Is Florida's New Timesharing Presumption Still a Rose by Another Name?

By Jerome Poliacoff, Ph.D; Netta Shaked, Ph.D

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With the advent of Florida's change in the statute providing for a presumption of equal time-sharing for divorcing parents, a formerly passionate litigator, now an advocate of the Collaborative process,[1] asked me a question I hope to answer in this column:

> *Considering the change in the statute providing for a presumption of equal time-sharing, do you believe there will be a decrease in the number of parenting plan evaluations and social investigations?*

As if to answer his own question, my colleague offered his further discouraging observation based on over four decades of practice of the family law system's adherence to "rules":

> *As we have come to find out over the years relating to equitable distribution, although equal division of marital assets is not a presumption, only a good "starting place," the courts are very reticent about doing anything other than dividing those assets equally.*
>
> *Is this what children will have to suffer through going forward, that there is little hope of anything other than placing them with a deficient parent for half the time?*

We don't think so, if not exactly.

Social Investigations

Before the 2023 amendment, Florida's statute on time-sharing did not establish a presumption of equal time-sharing. Instead, it required the court to consider the child's best interests based on a list of factors, such as a parent's ability to cooperate, the child's preference, a parent's availability, the child's needs, and so on. The court had the discretion to order any appropriate time-sharing schedule for the child, ranging from supervised time-sharing to equal time-sharing. In those cases where there were allegations of abuse, neglect, domestic violence, substance abuse, mental health issues, or other factors that could affect the child's welfare, the court could (and still can) order a social investigation to assist in the court's duty of determining the best interest of the child.

A social investigation[2] typically consists of interviews, observations of the parent-child interactions, home visits, psychological testing, interviews with collaterals, an assessment for the presence (or absence) of intimate partner violence[3] (a/k/a "IPV"), and, in some cases, criminal background checks. The outcome is a comprehensive report describing the functioning of the family system and recommendations for the court to consider regarding time-sharing in the best interests of the child.

The 50/50 Presumption Rationale

The guiding principle for implementing the fifty-fifty presumption was, we assume, to simplify the public policy of "... *frequent and continuing access*..." as previously articulated in the statute when there was *no presumption* "...*for or against any specific time-sharing schedule*"[4] in favor of either parent or

for a particular timesharing arrangement to now asserting a "*rebuttable presumption* that *equal time-sharing of a minor child is in the best interests of the minor child*".[5]

Above and beyond the assumed rationale and motivation for the change being, in part, to promote judicial economy,[6] the rationale and motivation for the change may also have come, hopefully, from the evolving perspectives and social science research[7] on parenting, as well as the significant and meaningful role that *both* parents play in a child's life post-divorce or separation.[8]

Not All Time-Sharing Needs to be Equal: Real-World Exceptions to the Presumption

The same research supporting the equal timesharing presumption emphasizes the *quality* of the time a parent spends with their child(ren)[9] as being a salient factor in child development, not the absolute *quantity* of time that a parent spends with his/her child(ren). While the presumption presupposes that children do benefit from completely equal access to both parents, this presumption may not hold in the face of the pragmatics of modern family life. Nor does the new presumption eliminate the court's responsibility to consider all relevant factors in a timesharing decision, including any evidence that might even suggest a different timesharing arrangement, other than an equal time split, would be more appropriate. Some relevant factors the court should still consider in everyday, real-world, cases which may not make a 50/50 arrangement viable with two households include: (a) the parents' respective living arrangements; proximity to each other's residences, place of employment, and/or to the child(ren)'s school(s); and work schedules; and (b) the child(ren)'s education (including location of school), extracurricular commitments, and/or special needs.

Elephants Don't Marry Giraffes: Litigants Will Still Litigate

From our perspective and the perspective of many of our colleagues who do family law-involved evaluations, the new presumption, much like the previous change of the statutory language from "custody" to "timesharing,"[10] is a *Wizard-of-Ozism* (please pardon our effort to add yet another term of art to the contemporary lexicon). Just as the *Cowardly Lion* was no braver after being given a new label – a badge of courage - he was still a lion; the change in 2008 of the statutory language from "primary residential parent" (i.e., "custodial parent") to "time-sharing" did not, as hoped, reduce the amount of conflict in Florida's family court system.

The family court system remains adversarial. Parents were fighting for more than equal "timesharing" before the new presumption, and they will continue to do so after. The new presumption does not recognize the presence in family court of the all too frequently seen high-conflict families and their high-conflict divorces, nor does the presumption recognize the possibility that a source for the high conflict may be one (or both) parent's lack of adequate parenting capacity to meet a particular child's needs or to cope with the immediate stressor of high conflict litigation. The results of research on the impact of interparental conflict supports the proposition that the well-being of children in high conflict divorcing families is often better when they spend at least adequate (if not *more than equal*) time with at least one parent who can provide high-quality parenting.[11]

What is the Alternative to a Social Investigation

The number of cases for which there is a need for a psychological evaluation, parenting coordinator, or guardian ad litem will not change because the law has. In cases where there has been intimate partner violence,[12] where one spouse has a mental health or substance abuse history,[13] or where a child has special needs that one parent refuses to recognize,[14] a full-scale social investigation may not be called for as there are family law rules already in place for the evaluation of each of the foregoing categories.[15] However, in many other cases, there will continue to be a need for the court's appointment of a psychologist evaluator, parenting coordinator, and/or guardian ad litem to assist the trier of fact in understanding the complex psychological issues and/or family system dynamics that are relevant to the court's ruling on time-sharing.

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The Need for a Comprehensive Court Order

If my colleague's fears are not to be borne out,[16] the court and family law attorneys will need to draft a comprehensive order providing the expected scope of the professional's appointment. A comprehensive order should articulate, in a detailed manner, the "issue" that the psychologist evaluator or guardian ad litem is being asked to evaluate and to provide a recommendation for. The use of a generic, jurisdiction-specific form order with check boxes and limited lines for handwritten notes should not be used, as these orders do not meet an evaluator's needs for a comprehensive order. With a clearly articulated order in hand, a psychologist evaluator should be able to conduct an evaluation for the court consistent with the standards, methods, and procedures that a "*reasonable psychologist*"[17] would use. A well-written, comprehensive order,[18] should (for a "reasonable psychologist" attuned to risk management concerns to accept the appointment) include (a) the question(s) and/or concern(s)to be answered and/or addressed, (b) the specifics as to how records will be released, to whom, and under what conditions, (c) who is responsible for payment, and (d) what recourse is available should a parent seek to file a complaint against the evaluator.

In sum, while the fifty-fifty presumption may influence the frequency and context in which social investigations are ordered, these investigations will continue to be an important tool for courts in cases where the child's welfare, parental fitness, or the feasibility of a 50/50 physical time-sharing arrangement is in question. The overarching goal remains to ensure that timesharing decisions are made in the best interests of the child, with a preference for arrangements that allow for meaningful and substantial involvement from both parents.

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Endnotes

[1] Fla. Stat. §61.57 Beginning, concluding, and terminating a collaborative law process.

[2] Association of Family and Conciliation Courts, Guidelines for parenting plan evaluations in family law cases, (2022). https://www.afccnet.org/Portals/0/Committees/2022%20Parenting%20Plan%20Guidelines.pdf?ver=pL0FdZapJmsbfUvQ6zzN-A%3D%3D

[3] Association of Family and Conciliation Courts, *Guidelines for Examining Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluations*, (2016). https://www.afccnet.org/Portals/0/PDF/Guidelines%20for%20Examining%20Intimate%20Partner%20Violence%20(1).pdf?ver=UEMamlbgkRzYKAS4tPBjFQ%3d%3d

[4] Fla. Stat. §61.13 (2)(c)1. (2022) (emphasis added). The statute provides ***no presumption** for or against the father or mother of the child or for or against any specific time-sharing schedule when creating or modifying the parenting plan* of *the child.*

[5] Fla. Stat. §61.13 (2)(c)1. (2023). ("Unless otherwise provided in this section or agreed to by the parties, there is a rebuttable presumption that equal time-sharing of a minor child is in the best interests of the minor child.") (emphasis added).

[6] *See* https://www.flcourts.gov/Administration-Funding/Judicial-Management-Council

https://www.flcourts.gov/Administration-Funding/Court-Funding-Budget.

[7] *See* Drozd, L., Saini, M., & Olesen, N. (Eds.), *Parenting plan evaluations: Applied research for the family court* Oxford University Press (2nd ed.). (2016), https://doi.org/10.1093/med:psych/9780199396580.001.0001;

Lamb, M. E., *Does shared parenting by separated parents affect the adjustment of young children?* , Journal of Child Custody: Research, Issues, and Practices, 15(1), 16–25 (2018), https://doi.org/10.1080/15379418.2018.1425105;

Nielsen, L. *Joint versus sole physical custody: Children's outcomes independent of parent–child relationships, income, and conflict in 60 studies*, Journal of Divorce & Remarriage, 59(4), 247–281 (2018), https://doi.org/10.1080/10502556.2018.1454204;

Steinbach, A., & Augustijn, L., *Postseparation parenting time schedules in joint physical custody arrangements*, Journal of Marriage and Family, 83(2), 595–607 (2021), https://doi.org/10.1111/jomf.12746.

[8] Braver, S.K., & Votruba, A.M., In J.M. de Torres Perea, E. Kruk & M. Ortiz-Tallo (Eds.), *Does joint physical custody "cause" children's better outcomes*? The Routledge international handbook of shared parenting and best interest of the child (pp. 63–77) (2021), https://doi.org/10.4324/9781003140566 (stating that "[o]n the basis of this comprehensive review we conclude that joint parenting probably does cause benefits to children on average, and that social scientists can now provisionally recommend rebuttably presumptive joint parenting to policymakers.") (emphasis added).

Galbraith, N., Kingsbury, M, *Parental Separation or Divorce, Shared Parenting Time Arrangements, and Child Well-Being: New Findings for Canada*, Canadian Studies in Population, 49, 75–108 (2022), https://doi.org/10.1007/s42650-022-00068-0 (providing that "[f]ollowing parental breakup, the relative odds of having mental health or functional difficulties were highest among children who had irregular contact with the other parent").

[9] *See* O'Hara, K. L., Sandler, I. N., Wolchik, S. A., Tein, J.-Y., & Rhodes, C. A., *Parenting time, parenting quality, interparental conflict, and mental health problems of children in high-conflict divorce*, Journal of Family Psychology, 33(6), 690–703 (2019), https://doi.org/10.1037/fam0000556 (providing that analysis of the research show that although more parenting time is associated with better father–child relationships, there is a point beyond which more time is not related to a better relationship).

[10] Roy, E., *The End of Custody in Florida: Finally Parents* Are Just Parents, Florida Bar Journal, 82, 10, p 49ff, (2008). Considering that "although previous changes to Ch. 61 provided there were no presumptions in favor of either parent, introducing the labels of "primary residential parent" and "secondary residential parent" triggered litigation. The desire to "win" the designation of primary residential parent often surpassed the "best interests" of the children. The connotation that the "primary parent" was the superior parent added fuel to the litigation fire. Having dispelled the myths about the superiority of the "primary" label, why is there a need for labels at all? This concept of "divorcing" labels for parents from the process of divorce is groundbreaking. **Calling parents just that, "parents," will positively alter litigation in Florida.** It will provide attorneys with the tools to diffuse the power struggle over the primary and secondary residential parent and enable more amicable resolution of issues involving children, which are truly in the children's best interest. passing the new parenting law, Florida has moved into the forefront of a national trend toward mitigating the animosity and litigation in dissolution of marriage cases to preserve the family unit for the children." (Emphasis added).

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[11] Sandler, I. N., Wheeler, L. A., & Braver, S. L., *Relations of parenting quality, interparental conflict, and overnights with mental health problems of children in divorcing families with high legal conflict*, Journal of family psychology : JFP : Journal of the Division of Family Psychology of the American Psychological Association (Division 43), 27(6), 915–924 (2013), https://doi.org/10.1037/a0034449. *See also Mahrer, N. E., O'Hara, K., Sandler, I. N., & Wolchik, S. A., Does Shared Parenting Help or Hurt Children in High Conflict Divorced Families?*, Journal of Divorce & Remarriage, 59(4), 324–347 (2018), https://doi.org/10.1080/10502556.2018.1454200 (providing that "[t]here is also evidence that the effects of shared parenting on child adjustment in the presence of high conflict differs by gender, and that high quality of parenting by at least one parent is associated with better child adjustment in high conflict divorces.").

[12] Beck, C. J. A., Anderson, E. R., O'Hara, K. L., & Benjamin, G. A. H., *Patterns of intimate partner violence in a large, epidemiological sample of divorcing couples*, Journal of Family Psychology, 27(5), 743–753 (2013), https://doi.org/10.1037/; Khaw, L., Bermea, A. M., Hardesty, J. L., Saunders, D., & Whittaker, A. M., *The system had choked me too": Abused mothers' perceptions of the custody determination process that resulted in negative custody outcomes*, Journal of Interpersonal Violence, 36(9-10), 4310–4334 (2021), https://doi.org/10.1177/0886260518791226; Tomlinson, C. S., Jiang, L. J., & Holtzworth-Munroe, A., In R. Geffner, J. W. White, L. K. Hamberger, A. Rosenbaum, V. Vaughan-Eden, & V. I. Vieth (Eds.), *Intimate partner violence and family law: Focus on separating and divorcing parents*, Handbook of interpersonal violence and abuse across the lifespan: A project of the National Partnership to End Interpersonal Violence Across the Lifespan (NPEIV) Springer Nature Switzerland AG (pp. 3043–3069) (2022),. https://doi.org/10.1007/978-3-319-89999-2_144.

[13] Deutsch, R. M., & Clyman, J., Impact of mental illness on parenting capacity in a child custody matter, Family Court Review, 54(1), 29–38 (2016), https://doi.org/10.1111/fcre.12201; Strohschein, L., *Challenging the presumption of diminished capacity to parent: Does divorce really change parenting practices?* Family Relations: An Interdisciplinary Journal of Applied Family Studies, 56(4), 358–368 (2007), https://doi.org/10.1111/j.1741-3729.2007.00465.x.

[14] Jennings, S., Autism in children and parents: Unique considerations for family court professionals. Family Court Review, 43(4), 582–595 (2005), https://doi.org/10.1111/j.1744-1617.2005.00057.x; Lahaie, E., Poitras, K., & Birnbaum, R., Judicial decisionmaking in family court involving children with autism spectrum disorder, Family Court Review, 61(4), 854–869 (2023) https://doi.org/10.1111/fcre.12759; Pickar, D. B., & Kaufman, R. L., Parenting plans for special needs children: Applying a riskassessment model, Family Court Review, 53(1), 113–133, (2015), https://doi.org/10.1111/fcre.12134; Rappaport, S. R., Kanter, C., & Anast, K., Special considerations in child custody evaluations for children with highfunctioning autism spectrum disorder, Family Court Review, 54(1), 81–95 (2016), https://doi.org/10.1111/fcre.12206.

[15] Family Law Rule of Procedure 12.360 Evaluation of Persons ("A party may request any other party to submit to, or to produce a person in that other party's custody or legal control for, examination by a qualified expert when the condition that is the subject of the requested examination is in controversy. Examinations may include, but are not limited to, examinations involving physical or mental condition, employability or vocational testing, genetic testing, or any other type of examination related to a matter in controversy."); Family Law Rule of Procedure 12.363 Evaluation of Minor Child ("...The court, on motion of any party or the court's own motion, may appoint an expert for an examination, evaluation, testing, or interview of any minor child").

[16] *See* above:

> *As we have come to find out over the years relating to equitable distribution, although equal division of marital assets is not a presumption, only a good "starting place," the courts are very reticent about doing anything other than dividing those assets equally.*
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> *Is this what children will have to suffer through going forward, where there is little hope of anything other than placing them a deficient parent for half the time?*

[17] Fla. Stat. §61.122 Parenting plan recommendation; presumption of psychologist's good faith; prerequisite to parent's filing suit; award of fees, costs, reimbursement.— "(1) A psychologist who has been appointed by the court to develop a parenting plan recommendation in dissolution of marriage, a case of domestic violence, or a paternity matter involving the relationship of a child and a parent, including time-sharing of children, is presumed to be acting in good faith **if the psychologist's recommendation has been reached under standards that a reasonable psychologist would use** to develop a parenting plan recommendation."

[18] Association of Family and Conciliation Courts, *Guidelines for parenting plan evaluations in family law cases*, (2022), https://www.afccnet.org/Portals/0/Committees/2022%20Parenting%20Plan%20Guidelines.pdf?ver=pL0FdZapJmsbfUvQ6zzN-A%3D%3D. See Communication Between Evaluators, Parties, Attorneys, and Courts (providing that "4.1 Appointment Orders and Agreements (b) The appointment order should designate the name of the evaluator as the court's neutral expert. It should **define the court's expectations and the obligations of the evaluator, parties, and attorneys, including the purpose and scope of the evaluation, and use of the evaluator's report, records, and testimony."** (Emphasis added); Poliacoff, J. *Succeeding in Making Family Court Ordered Psychological Evaluations Work: Explaining Roles and Rules*, The Florida Bar, Family Law Commentator, Vol. XXVIII, No. 1, p. 22-26 (2001).