

# Applying the “Best Interests of the Child” Standard in Shared Custody Arrangements

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**E**ven in the best of circumstances, divorce is a stressful process for all parties. This is especially true for the children who are placed in the center of custody disputes. While a variety of custodial arrangements exists, selecting a workable schedule that is acceptable to both parents and promotes the child’s best interests remains a complicated task, particularly when two “fit,” or competent, parents are involved.

Historically, “the best interests of the child” is the standard used by courts in making custody determinations. Over time, legal presumptions evolved to help define “the best interests of the child.” Prior to the Industrial Revolution, the idea that the father is the head of the household is what governed custody decisions. Beginning in the 1820s, early feminists pressured courts to consider women’s equality in awarding custody and, as a result, by the late-19th century, an infant or young child was automatically placed with their mother unless she was unfit. Second-wave feminists, however, opposed this “tender years” doctrine for giving women an unfair advantage and disregarding emerging constitutional law on gender equality. At the same time, “the best interests of the child” standard was criticized for failing to provide courts with adequate guidance in their decision-making.

As social norms changed, so too did courts’ application of the best interests standard, and “the primary caretaker” doctrine grew in popularity. Under the primary caretaker theory, custody was awarded to the parent historically responsible for caring for and nurturing the child before the initiation of divorce proceedings. It was believed that this arrangement caused the least amount of disruption in the child’s life. From the early 1980s until recently, Pennsylvania courts relied on the primary caretaker doctrine in support of an award of primary physical custody to one of two fit parents. Although Chapter 53 of the Domestic Relations Act, Section 5328(a), directs courts to determine a child’s best interests in ordering any form of custody, the primary caretaker doctrine helped tilt the scale when both parents were otherwise on an equal footing. This all changed, however, with the Pennsylvania

Superior Court's decision in *M.J.M. v. M.L.G.*, 63 A.3d. 331, (2013), that held that primary caretakers are no longer given weighted consideration. Instead, the Superior Court determined that the primary caretaker doctrine is incorporated into the best interests analysis by way of careful and thorough consideration on the record of the 16 factors affecting the safety of the child enumerated in Section 5328(a).

What does this mean, then, for custody disputes between two fit parents? It seems to suggest that Pennsylvania courts are embracing the trend of joint, or shared, physical custody. In Pennsylvania, "shared custody" does not have a set legal definition, but it is thought to encompass both legal and physical custody. Legal custody is the right to make major decisions on the child's behalf. This includes, but is not limited to, medical, religious and educational decisions. Physical custody refers to the amount of time the child actually spends with each parent, and what parent assumes responsibility for the child's day-to-day needs.

Proponents of shared physical custody argue that it brings gender and emotional equality to the decision-making process. Access to both parents is believed to foster an arrangement most closely resembling an intact nuclear family. Because neither parent has a superior legal claim over the child, mental health professionals believe it is less likely that one parent will take advantage of the other and more likely that they will consider each other equals. The premise of equality behind shared custody is also meant to eliminate feelings of second-class parental status often felt by non-custodial parents in sole-custody arrangements. A custody case we recently litigated is a prime example.

In that case, "Mother" and "Father" were involved in a two-year custody battle. Mother had majority physical custody of the parties' two adolescent children, in this case meaning that she had the children for eight nights in a 14-day period and Father had six overnights. Both parties were loving, caring and fit parents, albeit with differing styles. Mother was strict and provided a structured home environment. Father allowed the children more independence. A high level of conflict existed between the parties, and, of course, each parent believed his/her parenting model was superior. In fact, there was no discernible difference between either parent's ability to care for the children. Each parent provided equally suitable homes in good neighborhoods, within 10 minutes of the children's school. Both parents had flexible work schedules allowing them to take the children to school in the morning

and pick them up in the afternoon. Both took the children to their extracurricular activities and each participated in these activities. In short, both parents fully (and equally) tended to the children's needs.

Despite the ongoing litigation between their parents, the children flourished. In addition to being well-adjusted, both excelled at school and participated in several extracurricular activities including sports and music. The children also formed close relationships with both parents' extended families who lived close by.

The judge determined the unequal custodial schedule exacerbated the parental conflict. Mother's attempts to control every situation made Father obstinate in his own position and no middle ground could be reached. The judge found that Mother, as the majority custodian, felt she had the ability

to make all decisions without Father's input or consent. Meanwhile, Father felt like the lesser parent because he was not consulted in any decisions affecting his children, and there was no reason to deny him the same parental status as Mother. Ultimately, the judge awarded an equal physical custodial schedule to alleviate the psychological issues at play and help reduce parental conflict. The intent of the judge's decision was clear, both parents would be on equal footing as she believed two equally fit parents should be.

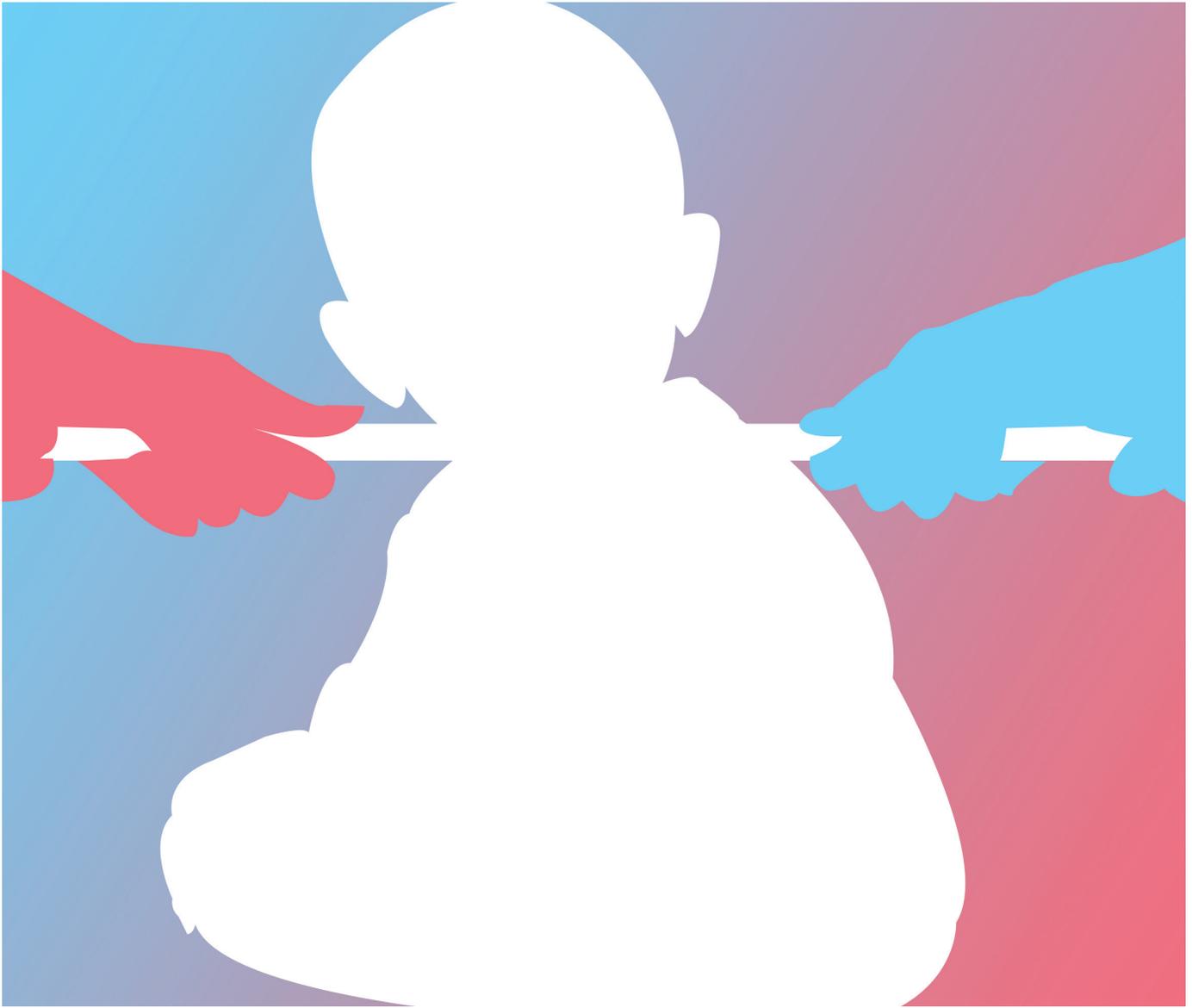
Critics of shared custody, on the other hand, argue that it causes emotional and physical instability and actually exacerbates parental conflict. The validity of the data collected from studies remains a main target of the debate, and there are obvious problems in doing the initial and any

follow-up research.

Despite its inherent shortcomings, joint custody field research validates certain benefits of various legal arrangements. In particular, studies have established that children benefit from continued relationships with each parent post-divorce. The amount of time required to maintain a close relationship, however, has not been determined. Instead, studies point to the quality of the parent-child relationship as critical to a child's positive adjustment and future development of healthy relationships.

Of course, believing that continuing relationships is in the best interests of the child in every case would be naïve, particularly in cases of neglect or abuse. The Pennsylvania Superior Court is sensitive to this fact, and for this reason there is no presumption in favor of joint custody. In *In re Wesley J.K.*, 299 Pa. Super. 504 (1982), the Superior Court

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maintained that a presumption-free law allows lower courts to engage in full, fair and comprehensive examinations of the best interests of the child, without burdening the custodial parent with defending the status quo. Instead, the court outlined four guidelines to consider in determining whether shared custody is appropriate.

First, both parents must be fit. As defined by the *In re Wesley* court, this means both parents must be sane and capable of making rational child-rearing decisions. Each parent must be willing and able to love and care for the child. Second, both parents must want to continue active involvement in the child's life. This is not to say that both parties must seek shared physical custody. Instead, a shared arrangement will be implemented so long as evidence exists demonstrating each parent's ability to place the child's interest before his or her own. Third, the child must have established relationships with each parent. This element is considered from the child's perspective. The child must see both parents as sources of security and love. The final and perhaps most important criterion considered is the degree of cooperation that exists between the parents. This, however, does not mean parents

must have an amicable relationship. According to the *In re Wesley* court successful shared physical custodial schedules only requires parents to separate personal conflicts from their parental roles and spare their children whatever resentment and ill will they may harbor. Ideally, this would be the case regardless of the type of arrangement in place.

Divorce has long-term effects on all parties involved. The effects on children correlate both to the individual child's resilience and support system. While multiple factors contribute to a child's healthy adjustment, the reduction of parental conflict, capable custodial parents and continuing contact with both parents, when possible, are critical. Still, determining the right custody arrangement requires the careful analysis and evaluation of both a child's best interest and a parent's right to rear their own child. ■

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