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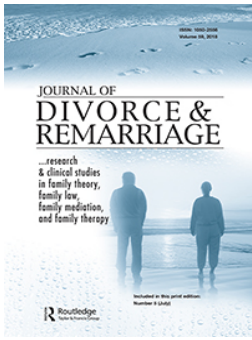
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## Arguments Against a Presumption of Shared Physical Custody in Family Law

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### ABSTRACT

The introduction of the “best interests of the child” standard as a legal presumption in family law in the 1970s signaled an important transition away from a maternal preference standard in child custody disputes, toward a recognition of the centrality and importance of both parents in the lives of children after parental separation. Paradoxically, this reform resulted in an increase rather than decrease in court-determined maternal sole custody. Despite robust empirical evidence in support of shared parenting, a gender convergence in child care roles, and increasing public support for shared parenting, the idea of shared parenting as a legal presumption has been met with skepticism and resistance among some legal and mental health professionals. This article traces the evolution of arguments against shared parenting since the concept was first introduced, from the early 1970s until the present day.

### KEYWORDS

Shared physical custody;  
family law

Despite strong public support and mounting empirical evidence in its favor, shared parenting as 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. These arguments place the burden of proof on proponents of dual residence as a viable legal alternative. As Kelly (1991) wrote, “It is ironic, and of some interest, that we have subjected *joint custody* to a level and intensity of scrutiny that was never directed toward the traditional post-divorce arrangement (sole legal and physical custody to the mother and two weekends each month of visiting to the father)” (p. 55), despite mounting evidence that

traditional sole custody arrangements were less nurturing and stabilizing for children and families.

These “waves” of arguments against shared parenting as a family law presumption were, first, an outright dismissal of shared parenting as an unworkable and preposterous notion; second, more concentrated and in-depth rebuttals; and third, a cautious but increasing recognition that the idea might have some merit. Today we find ourselves at a watershed moment in regard to recognizing and establishing shared parenting as in the best interests of most children of divorce, and as beneficial for parents as well.

In the first of these waves, an important early argument against joint legal custody was that it would disempower mothers, allowing fathers control over their children and ex-wives without any demonstration of responsibility for child care on their part (Polikoff, 1982; Weitzman, 1985). It was argued that “the search for symbolic equality has led to a sacrifice of equity” (Fineman, 1988, p. 4). A number of feminist scholars argued that when joint custody dispositions continue to resemble de facto sole maternal custody, the social role and functions of custodial mothers are maintained in practice but their legal rights and control over their children’s lives are diminished. The negative consequence of this, it was argued, was that the assumption of parental rights in the absence of shared child care responsibility has the potential for serious abuse, and from children’s point of view, “joint custody” is meaningless. Despite evidence that joint custody fathers were in fact significantly more involved in parenting than fathers without legal custody, it was further argued that the potential for abuse and inequity remains in those cases where parental rights are granted without any corresponding requirement for active responsibility for child care.

Another concern about the granting of joint custody to fathers was the assumption that the primary motivation of divorced fathers seeking joint custody and shared parenting arrangements was to avoid child support obligations (Polikoff, 1982). Fatherhood researchers (Ambrose, Harper, & Pemberton, 1983; Greif, 1979; Hetherington, Cox, & Cox, 1976; Jacobs, 1986; Kruk, 1992; Lamb, 1981; Lund, 1987) thus examined this question. This research concluded that although fathers envisioned the concept of shared parenting as encompassing a sharing of both parental rights and responsibilities, their primary motivation was to maintain meaningful day-to-day relationships with their children. Fathers experienced a profound grief reaction related to the absence of their children and saw themselves at high risk of becoming alienated from their children within traditional custody and access arrangements. (Kruk, 1992) Once it was established that fathers’ motives to maintain meaningful relationships with their children were genuine, with shared *physical* caregiving arrangements their desired goal, the three waves of arguments against shared parenting began to unfold in earnest. The first wave was based on an outdated form of attachment theory that focused on

children's need for maintaining attachments with their primary caregiver, and the mother's supposedly natural position as the primary parent. The second wave focused on children's exposure to high conflict and family violence in shared parenting arrangements; these arguments persisted despite an initial lack of research on the link between the two. Finally, the third wave of arguments acknowledged that shared parenting might be beneficial for most children, but cautioned against the idea of presumptions in family law, focusing on subgroups of children and families such as children in high-conflict families, or infants and the very young. Again, these arguments persisted despite new research supportive of shared parenting that challenged outdated assumptions about these populations.

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.

### **The first wave: Arguments against shared parenting**

Once it was established that fathers were less interested in seeking joint legal decision-making authority than with actively parenting their children, arguments against shared parenting gained full force. The first wave of objections to a legal shared parenting presumption was largely based on outdated versions of attachment theory that focused on children's need for maintaining attachments with their mothers as primary caregivers (Bowlby, 1969). These arguments failed to take into account new research-based reformulations of attachment theory that emphasized children's primary attachment to both parents, and the increasing popularity of shared caregiving in two-parent families.

The first line of attack against shared parenting was the "yo-yo" argument. This argument suggested that shared parenting was 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 (Goldstein, Freud, & Solnit, 1973). Aside from logistical problems, repeatedly moving from one home to another, having to follow two sets of rules and cope with potentially differing parental expectations would, it was contended, result in stress and confusion. Children might have difficulty adjusting to frequent moves and need a secure base. It was seen to be disruptive and confusing for children to have two homes where they encounter two different lifestyles and value systems. A child "bounced" from parent to parent could deal with different child-rearing styles, and could

encounter loyalty conflicts. Critics of shared parenting thus emphasized the child's vulnerability and need for a consistent and predictable lifestyle.

First-wave proponents also warned against problems caused by children's continual separations from their primary attachment figure, which in most families, it was argued, is the mother. Separations could, in this view, prevent younger children in particular from developing secure attachments to their mother, thereby generating difficulties in later life. The early works of Bowlby (1969) and Goldstein et al. (1973) were invoked to illustrate the central importance of children maintaining bonds with their primary attachment figure, which would be compromised within a shared parenting arrangement. Bowlby's now abandoned concept of monotropy, the idea that infants form attachment relationships with a single caregiver and that this first relationship serves as a foundation and template for all subsequent attachment bonds, was the basis for the proposition that infants and young children have one psychological parent who should be granted sole decision-making authority, including the authority to determine whether and to what degree the children have a relationship with the other parent (Goldstein et al., 1973).

### **Evidence refuting the first-wave arguments**

In rebuttal to the first wave of arguments against shared parenting, attachment theory has been amended to accommodate evidence that children form strong attachment bonds and relationships with both parents and show remarkable tenacity in continuing these under a variety of conditions (Lamb & Kelly, 2009). A number of studies were undertaken in the 1970s to determine whether two homes undermine stability. Greif (1979) concluded that the concern over the disruption of having two homes is rarely a concern of members of joint custody families themselves. Abarbanel (1979) observed shared custody families in California and found that children feel "at home" in both environments and saw themselves as living in two homes. Stack (1976) argued that sole custody deprives children of being exposed to another worldview from the noncustodial parent, which might better equip them for life in a pluralistic society. Emphasizing the child's resilience and need for stimulation from diverse sources, she also noted that sole custody can sever a child's ties with an entire set of relatives, whereas joint custody allows the child's support group to expand, including not only both parents and their relatives but also each parent's new friends. It is now well established that children's level of stress is reduced and adaptation to parental separation is enhanced in shared parenting, as opposed to sole custody, arrangements. In regard to both divorce-specific and general adjustment measures of physical, psychological, emotional, and social well-being, children in shared care homes fare significantly better than children in other

arrangements (Bergstrom et al., 2013; Fransson, Låftman, Östberg, Hjern, & Bergström, 2017; Nielsen, 2014; Turunen, 2017).

The major flaw of the primary parent or attachment figure argument is that it is based on outdated research and attachment theory formulations. As far back as 1972, Rutter concluded, “the chief bond need not be with the biological parent, it need not be with the chief caretaker, and it need not be with a female, as a less exclusive focus on the mother is required. Children also have fathers” (Rutter, 1972, p. 125). Bowlby (1973) himself eventually acknowledged that children are no more likely to be securely attached to mothers than fathers.

It is now well established that children form primary attachment bonds with both of their parents at the same stage in their development (Lamb & Kelly, 2009). Relationships spanning a range of activities and contexts, with minimal separations, are vital to preserving these attachments to both parents. According to current attachment research, after parents separate, evenings and overnights provide opportunities for crucial interactions and nurturing activities that daytime “visits” cannot provide, 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 (Warshak, 2014, this issue). These everyday activities create and maintain children’s trust and confidence in their parents, while deepening and strengthening parent–child bonds. Infants and very young children cannot tolerate lengthy separations from their attachment figures, and relationships with both their mothers and fathers profoundly affect their adjustment. The richer, deeper, and more secure the parent–child relationships, the better the child’s adjustment to family transitions, whether or not the parents live together. When both parents have been actively involved as caregivers in infants’ lives, continued frequent opportunities for routine interaction with both parents are crucial to children’s well-being after parental separation (Lamb & Kelly, 2009). More recently, Fabricius and Suh (2017) found that young adults who had overnight parenting time with their fathers before the age of 3 had better relationships with both parents than those who had not overnights. These benefits held even after controlling for parental conflict and children’s sex and age at separation. The benefits also held for parents who initially disagreed about overnights where the overnight parenting plan was imposed over one parent’s objections.

There is an emerging consensus that shared residential arrangements for infants and very young children are a protective factor (Warshak, 2014). Especially when children are young, their interactions with both of their parents need to be regular and routine and need to include overnights and shared parenting. (see Warshak, this issue)

Beyond infancy, preschool children remain highly vulnerable. Decades of research have documented young children’s vulnerability to depression after

parental divorce, 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, and a yearning for the absent parent. Maintaining relationships with both parents within a coparenting living arrangement is protective of children in regard to these symptoms (Lamb & Kelly, 2009).

The debunking of the primary parent argument has not deterred those who oppose shared parenting. Although acknowledging that children might form attachments with both parents, opponents still argue that mothers should retain their role as the primary day-to-day caregivers of children, and that it is harmful to children's well-being to disrupt the caregiving status quo (Boyd, 2003). From this perspective, postseparation sole custody arrangements were merely the continuation of existing child caregiving arrangements, vital to maintaining children's sense of stability and predictability of caregiving routines and relationships. In seeking shared parenting and disrupting the caregiving status quo, it was argued, breadwinner fathers were only seeking to avoid their child support obligations, invoking the "deadbeat dad" stereotype. This argument, however, fails to acknowledge the gender convergence of child care roles in contemporary families (Bianchi, 2000; Marshall, 2006). Current analyses report 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 care each week and fathers devote 10.5 hours, a 51% to 49% split (Higgins & Duxbury, 2002, 2012). Although they work more hours outside the home than mothers, young fathers spend an average of 4.3 hours a day with their children, only 45 minutes less than mothers (Galinsky, Aumann, & Bond, 2009).

Bianchi (2000) attributed the gender convergence in child care to six factors: (a) the reallocation of mothers' time to market work outside the home (child care time declines as work time has increased); (b) overestimations of maternal time with children in previous research (it was assumed that all time at home was invested in child care when in reality a large amount was given to household chores not involving 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 child care; and (f) technology such as cell phones has allowed parents to be "on call" without being physically present with children. Given these realities in contemporary families, shared parenting more closely reflects child caregiving arrangements before divorce than does sole physical custody, if one accepts the assertion that postdivorce roles should be determined by roles prior to divorce. In sum, the claim that mothers are the primary caregivers of children before divorce are, for most families, outdated.



## The second wave: Arguments against shared parenting

The second wave of arguments contends that shared parenting exacerbates conflict and can lead to violence between parents who are already in conflict over child custody arrangements. Here it is argued that shared parenting will increase interparental conflict, and that parents already in conflict will increase their animosity because shared parenting presumably calls for a high degree of parental cooperation. The need to cooperate and coordinate will, according to this line of reasoning, 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 coparents. Further, children in shared parenting arrangements are, it is argued, at greater risk of experiencing conflicting loyalties and becoming triangulated. Families in litigation who have shared parenting imposed on them presumably will then place their children in the middle of their conflicts.

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 are able to demonstrate their capacity to cooperate.

### *Evidence refuting the second-wave arguments*

How strongly does the empirical evidence support these second-wave arguments against shared parenting? Earlier research (Johnston, Kline, & Tschann, 1989) found more negative outcomes for daughters, but not for sons, from high-conflict than from low-conflict families when the children had frequent "visits" with their fathers. Kelly (2007), however, 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.

It has also been argued that shared parenting exposes women and children to family violence and child abuse. Feminist legal scholars (Berg, 2011; Meier & Dickson, 2017) in particular have argued that shared parenting is routinely ordered in families where there has been a history of violence. Jaffe, Crooks, and Poisson (2003) 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" (p. 213).

Domestic violence and child abuse are issues that proponents of shared parenting take 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.

Another important point in refuting the second-wave arguments is that “winner-take-all” sole custody plans could exacerbate interparental conflict, and might lead to violence. Fully half of first-time family violence occurs at the time the parents are separating, often in the midst of adversarial “winner-take-all” custody disputes (Ellis & Wight-Peasley, 1986; Hotton, 2003). Johnston, Roseby, and Kuehnle (2009) discussed 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 when two loving, competent parents cannot agree on a parenting plan, and the conflict and violence escalate.

For many years the position that shared parenting in situations of high conflict was harmful to children was popular. There is now strong empirical evidence, however, that children can benefit from shared parenting even when their parents do not have low-conflict, cooperative relationships (Fabricius, Sokol, Diaz, & Braver, 2016; Nielsen, 2017). Shared parenting might create an incentive for parental cooperation.

More recent research has also found that shared parenting can ameliorate the harmful effects of high conflict: A warm relationship with both parents is a protective factor for children (Nielsen, 2017; Warshak, 2014). The benefits of shared parenting exist independent of parental conflict. 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.

Rather than depriving children of time with one of their parents in high-conflict families, reduction of conflict to which children are exposed is important. A number of specialized interventions to help parents reduce conflict have been developed, including parallel parenting, therapeutic family mediation, parent education programs, and parenting coordination (Kruk, 2013). A key strategy is keeping parents focused on their children’s needs, and enhancing parents’ attunement to their children’s needs. The main therapeutic task in high-conflict families is to help parents separate their previous marital hostilities from their ongoing parenting responsibilities.

Finally, second-wave arguments fail to distinguish among different levels of conflict. 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 the majority of high-conflict divorces, however, violence and abuse are not a factor. Children's safety in the majority of 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 (Kruk, 2013).

### **The third wave: Arguments against shared parenting**

The third wave of arguments against shared parenting acknowledges that shared parenting might be beneficial for most children, but cautions against the idea of presumptions in family law, emphasizing that the current discretionary best interests of the child standard must be retained. The third wave of arguments is specifically aimed against establishing a legal presumption of shared parenting in family law. Currently, the best interests of the child remains the sole or primary criterion on which legal determinations of parenting after divorce are based in most legal jurisdictions. It is argued that children's "best interests" will be different in each individual case, given the unique circumstances of each individual child and family. Hence in this view, it is vital that the court retain its discretionary power in making decisions based on particular circumstances; assessing each case on its own merits should remain the cornerstone of family law. A legal presumption of shared parenting, it is argued, would prioritize parental rights over the well-being of children.

The best interests of the child standard is touted as gender-neutral, flexible, and simple to apply. It is claimed that the standard 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. In addition, it is argued that, in allowing judges to exercise their discretion, the best interests standard provides for individual justice. Moreover it is contended that social science research has not established the amount of time that parents need to maintain a meaningful relationship.

### ***Evidence refuting the third-wave arguments***

The third-wave arguments are problematic in many regards. First, the best interests of the child standard is vague and indeterminate, as children's best interests are largely undefined, lack legal consensus, and are based on speculation about future conduct. The absence of a clear definition of best interests renders the standard unworkable. Second, the standard 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. Third, decisions based on the best interests of the child reflect a sole custody presumption and judicial bias; judges might hold stereotyped or outdated ideas about fathers' and mothers' roles that bias their decisions. Fourth, the discretionary best interests of the child standard sustains, intensifies, and creates 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. Fifth, the best interests of the child standard makes 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. Sixth, the views of children and parents regarding the best interests of the child, which focus on children's needs and parents' responsibilities to those needs, are radically different to the views of the judiciary, which are deficit-based. Seventh, with two adequate parents, the court has no basis in law or psychology for distinguishing one parent as "primary" over the other. Finally, despite the rhetoric of children's best interests, children's interests are largely unrepresented in the court proceedings, as a custody contest instead pits the rights of mothers against the rights of fathers (Brown, 2014; Kruk, 2013).

A legal presumption of shared parenting based on a firm foundation of research evidence defining children's needs and interests in the divorce transition provides a clear and consistent guideline for judicial decision making. This presumption provides a clear-cut default rule, removes speculation about future conduct as a basis for making custody decisions, limits judicial discretion, enhances determinacy and predictability of outcome, and reduces litigation and ongoing conflict between parents.

### **The way forward**

A true legal presumption of shared parental responsibility would grant both parents equal decision-making authority and equal or nearly equal parenting time as their shared child care responsibility. In keeping with current research, a shared parenting presumption maximizes the involvement of both parents. A legal presumption of shared parenting establishes an expectation that the former partners are of equal status before the law in regard to their parental rights and responsibilities, and conveys to children the message that their parents are of equal value as parents. Shared parenting replaces the discretionary best interests standard with a child-focused, evidence-based best interests of the child from the perspective of the child approach.

Have we reached a watershed in understanding the best interests of children in situations of family separation and divorce? This question was placed front and center as the theme of the Third International Conference

on Shared Parenting in May 2017. Specifically, have we reached the point where we can conclude with confidence that the best interests of children are commensurate with a legal presumption of shared parenting responsibility, rebuttable in cases of family violence, negligence, child abuse, or other situations where children needed protection from a parent while the parents were still together. Are we at a point where the scientific evidence points in the direction of mandating that shared parenting becomes the foundation of family law?

The answer to these questions was distilled by Sanford Braver at the conclusion of the conference: “To my mind, we’re over the hump. we’ve reached the watershed. On the basis of this evidence, social scientists can now cautiously recommend presumptive shared parenting to policymakers.” He further added, “I think shared parenting now has enough evidence [that] the burden of proof should now fall to those who oppose it rather than those who promote it” (Braver & Lamb, this issue). It was also noted that a number of jurisdictions have now moved in the direction of establishing a rebuttable legal presumption of shared parenting. A recent Council of Europe resolution (Council of Europe, 2014), for example, encourages member states to adopt shared parenting as the foundation of family law, as an outgrowth of the emerging consensus in the scientific community on the benefits of shared parenting.

With an emerging consensus regarding the viability and importance of shared parenting, the wind is finally being taken out of the sails of shared parenting opponents. The three waves of arguments against presumptive shared parenting have been addressed in the research literature, and found wanting. A paradigm shift toward a more evidence-based and child-focused legal standard of shared parenting has finally emerged.

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