A PRESUMPTION AGAINST SHARED PARENTING FOR FAMILY COURT LITIGANTS

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Shared parenting is the most beneficial model for planning the future of many separating parents and their children. Shared parenting needs to be crafted, for appropriate cases, by willing parents on their own or through coaching by responsible lawyers, counselors, or mediators. Shared parenting is not an outcome that should be forced on high-conflict parents against their will as a compromise in the hopes that they will grow into the plan. Separating parents with a history of domestic violence need to receive appropriate screening and assessment on the nature of the violence, the impact of the violence on the adult victim and children, and the interventions required by the perpetrator before a safe parenting plan can be designed. The Think Tank Report on shared parenting is to be commended for its work. The Report acknowledges some of the limitations of shared parenting in situations that pose risks to children and/or inadvertently promote ongoing conflicts between parents. My concern is that domestic violence victims will be forced into shared parenting or fear being labeled as "hostile" and "unfriendly parents" or accused of alienation. There continues to be a need for much more professional education on the ongoing risks of domestic violence and the implications for differentiated parenting plans.

Key Points for the Family Court Community:

- Shared parenting is not for everyone.
- Litigating parents are unlikely to make shared parenting work.
- Case of domestic violence require screening and a differentiated parenting plan that recognizes safety, accountability and healing.

Keywords: *Differentiated Parenting Plans*; *Domestic Violence*; *Shared Parenting*; *and Unintended Consequences of Presumptions*.

At the outset of this commentary, I would like to commend Dr. Marsha Klein Pruett and Professor J. Herbie DiFonzo and the AFCC Think Tank participants for pulling together a thoughtful review of the research, policy, and practice in shared parenting. There is no doubt that the Think Tank pulled together a distinguished and diverse group of leaders in the field to address the most critical issues. The report is well written and structured in a clear manner that recognizes many of the controversies.

The title of my commentary is not intended to be a legal presumption, but rather a frame of reference to suggest that shared parenting should not be presumed for family court litigants. These litigants should have an onus on them to prove to the court that they could manage shared parenting in the event that any judge would consider such an option on an involuntary basis for one or both parents.

SHARED PARENTING AS A FOUNDATIONAL CONCEPT FOR PREVENTION, BUT NOT FOR LITIGATION

Shared parenting is the ideal outcome for *many* separating and divorcing parents *and their children*. Information about the benefits (and limitations) of shared parenting should be part of the education of professionals working with children and families and court-related legal and mental health professionals including lawyers, mediators, and judges. Public awareness campaigns should promote the benefit of shared parenting and postseparation parent education programs should encourage shared parenting. However, parents who enter the justice system to litigate about child custody or access have passed the point where shared parenting should be presumed or even encouraged.

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Entering a courthouse to ask a judge to decide a parenting plan for children communicates an inability for one or both parents to work together in the best interests of their children. Aside from exceptional circumstances where self-represented litigants get to a judge without appropriate screening, by the time most parents face a judge, one can safely assume that they have had access to many friends, family members, counselors, lawyers, parent education programs, or mediators who have told them to work out their differences. Countless people would have told them that, while they are separating as intimate partners, they will be parents together forever. Many people have told them that conflict hurts children. By this stage of appearing in court, the average parent should be starting to appreciate the emotional and financial costs of litigation.

The relatively smaller numbers (5–20%) of separating parents who are actively engaged in litigation to decide custody or access require different interventions and strategies. Research on these high-conflict cases suggest that they are distinct in the complexity of issues they bring into court, including the possibility of domestic violence, personality disorders, mental health issues, and addictions (Johnston, Roseby, & Kuehnle, 2009). In this commentary, I want to focus on one of these possibilities—the presence of domestic violence.

I am writing from the perspective of a psychologist who has worked with domestic violence victims, perpetrators, and children for over 40 years in both the family and criminal courts. My basic thesis is that shared parenting is wonderful for parents and children if the case is suitable and the parents voluntarily choose it, but a legal presumption of shared parenting will be harmful for children and adult victims of domestic violence. I want to put this thesis into an historical framework. In my opinion and review of the literature, the basic elements of shared parenting have been with us for at least 35 years whereas the recognition of domestic violence as a significant factor in child custody disputes has only begun.

Even where domestic violence is recognized as a factor in legislation, there has been considerable backlash and concern that victims are lying and exaggerating to boost their request for child custody (Jaffe, Lemon, & Poisson, 2003). In other words, as of 2013, there is already a presumption in the broader community and in the courts that shared parenting is to be embraced whereas proper exploration of the relevance of domestic violence on parenting arrangements is just beginning in earnest.

In my opinion, domestic violence is often recognized in name only, without a demonstrated understanding of the dynamics of abusive relationships. Some of the concerns include a narrow definition of domestic violence as physical assault and a lack of understanding of coercive control and psychological abuse. There is a lack of awareness that domestic violence may continue after separation and have an ongoing impact on children and parenting. Although domestic violence represents behaviors that range in severity and patterns, the courts may fail to conduct thorough analyses to properly understand the nature of individual cases. There is still a rush to find a victimized parent as an "alienator" without an understanding of what may be triggering protective behaviors in a parent with genuine concerns about abuse by the other parent (Jaffe, Ashbourne, & Mamo, 2010).

I will organize my commentary by examining each consensus point in the Think Tank report (Pruett & DiFonzo, 2014) and raising a caution from a domestic violence lens.

Consensus Point 1: Domestic violence is a public health issue in terms of the physical and psychological costs to children and victims. Shared parenting is not a public health issue, but rather a model of good cooperation for separating parents who are able to effectively work together for the sake of their children ("Promotion of shared parenting constitutes a public health issue that extends beyond a **mere** legal concern.") There is no doubt that collaborating parents have a positive impact on children, but domestic violence may rob one or both parents of an opportunity to appropriately collaborate. In fact, attempts to collaborate may endanger the adult victim and children.

Consensus Point 2: "Aggregate-level research" may not only be difficult to apply to individual cases but it may be misleading. There has been a longstanding concern in the literature that the courts and court-related professionals often apply the research findings from studies of community samples to a totally different population engaged in litigation in the family justice system. Taking findings about the benefits of shared parenting, generally based on studies of those who have chosen this parenting

arrangement voluntarily and applying them to a population that is consumed by the aftermath and/or ongoing domestic violence is contraindicated.

Consensus Point 3: High-conflict separating parents represent both a unique and diverse population that is often quite distinct from the overall population of separating parents. It is a population where there is insufficient data and the least agreement to offer courts advice about individual cases. When the high-conflict cases are further analyzed with regard to domestic violence, there are special challenges in protecting children from ongoing harm. Domestic violence can leave emotional and psychological scars for years, such as trauma symptoms so there needs to be an expanded understanding of this impact. Even in stating one of the Think Tank priorities as the "*maintenance of family relationships with the protection of children from conflict and violence and the safety of both parents*," there appears to be a limiting of this concern as "parents (who) have been violent in the recent past" when research and clinical practice would suggest that traumatic events such as exposure to domestic violence may last for years if not a lifetime.

Consensus Point 4: There is emerging research on the harm of domestic violence on infants and young children in terms of their cognitive development as well as trauma symptoms and attachment problems (Jaffe, Wolfe, & Campbell, 2011). Promoting shared parenting in the face of domestic violence can be harmful to infants and children and undermine their attachment to a principal caregiver. While I agree that "special consideration needs to be given to meeting young children's developmental needs," I fear that inadequate attention to domestic violence allegations may compromise the proper focus on this consideration.

Consensus Point 5: Children may benefit "from parents sharing in their upbringing throughout their life span" in the vast majority of cases. However, for children growing up with domestic violence, attempts to force shared parenting may lead to a never-ending war and ongoing tensions and fears as opposed to stability and predictability in their lives. In this discussion I would draw a parallel to the early research on the harm of divorce and separation on children and the magazine and newspaper headlines making this pronouncement to the general public. Only later did this general finding start to become qualified with the view that divorce was not as harmful as staying in a war zone for the sake of the children. I fear that the enthusiasm for shared parenting will be misleading if there are not clear expressions of its limitations.

Consensus Point 6: Judges and court-related professionals like custody evaluators must consider multiple best interests factors in handling "disputes over the care of a young child." While it is fair to say that in the majority of cases "no single factor trumps the influence and importance of the aggregate," there are exceptions in the case of domestic violence and child abuse. A pattern of domestic violence that endangers adult victims and children may be the factor that trumps all others. There is extensive research that suggests that, in some cases, violence does not end with separation and may escalate and be played out as a power and control issue in court. In extreme and rarer cases, domestic violence fatality review committees in the United States and Canada (Jaffe, Campbell, Juodis, & Hamilton, 2012) suggest that failure to recognize this factor may be fatal to the victim and children (Olszowy, Jaffe, Campbell, & Hamilton, 2013).

Consensus Point 7: There is little doubt that "self-determination by parents whenever it is safe for the parents and children to do so is an optimal goal for professionals in family law." My concern is that there is so much financial and systemic pressure on victims of violence to settle cases that safety is not often properly assessed or addressed. Concerns about safety may be misunderstood and seen as signs of an "unfriendly parent" or an alienating parent trying to frustrate the other parent's and children's rights to a relationship. Research suggests that some custody evaluators minimize the impact of domestic violence and may view these disclosures as a reflection of a hostile parent rather than a parent concerned about safety (Hardesty, Haselschwerdt, & Johnson, 2013).

Research on the long-term impact of domestic violence on parenting arrangements is still in its infancy (Jaffe, Johnston, Crooks, & Bala, 2008). This research is highly complex because it requires

longitudinal studies that examine the steps that parents have taken to address the violence and its impact on children and parenting. There are often a host of therapeutic needs for children, victims, and perpetrators that need to be carefully addressed before there can be a review and determination of the ability of "one or both parents to reflect on and repair relationship." My concern in these cases is the assumption of safety before a determination of accountability and genuine amends is made (Bancroft, Silverman, & Ritchie, 2011).

Consensus Point 8: I would support "a presumption of joint decision making" for all parents who get along well after separation. Once parents enter litigation and search in earnest for a wise judge, there needs to be a "case-by-case approach." Rather than presume joint decision making in the courthouse, judges need to presume family lawyers, mediators, parent educators, friends, family, and coworkers have advised parents of the value of shared parenting in general, but that parents, or one of them, in particular a victim of family violence, has decided that this is not appropriate for them and their children. Rather than more of the same, judicial officers need to presume that there are other issues that need to be addressed more fully, including allegations of domestic violence.

Consensus Point 9: Consensus Point 9 is the most consistent with my fundamental thesis in stating that "Negotiations and determinations about parenting time after separation that involves third parties (mental health, legal) is inescapably case specific." The critical issue from the domestic violence lens is ensuring adequate training is in place with regard to the impact of violence and the promotion of safety, accountability, and healing.

There has been much progress in recognizing domestic violence as a crime within the criminal justice system with specialized police officers, prosecutors, victim services, and courts. However, victims report less satisfaction with the family court's understanding of the dynamics of abusive relationships and how the violence may continue and take different forms through forced shared parenting (Zeoli, Rivera, Sullivan, & Kubiak, 2013). There are often missed opportunities to better inform the family court and coordinate information from relevant criminal proceedings unless litigants are fortunate enough to be in a jurisdiction with an integrated domestic violence court, where criminal and family proceedings are dealt with by the same judge (Katz & Rempel, 2011; Cissner, Labriola, & Rempel, 2013).

Consensus Point 10: No one can disagree with the statement that "children's best interests are furthered by parenting plans providing for continuing and shared parenting relationships that are safe, secure, and developmentally responsive." There is no magic formula or "template calling for a specific division of time imposed on all families." The dangers of presuming shared parenting for all separating parents are the situations where a principal caregiver and children are disrupted by "insensitive parenting aggravated by ongoing parental contact." This circumstance is highlighted in domestic violence cases when the litigation is really an extension of the power and control issues within the adult relationship and not child centered.

Consensus Point 11: Consensus Point 11 reiterates the importance of judging each case on its unique best interests' factors without presuming specific parenting time. Several jurisdictions have enshrined this view in legislation that encourages as much contact with each parent as possible consistent with the best interests of the children. For example, in the *Canadian Divorce Act*, Section 16(10), there is a promotion of maximum contact consistent with best interests of the child ("(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact"). This language brings the focus back on best interests of this child and not on a generic academic presumption. The shortcoming would be an understanding of the meaning of the "willingness to facilitate contact" without an assessment of domestic violence.

Exposure to domestic violence is considered contrary to children's best interests in most jurisdictions. There is an emerging body of knowledge that supports efforts at screening cases, assessing potential lethality, and trauma-informed assessment and intervention. However, outcome studies of

differential parenting plans in the context of domestic violence are lacking. Another concern that impacts our understanding of domestic violence as a factor in deciding custody is the reluctance of victims to disclose the violence. The vast majority of domestic violence victims do not call the police or have documented evidence to show the court about their history. Some victims may not understand the impact of the violence on their children or why this factor is even relevant or they may be reluctant to disclose. Often victims of domestic violence are looking for ways to move on with their lives while avoiding any further conflict with their abuser.

Consensus Point 12: Alternative dispute resolution (ADR) options are an essential route to positive outcomes for separating parents, especially those considering a shared parenting arrangement. However the rush to some ADR options as a sensible and cost-effective alternative to litigation may force domestic violence victims to see no other option. While there is agreement that domestic violence screening is an essential first step before ADR options (such as mediation), there is some evidence that the screening may too often overlook concerning cases (Hardesty, Haselschwerdt, & Johnson, 2013).

High-conflict cases, especially those with domestic violence issues, benefit from experienced family court judges who case manage and work with families over time to monitor issues around assessment, safety, risk management, and graduation from supervised visitation (Bala, Birnbaum, & Martinson, 2011). Having multiple judges handle the same family over years of litigation is family justice at its worst, in contrast to dedicated judges with specialized expertise and case management skills (Mamo, Jaffe, & Chiodo, 2007). I commend the Think Tank's clear support for "the assignment of one judge throughout each family's process, and built-in follow-up where families have a place to return to court to assess how their arrangements are holding or to seek changes if safety becomes an issue or enforcement becomes necessary."

SUMMARY

In summary, I support the enthusiasm for shared parenting as the most beneficial model for the future of many separating parents and their children. In my view, shared parenting is something that needs to be crafted, for appropriate cases, by willing parents on their own or through coaching by responsible lawyers, counselors or mediators. Shared parenting is not an outcome that should be forced on high-conflict parents against their will as a compromise in the hopes that they will grow into the plan. Separating parents with a history of domestic violence need to receive appropriate screening and assessment on the nature of the violence, the impact of the violence on the adult victim and children, and the interventions required by the perpetrator before a safe parenting plan can be designed.

The Think Tank report on shared parenting certainly acknowledges some of the limitations of shared parenting in situations that pose risks to children and/or inadvertently promote ongoing conflicts between parents. My concern is that domestic violence victims will be forced into shared parenting or fear being labeled as "hostile" and "unfriendly parents." In the current climate of parental alienation allegations, victims may be seen as undermining the other parent by even raising concerns about domestic violence. Although there is a growing awareness about the harm of domestic violence, there is a need for much more professional education on the ongoing risks and the implications for differentiated parenting plans. Although the report represents "a first step in the process of thinking through how research, policy, and practice about shared parenting can be more effectively integrated," the second step needs to consider the unintended consequences of public policy and legislation embracing shared parenting more than what already exists. The view that "shared parenting encompasses both danger and delight" is an important frame of reference in consideration of the impact of domestic violence.

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