting in family law.

Opposition to Equal Shared Parenting (keep status quo), retaining the current "discretionary best interests of the child standard":

1. Argued strengths of the discretionary children's "best interests" standard:
 - a. Is flexible, and simple to apply (also gender-neutral of course)
 - b. Will be different in each individual case, given the unique circumstances of each individual child and family and it is vital that the court retains its discretionary power in making decisions based on particular circumstances; assessing each case on its own merits should remain the cornerstone of family law.
 - c. Provides for individual justice, allowing judges to exercise their discretion (counter argued by "weaknesses" all 9 points below from 1a to 1i)
 - d. Provides a safety net to ensure that children's safety and well-being are protected to the maximum degree possible, especially in violent or abusive families.
2. Argued weaknesses of a legal presumption of shared parenting (SP):
 - a. SP would prioritize parental rights over the well-being of children.
 - b. Social science research has not established the amount of time that parents need to maintain a meaningful relationship.

Proponents for Equal Shared Parenting (need for change), legislate a presumption of equal shared parenting:

1. Argued weaknesses in the discretionary "best interests of the child" standard:
 - a. Lacks a clear definition or legal consensus, is vague and indeterminate, which renders the standard unworkable.
 - b. Based on speculation about future conduct
 - c. Gives judges unfettered discretion in decision making, based on their idiosyncratic biases, in an area around which they have little or no training or expertise and is thus subject to judicial error. This discretion can result in unpredictable and inconsistent outcomes.
 - d. Decisions reflect a sole custody presumption and judicial bias; judges might hold stereotyped or outdated ideas about fathers' and mothers' roles that bias their decisions.
 - e. Sustain, intensify, and create conflict, and fuels litigation because of the incentive of a winner-takes-all context where such an undefined standard provides a context of anything goes.
 - f. Make the court dependent on custody evaluations lacking an empirical foundation, as the scientific basis for child custody evaluation is hotly contested and the qualifications for becoming an expert are nebulous at best.
 - g. Uses the views of the judiciary, which are deficit-based and radically different than the views of children and parents which focus on children's needs and parents' responsibilities to those needs
 - h. The children's interests are largely unrepresented in the court proceedings (despite the rhetoric), as a custody contest instead pits the rights of mothers against the rights of fathers (Brown, 2014; Kruk, 2013).
 - i. With two adequate parents, the court has no basis in law or psychology for distinguishing one parent as "primary" over the other.

2. Argued strengths of a legal presumption of equal shared parenting (SP):
 - a. It is based on a firm foundation of research evidence defining children's needs and interests in the divorce transition
 - b. Provides a clear and consistent guideline for judicial decision making
 - c. Provides a clear-cut default rule, removes speculation about future conduct as a basis for making custody decisions
 - d. Limits judicial discretion
 - e. Enhances determinacy and predictability of the outcome
 - f. Reduces litigation and the ongoing conflict between parents
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