

2018 NJSBA Annual Meeting

Would Equal Physical Custody Elevate a Parent's Desires over the Child's Best Interests?

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The Best Interest of the Child Must Remain the Goal of Custody and Parenting Time Determinations

By: Jeralyn L. Lawrence, Esq.¹

This article will address current New Jersey law as it relates to custody and parenting time determinations, the evolution of statutory and case-law precedent, and the serious and underlying concerns accompanying the current proposed bill¹ that, if accepted into law, would establish the presumption of joint physical custody in every matter where the issue is raised. This article will additionally address alternative means of resolving issues of custody and parenting time in lieu of seeking a judicial determination as to same. The purpose of the proposed bill is clear: “The Legislature finds and declares that it is in the public policy of this State to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.”

While the impetus behind S273/A1091 remains consistent with current public policy, the proposed presumption of joint physical custody effectively impedes the judiciary’s inherent authority to address the best interests of the individual child based upon his or her needs, and the unique facts and circumstances of each case. The proposed presumption has no basis in the law, psychological studies, or research into the best interests of children. Conversely, it is an automatic, arbitrary, and capricious mechanism that, if established, will hinder parents, attorneys, and the courts alike from addressing what must remain the central and ultimate goal in custody and parenting time disputes: securing the best interest of the child involved.

¹ Jeralyn L. Lawrence, Esq. would like to thank Ashley E. Edwards, Esq. for her tremendous contributions to this article.

New Jersey courts have long recognized the traditional “best interest of the child” standard in custody determinations.ⁱⁱ This standard was first enunciated in New Jersey in 1944, and has and continues to evolve along with changes in the social climate.ⁱⁱⁱ For example, New Jersey courts previously recognized what has since been coined the tender years’ doctrine. Pursuant to same, physical custody of a child of “tender years” was “ordinarily [] awarded to the mother if she [was] a fit and proper person.”^{iv} The theory was that “the mother [would] take better and more expert care of the small child than the father [could].”^v This categorical theory has since been refuted by psychological experts, attorneys, and the courts alike.^{vi}

Per current New Jersey statutory law, “it is the public policy of this State to assure minor children frequent and continuing contact with both parents after both parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.”^{vii} Notably, the language of the proposed bill, S273/A1091, mirrors that of the statute currently in effect. New Jersey, by statute, is a shared parenting time State wherein “the rights of both parents shall be equal . . .”^{viii} Per the statute, courts must address and weigh a variety of factors in any proceeding involving the custody of a child. These factors include:

the parents’ ability to agree, communicate and cooperate in matters relating to the child; the parents’ willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of

the child's education; the fitness of the parents; the geographical proximity of the parents' home; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless that parents' conduct has a substantial adverse effect on the child.^{ix}

As is clear from a cursory review of the statute itself, there exists no preference or presumption that a child will or should remain with one parent over the other. Conversely, the statute explicitly provides that both parents' rights are equal in any custody determination. This tenant of equal rights stems from the First, Ninth, and Fourteenth Amendments of the United States Constitution.^x Thus, New Jersey courts are tasked with issuing a custody determination based on a weighing of the statutory factors in light of the facts and circumstances of each individual case, with the best interest of the child as the cornerstone of the analysis.^{xi}

This principle is further supported by relevant case-law precedent confirming the long-standing rule that the "touchstone for all custody determinations has always been 'the best interests of the child.'"^{xii} A court's custody determination must focus on the "safety, happiness, physical, mental and moral welfare"^{xiii} of the child in question. Current New Jersey law provides the judiciary with the discretion necessary to create a parenting time schedule that meets the specific needs of each child. This goal is inhibited by the proposed bill, which provides for

a rebuttable presumption of joint legal custody and equal or approximately equal physical custody. The court shall enter an order for joint legal and physical custody of a minor child to both parents which shall include: (1) provisions for residential arrangements so that a child shall reside an equal or approximately equal amount of time with each parent in accordance with the needs of the child and the parents; and (2) provisions for consultation between the parents in making major decisions regarding the child's health, education, and general welfare.

To rebut the presumption of equal or approximately equal physical custody, a parent shall bear the burden of proof and must provide clear and convincing evidence that joint physical custody is harmful to the child.^{xiv}

The proposed bill eradicates the myriad of factors currently addressed by the courts, and instead replaces a judge's fact-sensitive analysis of the child's needs and best interest with what is effectively a one-size-fits-all parenting time arrangement. The virtually automatic nature of the proposed bill raises numerous and alarming concerns for parents, practitioners, courts, and most importantly, children who would be subject to same.

By depriving the court of its discretion to craft a parenting time schedule that considers the unique facts and circumstances of any given case, we are ignoring the specific needs and best interests of children subject to such decisions. Such an automatic analysis explicitly ignores the population of children with special needs who may benefit from an alternate parenting time arrangement. A presumption of equal parenting time similarly disregards the reality that parents may live far apart (thus requiring that the child travel frequently and extensively), or that a parent may struggle to accommodate such an arrangement due to his or her work schedule. Further, a parent's mental and/or physical health may make it impractical, if not impossible, for him or her to exercise an equal parenting time schedule.^{xv}

Children of parents who are unable to communicate, cooperate, and compromise with one another may also suffer if subject to such a presumption. Similarly, a parent who has experienced acts of domestic violence at the hands of his or her former spouse or partner may be exposed to further abuse and control as a result of same. Under such circumstances, a victim of domestic violence may ultimately decide to remain in an abusive relationship if he or she believes doing so

would protect the child from spending time alone with the abuser. A child caught in the middle of any one of the untenable circumstances referenced above is likely to experience not only a significant disruption to his or her routine post-divorce or separation, but the accompanying instability that results from same.

The New Jersey Supreme Court has explicitly addressed and acknowledged these concerns: “The objections most frequently voiced include contentions that such an arrangement creates instability for children, causes loyalty conflicts, makes maintaining parental authority difficult, and aggravates the already stressful divorce situation by requiring interaction between hostile ex-spouses.”^{xvi} These concerns are largely diminished by current statutory law and case-law precedent which provide for a complete review and analysis of the circumstances of each individual matter, judicial discretion, and the statutorily defined goal of attaining a parenting time schedule that promotes the best interest of the individual child.

Courts are called upon to address issues of custody and parenting time only under circumstances where the parties themselves are unable to resolve same. Judges tasked with making such determinations have long opined that the courts are never the optimal venue to make such imperative decisions:

We urge the parties to understand that courts in any jurisdiction are poor places to resolve such fundamental relational problems as child custody. Rules of law and procedural strictures are no substitute for personal choice in so intensely personal an issue. Parents who have divorced are frequently unable to communicate constructively on issues of importance; so they look to the legal system to resolve their problems. But no stranger in a judicial robe, however able and well motivated he or she may be, is equipped to make a decision as valid as the parents working together might make.

[The parties] must come to understand that security, peace of mind and stability are every child's right. Their inability to deal constructively with each other deprives their son of his due, which is within their power to give. Professed love is no substitute where it results in turmoil and uncertainty for the child who is pulled in opposite directions by his parents. This child will receive what he desperately needs in this regard only if both parties are genuinely prepared to subordinate their individual needs to the best interests of the child and begin to communicate with each other solely for the benefit of the child. We urge the parties to make an effort to resolve this matter between themselves with professional assistance. Otherwise, there is a substantial risk that they will doom their child to a future of conflict, sadness and certain psychological harm.^{xvii}

Parents who are unable to amicably resolve issues of custody and parenting time amongst themselves have a wide array of options available to them in lieu of seeking judicial relief. Alternative Dispute Resolution assists parties willing to work together to resolve custody and parenting time disputes, among others, and includes mediation, the collaborative process, and arbitration.

Mediation is the most common method of Alternative Dispute Resolution. Mediation is a process by which the parties attempt to resolve their outstanding issues with a neutral, trained mediator whose goal is to assist the parties in communicating and compromising with one another. Parties engaging in mediation may elect to do so with or without the assistance of individual attorneys. The mediator does not make determinations, but merely guides the parties toward resolution of their issues and facilitates their negotiations. Mediation is a confidential process, which is appealing to parties who may otherwise feel hesitant to participate if their

communications could later be utilized against them in a court proceeding should the mediation prove unsuccessful.

Another option available to parties who desire to resolve their differences outside of the courtroom is the collaborative process, also referred to as a collaborative divorce. The collaborative process consists of each party hiring his or her own attorney, and with all executing a participation agreement, which is an agreement that contractually commits the parties to settling their matter outside of court. Pursuing a collaborative divorce allows for a more informal, private divorce/separation process as it occurs through a series of meetings. However, if the parties are unable to reach an amicable resolution, and consequently must seek relief from the court, the attorneys utilized are prohibited from representing the parties relative to same.

The third method of Alternative Dispute Resolution is arbitration. Parties who elect to proceed with arbitration select a mutual, neutral arbitrator who, comparable to a judge, will listen to arguments presented by both parties and issue a determination relative to same. Arbitration can be binding or non-binding. In binding arbitration, both parties waive their respective right to trial, and the arbitrator's determinations are final, subject to any recourse explicitly set forth in the parties' arbitration agreement. Conversely, parties who agree to participate in a non-binding arbitration do not waive their right to trial, and may seek judicial relief from the arbitrator's determination.

Alternative Dispute Resolution is an appealing and popular option for divorcing or separating parties seeking to resolve their issues in a less adversarial setting than that of the court system. There are many advantages to engaging in Alternative Dispute Resolution in lieu of seeking judicial relief, including but not limited to the significantly lesser expense often

associated with same, and the vast opportunities available to parties to resolve their issues in a more private, cooperative setting. For these reasons, and in light of the sensitive nature of issues of custody and parenting time, an increasing number of parties are electing to participate in mediation, collaboration, and arbitration, or a combination of the three methods, to resolve their issues.

Many litigants who participate in Alternative Dispute Resolution in lieu of litigation find the experience to be amicable and rewarding. Although Alternative Dispute Resolution is a valuable tool to resolve all types of disputes incident to divorce or separation, each of the three referenced methods of Alternative Dispute Resolution provide litigants the opportunity to engage in an open conversation and analysis as to what is best for their child, with a focus on the unique circumstances of the individual case. Not only would the automatic nature of the presumption provided in the proposed bill impede the court's fact-sensitive analysis of this integral issue, but also that of litigants who elect to participate in Alternative Dispute Resolution.

The best interest of the child must remain the goal to achieve in each and every custody and parenting time determination. The proposed presumption of joint physical custody disregards this long-standing tenant of family law, endeavors to streamline the most imperative aspect of any divorce or separation, and provides for far less of an analysis than is presently required to equitably distribute marital or joint property. Children are not property that can be so simply and automatically divided, and a determination as to what is best for each individual child cannot be reduced to a rebuttable presumption. This monumental decision must remain in the sound discretion of the court, should parents be unable agree.

Practical Tips: The Honorable Anthony F. Picheca, Jr., J.S.C. is a judge of the Somerset County Superior Court with over nine years of experience in the Family Division. From his experience on the bench presiding over custody and parenting time disputes, Judge Picheca offers the following practical tips:

1. The best custody and parenting plans are the ones not in writing. In these situations, parents are properly communicating, cooperating, and compromising with one another as to the day to day issues that arise. This works best when parents are flexible and willing to put their own selfish interests aside and subordinate same for the best interest of the child.
2. If the parties are unable to reach a custody and parenting time agreement amongst themselves, assist your clients in creating a detailed road map to attempt to guide the parties. However, it is prudent to advise your client that even the most detailed and thought out parenting time schedules cannot contemplate every possible circumstance. In the end, parents must work on committing to do better communicating with one another.
3. If all else fails and you must call upon the court to determine a custody and parenting time dispute, retain custody experts. Ideally, parents will agree to retain a joint expert and be bound by his or her recommendations. This saves both time and cost. However, if clients are unwilling to be bound by the expert's recommendations, parents should retain their own experts from the very beginning.

4. Encourage clients to engage in mediation, or another form of collaboration, to assist in resolving custody and parenting time issues. Sometimes the input of a neutral third party professional is what the client needs to reach an amicable resolution.
5. If you are at an impasse, reach out to your judge. Most, if not all judges are happy to assist attorneys and clients to resolve their cases to the extent possible.
6. It is most important that we do not lose focus on the best interests of the child. Each child is unique and their needs are not fungible. There is no “one size fits all” approach when it comes to custody and parenting time.

Conclusion

Attorneys should encourage parents involved in custody and parenting time proceedings to focus primarily upon effectuating an agreement that encompasses what is best for the individual child. Clients confronted with custody and parenting time issues should refrain from obsessing about “overnights,” and instead thrive to craft a parenting time arrangement that permits both parents to be present and actively involved in the child’s life. Clients struggling with these issues should be encouraged to consider seeking professional support and assistance in the form of family therapy, or when necessary, reunification therapy. These resources promote positive communication and the development and fostering of good-will between the parents, which ultimately benefits the child. A rebuttable presumption of joint physical custody as presently proposed unequivocally distorts this goal and wrongfully focuses on the quantity instead of the quality of time parents spend with the child.

ⁱ S273/A1091.

ⁱⁱ Mayer v. Mayer, 150 N.J.Super. 556, 561-66, 367 A.2d 214 (App.Div. 1977). See Matflerd v. Matflerd, 10 N.J.Super. 132, 136-37, 76 A.2d 722 (App.Div. 1950); Jackson v. Jackson, 13 N.J.Super. 144, 147, 80 A.2d 306 (App.Div. 1951); Sheehan v. Sheehan, 38 N.J.Super. 120, 125-26, 118 A.2d 89 (App.Div. 1955); DiBiano v. DiBiano, 105 N.J.Super. 415, 418-19, 252 A.2d 735 (App.Div. 1969); Vannucchi v. Vannucchi, 113 N.J.Super. 40, 47, 272 A.2d 560 (App.Div. 1971).

ⁱⁱⁱ Armour v. Armour, 135 N.J.Eq. 47, 52, 37 A.2d 29 (E.&A. 1944). See DiBiano, 105 N.J.Super. at 418.

^{iv} Esposito v. Esposito, 41 N.J. 143, 145, 195 A.2d 295 (1963). See Mayer, 150 N.J.Super. at 563.

^v Matflerd, 10 N.J.Super. at 137. See Esposito, 41 N.J. at 145. See also Sheehan, 38 N.J.Super. at 290-91.

^{vi} Warshak, Richard A. "Social science and parenting plans for young children: A Consensus Report." *Psychology, Public Policy, and Law* 20.1 (2014): 46-67. Print.

^{vii} N.J.S.A. 9:2-4.

^{viii} Id.

^{ix} Id.

^x “[A] parent’s rights to the care and companionship of his or her child are so fundamental as to be guaranteed protection under the First, Ninth and Fourteenth Amendments of the United States Constitution.” Wilke v. Culp, 196 N.J.Super. 487, 496, 483 A.2d 420 (App.Div. 1984)(citing In re J.S. & C., 129 N.J.Super. 486, 489, 324 A.2d 90 (Ch.Div. 1974), aff’d o.b., 142 N.J.Super. 499, 362 A.2d 54 (App.Div. 1976).

^{xi} J.A. v. A.T., 404 N.J.Super. 132, 145, 960 A.2d 795 (App.Div. 2008)(citing Kinsella, 150 N.J. at 317-18): “Superimposed upon the consideration of these factors is the ultimate determination that the custody decision reached by the court be guided by the ‘best-interest-of-the-child’ standard.” See also Terry v. Terry, 270 N.J.Super. 105, 119, 636 A.2d 579 (App.Div. 1994).

^{xii} Faucett v. Vasquez, 411 N.J.Super. 108, 118, 984 A.2d 460 (App.Div. 2009)(citing Kinsella v. Kinsella, 150 N.J. 276, 317, 696 A.2d 556 (1997).

^{xiii} Fantony v. Fantony, 21 N.J. 525, 536, 122 A.2d 593 (1956). See Hand v. Hand, 391 N.J.Super. 102, 105, 917 A.2d 269 (App.Div. 2007).

^{xiv} 2018 New Jersey Senate Bill No. 273, New Jersey Two Hundred Eighteenth Legislature - First Annual Session.

^{xv} “[I]n certain cases, the facts and evidence may reflect that, due to illness or injury, a custodial parent may no longer be able to appropriately care for a child’s health, safety, and welfare. In New Jersey, the law is clear that, in such factual circumstances, the court in its discretion may conclude that in order to protect a child’s best interests, a transfer of residential custody to another parent or caretaker may be necessary, no matter how morally blameless the custodial parent may be.” A.W. v. T.D., 433 N.J.Super. 365, 370, 79 A.3d 1045 (Ch.Div. 2013).

^{xvi} Beck v. Beck, 86 N.J. 480, 487, 432 A.2d 63 (1981). The Supreme Court explicitly addresses the issue of legal custody; however, the principles apply equally to the question of physical custody.

^{xvii} Tahan v. Duquette, 259 N.J. Super. 328, 336, 613 A.2d 486, 490 (App. Div. 1992).

