

Equal Parenting Time: The Case for a Legal Presumption

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### **Abstract:**

I review several sources of evidence bearing on the question of whether equal parenting time with both parents is in the best interests of children of divorce. First, the scientific evidence consists of correlational findings that meet four conditions necessary for a causal role of parenting time: A legal context that constrains the possibility of self-selection; a “dose-response” association between parenting time and father-child relationships; positive outcomes when parents disagree and courts impose more parenting time; and negative outcomes when relocations separate fathers and children. Second, the cultural evidence is that norms about parenting roles have changed in the last generation, and this is reflected in public endorsement of equal parenting time. Third, test-case evidence comes from the 2013 equal parenting law in Arizona, which has been evaluated positively by the state’s family law professionals. Finally, examples from recent Canadian case law show courts responding to the new cultural norms by crafting individualized equal parenting time orders over one parent’s objections even in cases of high parent conflict, accompanied by well-reasoned judicial opinions about how that is in children’s best interests. I conclude that the overall pattern of evidence indicates that legal presumptions of equal parenting time would help protect children’s emotional security with each of their divorced parents, and consequently would have a positive effect on public health in the form of reduced long-term stress-related mental and physical health problems among children of divorce.

### **Keywords**

equal parenting time, parent conflict, divorced fathers, parent-child relationships, legal presumptions

At the heart of the current science and policy debates about children's living arrangements after parental divorce or separation is the question of whether it is in children's best interests to live equal amounts of time with each of their parents. My colleagues and I have theorized and reviewed evidence that parenting time is an important source of children's emotional security about parent-child relationships, and that secure parent-child relationships, in turn, are an important source of protection from stress-related mental and physical health problems.<sup>1</sup> In this chapter, I discuss the theoretical mechanisms by which parent conflict also affects children's emotional security; review the previous correlational evidence regarding parenting time, parent conflict, and children's well-being; and conclude that the correlational evidence supports equal parenting time. The science is now entering a "second generation," in which opportunities are becoming available for stronger tests of whether equal parenting time causes benefits in parent-child relationships, while the cultural norms for parenting roles after parental separation have already evolved in the direction of equal parenting time, both of which I discuss next. Lastly, I review findings of an initial evaluation of Arizona's implementation of an equal-parenting-time presumption, the status of custody law in other states regarding presumptions of equal parenting time, and recent Canadian case law under the statutory *maximum contact principle*. I conclude that the evidence to date from all these sources converges to indicate that a legal presumption of equal parenting time is in children's best interests, because such a presumption is likely to strengthen the emotional security of children of divorced and separated parents and thereby have a widespread positive impact on public health.

In our research, we measure the amount of yearly parenting time children have with their fathers in order to test whether more parenting time, up to and including equal parenting time with both parents, is associated with increasing benefits to children. In the older literature, and

still to some extent today, researchers have instead measured frequency of visits, using scales with response options such as “2 to 6 times a year,” “1 to 3 times a month,” and “2 to 5 times a week.” It has since been discovered that the number of days of parenting time cannot be reliably calculated from such response categories; thus, these scales are of limited use in answering modern policy questions about equal parenting time.<sup>2</sup> More recently, one encounters the term “shared parenting” in discussions of policy, and it is important to first consider how viable that concept is as a foundation for policy.

*How useful is the term “shared parenting” for policy?*

“Shared parenting” is like a “handful of pennies.” At no point does adding another penny make them a handful; furthermore, a handful depends on the size of the hand. The concept of a handful is inherently vague, as is the concept of shared parenting. At no one point does increasing the number of days and nights that the child spends at the father’s home become shared parenting, and what one child experiences as shared parenting, as well as any benefits that derive from it, might be different for another child. When “shared parenting” is used as a technical term in policy discussions, the vagueness is removed by arbitrarily defining it as ranging from some minimum proportion of parenting time with fathers (e.g., 35%), up to and including equal parenting time with both parents.

There are currently no United States child custody statutes with a presumption for shared parenting defined as some minimum proportion of parenting time with fathers, although some have been proposed. Several problems would arise with such a statute. The first is that the lower bound of the definition is likely to be insufficient for many children, but it is also likely to be the compromise target that attorneys, mediators, and courts will encourage parents to agree to when the father wants equal parenting time and the mother objects. For example, 35% parenting time

might seem enough to support strong father-child relationships. However, when we move from intuition to consider what 35% parenting time (128 days) actually looks like in a parenting plan, the view becomes less sanguine. There are 36 weeks of school, and 16 weeks total of school vacations and holidays; thus, if the child spends half of school vacations and holidays with the father (56 days), that leaves 72 days of parenting time during the 36 school weeks, or an average of two days per school week. Half of those will be weekends, leaving an average of one school day and night per week with the father. That makes it difficult for the father to be much of a presence in the child's school life, and makes it difficult for the child to see the father as a parent who knows about all the different aspects of the child's life. Two days per school week also means that there will be long periods of time before the child returns to dad's home, up to seven days if the parenting plan is Wednesday and Thursday with dad one week, and Friday and Saturday the next week. That makes it difficult for the father to establish consistent parenting routines, and difficult for the child to adjust before it is time to leave again.

The second problem is that a presumption for "shared parenting" does not tell courts and parents what amount of parenting time is sufficient. When such bills are proposed, they typically include language to the effect that children should have at least the minimum proportion of parenting time with fathers, and that they should have more, up to 50%, based on the individual circumstances of the family. Minimum requirements, as in "minimum daily requirements" of vitamins and minerals, usually specify the amount that is sufficient, but the above language specifies a minimum amount of parenting time that is necessary but not sufficient. Parents will rightly be uncertain about how much parenting time courts will deem to be sufficient under such a standard. Incoherence in a legal standard promotes confusion and conflict between the parties, and heterogeneity among courts in how to interpret and apply that standard.

The final problem is that a definition of shared parenting prescribes an amount of parenting time for all families, albeit as a minimum starting point, and thus it imposes a constraint on judicial discretion, which in some cases might not be in children's best interests. Thus, basing child custody statutes on a definition of shared parenting produces the worst case of both constraints and heterogeneity in judicial decision making.

The alternative presumption is that the child should have as close to equal proportions of parenting time with both parents as is possible for that family, on a schedule that is individualized for each family. As we will see below, this approach is more in line with what we know about the effects associated with different amounts of parenting time. It is also coherent and preserves judicial discretion.

#### *The Correlational Evidence and Policy Implications*

*The Meaning of Parenting Time.* Comprehensive reviews of the research on the various dimensions of non-resident father involvement began in 1999 with a review of the 63 extant studies by Amato and Gilbreth.<sup>3</sup> They concluded that the evidence showed that the *quantity* of parenting time was less important than the *quality* of the father's parenting behaviors for children's school success and mental health. Fabricius et al. have discussed the problems with that conclusion.<sup>4</sup> One problem is that most of the studies available to Amato and Gilbreth at the time used the frequency-of-visitation scales, which fail to accurately measure the quantity of parenting time (e.g., one visit per month could be a dinner or a whole month).

Another problem is that Amato and Gilbreth defined high-quality father parenting as including not only the traditionally recognized behaviors (e.g., providing emotional support, praising children's accomplishments, maintaining consistent discipline, and explaining the reasons for rules), but also other things such as helping with homework, and working on projects

together. Divorced fathers who are more involved in helping with homework and working on projects together necessarily have more parenting time in which to do more of those things. That means that divorced fathers who scored higher on “quality of parenting behaviors” in Amato and Gilbreth’s scheme also likely had greater amounts of parenting time. Thus, the combination of an unreliable measure of quantity of time (i.e., frequency of visitation), and a confounded measure of quality of time (i.e., some items assessed quality but others assessed quantity) might have inadvertently stacked the deck toward concluding that the quality of fathers’ parenting behaviors was more predictive of child outcomes than the quantity of parenting time. One current review of the literature repeats these same mistakes and thereby comes to the same unwarranted conclusion; for example, these authors counted the question, “How often does father put the child to bed?” as a measure of the quality of fathers’ parenting behaviors, rather than as a measure of the number of overnights children spent with fathers.<sup>5</sup>

Another important aspect of Amato and Gilbreth’s review is that it reflected the general tendencies at the time to overlook the connection between the amount of parenting time and the security of father-child relationships, and to overlook the security of father-child relationships as an important outcome variable on a par with the more traditional outcome variables such as depression, aggression, and school performance. These shortcomings have persisted in some quarters despite increasing evidence (discussed below) to the contrary. Part of the reason, I believe, is a lack of understanding of what parenting time means to the child.

We hypothesized that spending time doing things together such as working on projects, or going to the movies, whether the parent also engages in the traditional high-quality parenting behaviors during that time or not, communicates to the child that he or she is important.<sup>6</sup> We derived this hypothesis from open-ended interviews with about 400 adolescents in both intact

and non-intact families about their relationships with each of their resident and nonresident parents, in which they spontaneously talked about, among other things, whether their parents spend enough time with them.<sup>7</sup> Later, using standardized measures in state-of-the-art longitudinal analyses, we confirmed that the more time each parent in two-parent households spent with the adolescent child in daily activities – we asked about playing indoor and outdoor games, going to movies and sporting events, shopping, and cooking -- the more secure the child felt one to two years later that he or she mattered to that parent.<sup>8</sup> For divorced fathers, this requires having enough parenting time to be able to spend enough time doing things together to protect children from doubts about how much they matter.

The findings of many studies in many Western countries now clearly show that more parenting time is related to greater divorced father-child relationship security.<sup>9</sup> For example, Figure 1 shows the relation we found in a sample of 1,030 college students from divorced families.<sup>10</sup> The horizontal axis shows parenting time with father during childhood, and the vertical axis shows emotional security with father years later in young adulthood. The vertical line divides parenting time at 13 to 15 days per "month" (i.e., 28 days). This represents equal (50%) parenting time with each parent. On the left side of the vertical line, it is clear that young adults' current emotional security with their fathers improved with each increment, from 0% to 50%, of parenting time that they had spent with their fathers during childhood. Note that there is no "plateau" short of equal parenting time that might indicate a minimum amount of parenting necessary to ensure good father-child relationships. On the right side of the vertical line, from 50% to 100% time with fathers, are the few (N = 152) father-custody families, in which the zigzags are not statistically reliable and represent random variation. Fabricius and Suh have recently found the same thing for overnight parenting with the father during infancy (0 to 2 years

of age): Young adults' emotional security in the father-child relationship improved with each increment of overnights with fathers during infancy from no overnights with fathers to equal overnights with each parent.<sup>11</sup> Importantly, neither of these studies show any deterioration of the mother-child relationship from 0% to 50% parenting time with fathers; in fact, Fabricius and Suh found some improvement in mother-child relationships when fathers had overnight parenting time, perhaps because it helped relieve some of the stress of being a full-time, single mother.<sup>12</sup>

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The potential public health benefits to society of improving divorced father-child relationship security could be substantial. An estimated 35% of children of divorce have poorer relationships with their fathers in adulthood than children from intact families, after controlling for 40 divorce-predisposing factors.<sup>13</sup> Amato and Gilbreth's review of studies revealed that children who were less close to their divorced fathers had worse behavioral adjustment, worse emotional adjustment, and lower school achievement.<sup>14</sup> Evidence not only from the divorce literature, but also from the general health literature going back 50 years shows that poor relationships with either parent contribute in later life to "consequent accumulating risk for *mental health disorders, major chronic diseases, and early mortality* [emphasis added]."<sup>15</sup> Weakened relationships with divorced fathers also manifest in less support given and received in the form of intergenerational transfers of time and money.<sup>16</sup> Our latest study in this line of work found that adolescents' perceptions of how much they mattered to their fathers were actually more important than their perceptions of how much they mattered to their mothers for predicting their later mental health.<sup>17</sup>

Soon after Amato and Gilbreth, other reviews of the literature began appearing that rightly sought out studies that measured the amount of parenting time rather than the frequency of visitation.<sup>18</sup> In contrast to the conclusion of Amato and Gilbreth, these reviews found that the quantity of parenting time was associated with a wide range of beneficial child outcomes in addition to improved father-child relationships, including academic success, mental health, behavioral adjustment, and self-esteem. However, the authors of these new reviews used definitions of shared parenting to determine how many studies found that children with at least a certain minimum amount of parenting time with fathers had better outcomes than children with less than that amount of parenting time. The first was Bausserman, who located 25 studies and used a minimum cutoff of 25% parenting time with fathers.<sup>19</sup> Nielsen initially found 40 studies, and later found an additional 20 studies, both times using a cutoff of 35% time with fathers.<sup>20</sup> These definitions of shared parenting grouped together studies that differed widely in the average amounts of parenting time with fathers, and as a result, the findings do not tell us whether there are additional benefits associated with levels of parenting time above the cutoffs. Only one review (of 19 studies) compared sole physical custody to two cutoffs for joint physical custody; i.e., 30% to 35% parenting time with fathers, versus 40% to 50%.<sup>21</sup> The children who had almost equal parenting time (40% to 50%) had better behavioral adjustment (e.g., aggressiveness, conduct problems) and social adjustment (e.g., social skills, social acceptance) than children in sole physical custody, whereas those with 30% to 35% parenting time did not. All the authors of these reviews used definitions of shared parenting to simply group studies together for comparison purposes, but these reviews inadvertently lend themselves to use by advocates calling for legal presumptions for shared parenting defined as at least 35% parenting time with fathers.

*The Meaning of Parent Conflict.* Relatively few studies of parenting time also examine levels of parent conflict. That is unfortunate because parent conflict is known to harm children, and there is long-standing concern among researchers<sup>22</sup> and policy makers about whether more parenting time with fathers in high conflict families would expose children to more harm from conflict.

It is important to understand how and why parent conflict works to harm children. The best theory we have is Emotional Security Theory (EST).<sup>23</sup> The central tenet of EST is that parent conflict, in intact as well as in divorced families, can threaten children's sense of security that their parents will be able and willing to continue to take care of them. Some children can have confidence that the conflict will be managed and regulated by the parents, or otherwise will not threaten their continued care. Other children, in response to parent conflict, experience emotional insecurity about the continued physical and emotional availability of their parents. That emotional insecurity is manifested in three ways: (a) *distress* in response to episodes of parent conflict; (b) attempts to *regulate* their exposure to the conflict in various ways such as freezing, intervening, or ingratiating themselves; and (c) negative *expectations* that the conflict will cause their parents to withdraw and will undermine family stability. Negative expectations can be revealed when children are asked to finish story stems about parents in conflict; as one child narrated, "The Mom and Dad keep blaming each other. 'You made the mess.' 'No, you did.' Then Dad leaves the house."<sup>24</sup>

In young children from divorced families, these negative expectations about parent conflict take the form of worries about the continuity of their living arrangements and the stability of their relationships with parents. Such worries are evocatively captured by the following items on the Fear of Abandonment subscale of the Children's Beliefs about Parental

Divorce Scale<sup>25</sup>: “I worry that my parents will want to live without me;” “It’s possible that my parents will never want to see me again;” “I worry that I will be left all alone;” “I think that one day I might have to live with a friend or relative.” In young adults from divorced families, lingering insecurity about parent conflict is still manifested in the same three ways identified by EST: (a) memories of the *distress* of experiencing parental conflict; (b) lingering feelings of *self-blame* in having failed to reduce the conflict and prevent the divorce; and (c) negative *expectations* that continuing conflict will undermine their parents’ ability to cooperate in helping them meet the challenges of young adulthood. This insecurity about parent conflict is captured by four of the six subscales of the Painful Feelings About Divorce Scale (PFAD)<sup>26</sup>: Loss and Abandonment (e.g., “I had a harder childhood than most people.” “I missed not having my father around.”), Self-Blame (e.g., “I wish I had tried harder to keep my parents together.”), Seeing Life Through the Filter of Divorce (e.g., “I worry about big events when both my parents will have to come.” “My parents’ divorce still causes struggles for me.”), and Acceptance of Parental Divorce (e.g., “My parents did not eventually seem happier after they separated.”)

Fabricius and Luecken studied college students and found that more parent conflict around the time of the divorce predicted more insecurity about parent conflict, as measured by the PFAD, years later in young adulthood, which in turn predicted worse current stress-related physical health.<sup>27</sup> However, more parenting time with fathers *mitigated* the harm from parent conflict. Specifically, more parenting time with fathers during childhood predicted greater emotional security of father-child relationships in young adulthood, which in turn predicted *better* stress-related physical health. Both findings are consistent with EST, which holds that the child’s emotional security in parent-child relationships is distinct from the child’s emotional security about parent conflict, and that each contributes to the child’s well-being.

Importantly, Fabricius and Luecken found no indication that more parenting time in the high conflict families resulted in more insecurity about conflict. Mahrer, O’Hara, Sandler, and Wolchik recently reviewed the small group of studies of parenting time and parent conflict.<sup>28</sup> They concluded that the findings are mixed<sup>29</sup>, and that more research is needed to ascertain whether more parenting time with fathers in high conflict families exposes children to more harm from parent conflict. The mixed findings might be due to older studies having too few children in high-conflict families with equal parenting time. The mixed findings might also be due to the use of analytical methods that were not designed to detect complex relations between parenting time and insecurity about parent conflict. Consequently, I re-analyzed the Fabricius and Luecken data to look for complex effects of parenting time in high conflict families.

Fabricius and Luecken assessed parenting time with the question, “Between the time your parents got divorced and now, which of the following best describes your living arrangements with each of them?” The response options were five verbal categories (from *lived entirely with mother and saw father minimally or not at all*, to *lived equal amounts of time with each parent*) that have the following approximate yearly equivalencies of proportion of parenting time with father: 5%, 15%, 25%, 35%, and 45%, respectively.<sup>30</sup> Among the approximately 200 college student participants who provided complete data, the percentages in each of the categories of parenting time were 22%, 25%, 22%, 17%, and 15%, respectively.

Results of the re-analysis showed that, in low-conflict families, the quality of father-child relationships improved with increased parenting time, similar to Figure 1. In high-conflict families, relationships tended to be worse overall than in low-conflict families, reflecting the typical finding that more parent conflict is associated with poorer father-child relationships.<sup>31</sup> Nevertheless, father-child relationships in high-conflict families also improved with increased

parenting time, but only up to 25% time, after which they leveled off. Thus, there was no evidence that more parenting time in high-conflict families was harmful to long-term father-child relationships.

Children's insecurity about parent conflict in low-conflict families did not increase with increased parenting time. In high-conflict families, insecurity spiked significantly from 25% to 35% parenting time, and at 35% it was significantly greater in high-conflict families than in low-conflict families. However, at essentially equal parenting time (45%), insecurity about parent conflict was not greater in high-conflict families than in low-conflict families.

The same pattern was evident for one of the two standardized measures that Fabricius and Luecken used to assess the young adults' stress-related physical health. This was the somatic symptoms scale (e.g., headaches, dizziness, chest pains, nausea). In low-conflict families, somatic symptoms did not increase with increased parenting time. In high-conflict families, somatic symptoms spiked significantly from 25% to 35% parenting time, and at 35% were significantly greater in high-conflict families than in low-conflict families. However, at essentially equal parenting time (45%), somatic symptoms were not greater in high-conflict families than in low-conflict families. For the other measure (i.e., global health rating), the parenting time patterns were not different for high-conflict versus low-conflict families.

These new analyses revealed that, as some have feared, increasing parenting time with fathers in high-conflict families does not appear to have the same beneficial effects as it does in low-conflict families. However, the most insecurity about parent conflict, and the most somatic symptoms both occurred at 35% parenting time not at equal parenting time (45%). EST, when applied to the context of children's living arrangements after divorce, provides a ready explanation of these findings. The central tenet of EST, that parent conflict can threaten the

child's sense of security about the parents' continued support, suggests that when parenting time is low, the father's potential withdrawal in response to parent conflict threatens the child with relatively little change in circumstances because the child already spends little time with the father. At 35% parenting time, however, the change in circumstance would be quite substantial; furthermore, insecurity about the father's continued involvement can be heightened because there are still long periods when the child is not at the father's home. In contrast, at equal parenting time, while the change in circumstance would be greater than at 35% time, there is less room for insecurity about the father's commitment to continued presence because it is concretized in his provision of an equal home for the child. Thus, equal parenting time, in and of itself, likely carries meaning to protect the child against insecurity about parent conflict.

*Summary and Policy Implications.* The effects of divorce on children are largely due to how much the divorce threatens their emotional security. Several lines of research suggest that reduced parenting time with fathers threatens emotional security by preventing children from having sufficient daily interactions to reassure them that they matter to their fathers. The correlational findings of many studies show that more parenting time with fathers up to and including equal parenting time is associated with improved emotional security in the father-child relationship. None of these studies found that mother-child relationship security decreased with increasing parenting time with fathers. This means that the children of divorce with the best long-term relationships with both parents are those who had equal parenting time.

High levels of parent conflict pose a different threat to emotional security. Children fear that conflict will cause parents who might otherwise be supportive and responsive to become emotionally and physically unavailable, and unable to cooperate to meet their needs. The few studies are mixed regarding whether more parenting time with fathers in high conflict families is

harmful for children. New analyses designed to detect complex relations between parenting time and conflict showed that in low conflict families, there was no indication that more parenting time was harmful. In high conflict families, both insecurity about parent conflict and stress-related somatic symptoms spiked at 35% parenting time with fathers, and were higher than in low conflict families at 35% time but not at equal parenting time. Equal parenting time appears to protect children from insecurity about parent conflict. This evidence has only recently become available because only recently have we been able to study larger samples of high conflict families with equal parenting.

Secure parent-child relationships and security about parent conflict are both important aspects of children's well-being, and both also contribute to better stress-related physical and mental health. The policy implication seems clear in low conflict families--namely, that equal parenting time is generally best for the children. In high conflict families, the little evidence we have suggests that security in relationships with fathers might plateau at 25% parenting time, while at 35% parenting time children might have more distress about parent conflict and somatic symptoms. Strictly speaking then, in high conflict families either 25% or equal parenting time might seem best; however, attempting to protect children from insecurity about parent conflict by giving them equal parenting time with their parents is preferable to giving them minimal (25%) parenting time with their fathers. For one reason, 25% parenting time is equivalent to the traditional standard of every other weekend throughout the calendar year, which is no longer the norm in the current cultural climate (see below).

#### *Evidence for Causality of Parenting Time.*

There is considerable turmoil in both the research literature and policy circles concerning the potential effects of legislation establishing a presumption in favor of equal parenting time.<sup>32</sup>

The issue that causes legitimate concern is the difficulty of drawing policy implications from the current correlational research based on families who selected into shared parenting under legal regimes without such presumptions. The worry is that better parents are selected into having more parenting time, so that the observed benefits are due to the type of parents rather than the amount of parenting time. While experimental studies on parenting time cannot be conducted, there are several reasons and lines of evidence to suggest that selection plays a minimal role in the observed benefits and consequently that parenting time plays a causal role.

The first reason is that better fathers are not able to choose to have more parenting time. In the classic Stanford Child Custody Study in California, Maccoby and Mnookin reported that about a third of fathers wanted joint physical custody, and another third wanted primary physical custody.<sup>33</sup> In Arizona, Fabricius and Hall found that similar proportions of college students reported that their fathers had wanted equal or nearly equal living arrangements, or to be their primary residential parent.<sup>34</sup> Yet in both studies, children's living arrangements were twice as likely to reflect the mothers' than the fathers' preferences. The amount of parenting time fathers have under current legal regimes is influenced by many factors, including the mother's preferences, the parents' perceptions of general maternal bias in the courts, advice from attorneys about likely outcomes, parents' financial resources to pursue their cases, differences in effectiveness of attorneys in arguing their clients' cases under the adversarial system, and individual biases among custody evaluators and judges.<sup>35</sup> This "funneling" process represents a different dynamic than the typical self-selection scenario in which people choose to engage or not in a certain behavior, and could in fact constitute a 'natural experiment' in which better fathers end up with considerably different amounts of parenting time.<sup>36</sup>

The second reason that parenting time is likely to play a causal role in benefits to the father-child relationship is that there is a “dose-response” pattern, which means that even small increases in parenting time across the range from 0% to 50% are significantly associated with increases in father-child relationship security.<sup>37</sup> Fathers are highly unlikely to have been funneled into increasing amounts of parenting time according to their increasing potential to be good fathers; thus, selection is an unlikely explanation for this dose-response pattern.

The third reason is that the beneficial effects of shared parenting do not seem to be due to better, more cooperative parents agreeing between themselves to share parenting time. We examined the publicly available data from the Stanford Child Custody Study<sup>38</sup> and found that the great majority of parents with shared parenting had to accept it after mediation, custody evaluation, trial, or judicial imposition.<sup>39</sup> Nevertheless, those with shared parenting time had the most well-adjusted children years later. In a recent study, we asked parents to report whether they had agreed about overnight parenting time when their children were 0 to 2 years of age, or whether they disagreed (i.e., “We never came to agreement, one of us got what he or she wanted mostly because the other one gave in,” or “The final decision came out of either mediation, custody evaluation, attorney-led bargaining, or court hearing.”).<sup>40</sup> If the children had equal overnights with each parent by the time they were 2 years old, it did not matter whether their parents had agreed to it or not; the two groups had equally good relationships with their fathers as well as with their mothers, and better relationships than those who had had fewer overnights. These findings could also constitute a different type of natural experiment, not one in which better fathers were distributed across different amounts of parenting time, but one in which courts imposed equal parenting over mothers’ objections; in both cases, the findings suggest that

greater emotional security in parent-child relationships was due to the greater amounts of parenting time with fathers.

The fourth reason comes from studies of parental relocation after divorce. To the extent relocation is caused by external circumstances such as job opportunities, health, extended family factors, etc. that are not related to parenting ability, it could constitute another type of natural experiment. Ours are the only empirical studies of relocation, and they revealed no positive outcomes associated with parental relocation.<sup>41</sup> Instead, compared to non-relocating families, relocation of more than an hour's drive from the original family home was associated not only with long-term harm to children's emotional security with parents and their emotional security about parent conflict, but also with more anxiety, depression, aggression, delinquency, involvement with the juvenile justice system, associations with delinquent peers, and drug use. These associations held after controlling for parent conflict, domestic violence, and mothers' family income.<sup>42</sup> That is important because it eliminates the alternate explanation that conflict, violence, or financial strain caused both the relocation and the poor child outcomes. In addition, there were similar effects in the two most frequent cases – when the custodial mother relocated with the child away from the father's home, and when the non-custodial father relocated without the child away from the mother's home -- which indicates that the negative outcomes were not due to the child having to adjust to a new home environment, but rather to the separation of the child from the father.<sup>43</sup> When the fathers relocated, children were older at the time of the divorce and thus spent fewer years living apart than when the mothers relocated; we controlled for those factors as well, and still found similar effects for mother- and father-relocation.<sup>44</sup> Our relocation studies differed in methodologies and populations sampled, but nevertheless revealed similar results. Thus, as a set of studies, they provide a strong conceptual replication of the finding that

separation of the child from the father by more than an hour's drive, and the reduced parenting time that necessarily follows, is associated with a wide range of harmful consequences to the child.

*Cultural Norms of Parenting Roles after Parental Separation.*

Custody policies are value-laden. Their moral legitimacy comes from their connection to the prevailing, underlying cultural norms about gender roles and parenting; thus, they necessarily undergo fundamental historical change more so than other laws.<sup>45</sup> In connection to the long-term historical trend toward gender equality and involvement of fathers in child care, there is now consistent evidence of a strong public consensus that equal parenting time is best for children. The first indication of this consensus was found by Fabricius and Hall, who asked college students, "What do you feel is the best living arrangement for children after divorce?".<sup>46</sup> Regardless of how the question was phrased over the course of several semesters, whether students were male or female, or from divorced or intact families, approximately 70% to 80% answered, "equal time".<sup>47</sup> Subsequent surveys have found that large majorities favor equal parenting time in all the locales and among all the demographic groups in the United States and Canada in which this question has been asked, and across several variations in question format, including variations that ask respondents to consider differences in how much pre-divorce child care each parent provided, and differences in parent conflict. For example, we presented hypothetical cases to a large representative sample of Arizona adults, in which participants were asked how they would award parenting time if they were the judge.<sup>48</sup> Participants most commonly awarded equal parenting time even when the hypothetical case stated that one parent had provided the most child care and when there was high mutual parent conflict. There were no significant differences by gender, age, education, income, political outlook, whether the

respondents themselves were currently married, had ever divorced, had children, or had paid or received child support.

This strong cultural norm that equal parenting time is best for children would by itself provide sufficient justification that a legal presumption for equal parenting time is in children's best interests. The reason is that in this cultural milieu, those children who received the old standard, every-other-weekend visitation would be placed in the position of comparing themselves to their peers who had equal parenting time and searching for an explanation for why they are different. As a result, many children would unnecessarily worry that their own fathers' limited post-divorce involvement with them was due to their fathers' deficiencies, or their fathers' lack of caring, or their own unworthiness. A legal presumption for equal parenting time is in children's best interest because it would protect them from this source of emotional insecurity.

#### *Evaluation of a Policy for Equal Parenting Time.*

Lawmakers are often counseled to reject a presumption of equal parenting time, under the assumption that it would impose a one-size-fits-all rule and prevent judges from using discretion in individual cases to protect children. Fortunately, we have a test case to allow us to examine whether a presumption constrains judicial discretion and puts children at risk. Just such a law has been in operation in Arizona since 2013, and an initial state-wide evaluation of the law has been completed.<sup>49</sup>

The landmark reform of Arizona's child custody statute was a large, team effort by judges, attorneys, court staff, and mental health professionals who provide mediation and evaluation services to parents, domestic violence experts, legislators, lay mothers and fathers, and one academic researcher (Fabricius). The legislative process began several years earlier with

education about the new research findings on the benefits associated with shared parenting time, delivered by Fabricius at the annual workshops and training sessions sponsored by the state Bar Association and the state chapter of the Association of Family and Conciliation Courts. Surveys at the last of these sessions in 2008 and 2010 showed that judges were strongly in favor of equal parenting time for fit parents.

The new statute was carefully worded to promote equal parenting time while still requiring judges to weigh the traditional children's best interest factors, such as parental mental health, that might disqualify either parent. The statute states at §25-103(B): "Absent evidence to the contrary, it is in a child's best interest to have substantial, frequent, meaningful and continuing parenting time with both parents;" and at (C): "A court shall apply the provisions of this title in a manner that is consistent with this section." It further states at §25-403.02(B): "Consistent with children's best interests, the court shall adopt a parenting plan that maximizes [both parents'] respective parenting time." The traditional preference for the parent who had provided primary caretaking was removed and replaced at §25-403(A.1) with language directing courts to consider instead "the past, present and potential future relationship between the parent and the child." Thus, without citing percentages of parenting time, the law puts the focus on providing the child with as close to equal parenting time with both parents as possible for that family.

The evaluation study<sup>50</sup> consisted of a survey sent to all the state conciliation court staff (response rate = 82%), family court judges (response rate = 40%), private mental health providers (response rate = 50%), and private attorneys (response rate = 11%), asking for their perceptions of how the law is working. All four groups agreed that the courts are interpreting and applying the law as a presumption for equal parenting time, and that as a result, fit fathers are

highly likely to have their petitions for equal parenting time awarded. This law thus provides a strong test case of whether a parenting time presumption constrains judicial discretion or exposes children to harm.

The findings indicate that the Arizona law does neither. On average, the four groups of family law professionals rated the law positively overall, and positively in terms of children's best interests. The survey also allowed participants to express their own ideas about what is good and bad about the law. Judges seldom said anything about their discretion to individualize parenting time being constrained by the law. On the contrary, they often said that they had to correct some parents' misunderstanding that the law was a one-size-fits-all rule. Thus, Arizonans have not encountered a trade-off between equal parenting time and judicial discretion as a result of courts being directed to try to maximize children's time with both parents.

The four groups of family law professionals reported small increases after the law in allegations of domestic violence, child abuse, and substance abuse, which indicates that the law does not dissuade parents from raising these concerns, but they reported essentially no changes in parent conflict or legal conflict leading up to the final decree. There was some reported increase in post-decree filings, most likely reflecting requests to have older decrees re-adjudicated under the new law. Finally, there were two subgroups that did not evaluate the law positively. About half of the attorneys and one-third of the mental health providers evaluated the law negatively. It is not clear why they differed from the rest of their colleagues. The mental health providers who evaluated the law negatively had practiced for fewer years than their colleagues who evaluated it positively, but they did not differ by sex. The two sub-groups of attorneys did not differ by sex or number of years in practice.

*United States Statutes Regarding Presumptions of Equal Parenting Time.*

In addition to Arizona, just three other states have statutes with language stating a presumption for equal or maximized parenting time in a final decree. Most recently, in 2018, Kentucky amended its statutory provision governing custody following divorce, K.R.S. § 403.270, to provide that “there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child.” In 2007, Wisconsin enacted Code Section 767.41 (4)(a)(2) providing that courts “shall set a placement schedule that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.” However, the issue of equal parenting time in Wisconsin still seems to be unresolved because the 2018 summer legislative leadership unanimously approved a bi-partisan Legislative Council Study Committee on Child Placement and Support, the scope of which states that it “may consider alternatives to current law concerning physical placement, including a rebuttable presumption that equal placement is in the child’s best interest.” Since 1994, Louisiana Civil Code Article 132 has dictated that courts must award “joint custody” to divorcing parents unless they agree otherwise or unless one parent shows by clear and convincing evidence that having sole custody would be in a child’s best interests, and a subsequently enacted statutory provision, LSA-R.S. 9:335(A)(2)(b), clarifies that when joint custody is ordered, “to the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.” These Louisiana statutes preceded the modern research on shared parenting time and might have been enacted in response to earlier studies.<sup>51</sup> One other state, Alaska, has a statutory presumption of equal parenting time, but only for temporary orders.

Five other states’ statutes include a presumption regarding parenting time but fall short of presuming equal parenting time. Nevada, in Code sections 125C.0015 and 125C.0035, presumes

“joint physical custody” at the temporary and final decrees but does not define it. Arkansas, in Code section 9-13-101 “favors,” but does not presume, an award of “joint custody,” which is defined as reasonably equal division of time between the parents. New Mexico’s Code §40-4-9.1 presumes “joint physical custody” at the temporary orders stage, but states that it does *not* imply equal parenting time. The District of Columbia and Idaho both presume “joint custody” but define it as “frequent and continuing contact.”<sup>52</sup>

*Recent Canadian Case Law under the Maximum Contact Principle in Section 16(10) of the Divorce Act.*

Custody policy in Canada is established at the national level, and there is currently no statutory presumption for equal parenting time. There is something called the *maximum contact principle* in section 16(10) of the Divorce Act, but it is universally considered to not be a presumption in favor of shared parenting. Nevertheless, case law in Canada has evolved toward equal parenting time. These cases are the decisions of individual trial judges and appellate courts making their own use of the maximum-contact principle and are not yet well-known. The Ontario cases have been reviewed by others.<sup>53</sup> I provide a brief, selective summary below.

Equal parenting time presupposes some arrangement for parents to share in decision-making about the child’s life (sometimes called joint legal custody). Courts were traditionally reluctant to order shared decision-making in high conflict cases, but that has been changing since the Ontario Court of Appeal cases of *Kaplanis v. Kaplanis* (2005) and *Ladisa v. Ladisa* (2005) affirmed that shared decision-making could be ordered to preserve each parent’s relationship with the child. Mostly since 2005, 70 cases have used that principle to order shared decision-making despite evidence of parent conflict and failure to communicate and cooperate.

For example, in *Brook v. Brook* (2006), Justice Quinn noted that, “The quest for joint [legal] custody must not be restricted to those who can pass the Ozzie-and-Harriet test.” These cases are notable for the careful and nuanced consideration judges gave to the nature, extent, history, and motivation for the conflict, and for creative, individually-tailored provisions to avoid future conflict over decisions about the child’s life.

At least 34 cases have used the maximum contact principle to order equal parenting time. For example, the Saskatchewan Court of Appeal in *Ackerman v. Ackerman* (2014) noted that, although there was no presumption in favor of shared parenting by the maximum contact principle, “maximum contact between a child and each of his or her parents is desirable,” and upheld the trial judge's alternating-week equal parenting time order.

In *Fraser v. Fraser* (2016), Justice McGee noted, “Ongoing relationships with each of one's parents is a right. When a parent argues for unequal parenting time, the onus is on that parent to demonstrate why the proposed schedule is in the child’s best interests.” She found that, given the complexity of the family members’ lives with three young, active children, an alternating-week schedule would reduce the amount of transitions, maximize contact with both parents, and ensure that each parent took responsibility for homework. Each parent would also take the children to activities while in the other parent's care to remedy the court's concern that seven days would be too long to be away from a parent. This provided the additional benefit of dividing up transportation when the children had conflicting schedules.

In *C. (M.) v. C. (T.)* (2010), the court applied the maximum contact principle to order equal parenting time on a three-day rotating basis despite a high level of parent conflict. Justice

Walsh eloquently expressed the psychological theories and research findings about emotional security that I have described above:

I do not do this in an attempt to be fair to the parents, but rather because it will allow for more meaningful interaction between the children and both parents, particularly the father. It will, in my opinion, be better for the children's mental, emotional and physical health; reduce the disruption in the children's sense of continuity; foster the love, affection and ties that exist between not only the children and parents, but the children with the paternal grandmother and with the extended families of both parents; and will provide the children with a secure environment

In *Gibney v. Conahan* (2011), Associate Chief Justice O'Neil of the Nova Scotia Supreme Court noted the influence of parenting research reported in the media and the prevailing cultural norms about gender roles and parenting:

Much is written and appears in popular magazines, on radio and TV about the need for children to have the opportunity to bond with both parents. The litigants herein espouse this view. They do not agree on how much time Mr. Conahan requires to achieve and maintain a loving and deep relationship with the children and they with him. Ms. Gibney proposes that he parent six overnights every four weeks and five hours on four evenings over this period. In keeping with the changing role of women in the work place and men in the household, as well as an increased acceptance of the parenting ability of men, the law has evolved. Age-old stereotypes about the role of men and women as parents are slowly dissipating.

The court was satisfied that each parent would maximize the parenting opportunity afforded to them, and that equal parenting time would allow continuity with friends and school and time with extended family members. The court found that a weekly equal parenting time schedule with a mid-week visit for the other parent was in the children's best interests.

### *Conclusions*

From all the perspectives examined, the evidence suggests that a legal presumption for equal parenting time is in children's best interests. First, the correlational research reveals that children's emotional security is enhanced at equal parenting time in both low- and high-conflict families. Second, the following lines of argument converge to suggest that more parenting time with fathers actually causes enhanced emotional security in children: Good fathers are not able to self-select into having more parenting time; the relation between parenting time and security of father-child relationships shows a dose-response pattern; benefits are found when courts impose equal parenting time; and poor child-welfare outcomes result when relocation separates fathers from children. Third, cultural norms about parenting roles have changed in the last generation, and this is reflected in public endorsement of equal parenting time. Fourth, the 2013 equal parenting law in Arizona has been evaluated positively by the state's family law professionals. Finally, Canadian case law, reflecting changed cultural norms rather than any national legislative change, has evolved to often order equal parenting time over one parent's objections even in cases of high parent conflict, accompanied by well-reasoned judicial opinions about how that is in children's best interests.

The problem with not having a legal presumption of equal parenting time is that many parents are likely to make parenting time decisions under the impression that the family courts

are biased toward primary parenting time for mothers. This impression of maternal bias was universally held in Arizona before the law was passed.<sup>54</sup> The mere impression of bias encourages parents to settle out of court for less parenting time with fathers, and becomes a self-fulfilling prophesy.<sup>55</sup>

As Joan Kelly has pointed out, the current child custody statutes were written in the absence of evidence of how well they promoted children's well-being.<sup>56</sup> The evidence that is now available is compelling that failure to enact presumptions of equal parenting time risks unnecessary harm to children's emotional security with their parents, and consequently unnecessary harm to public health in the form of long-term stress-related mental and physical health problems among children of divorce.

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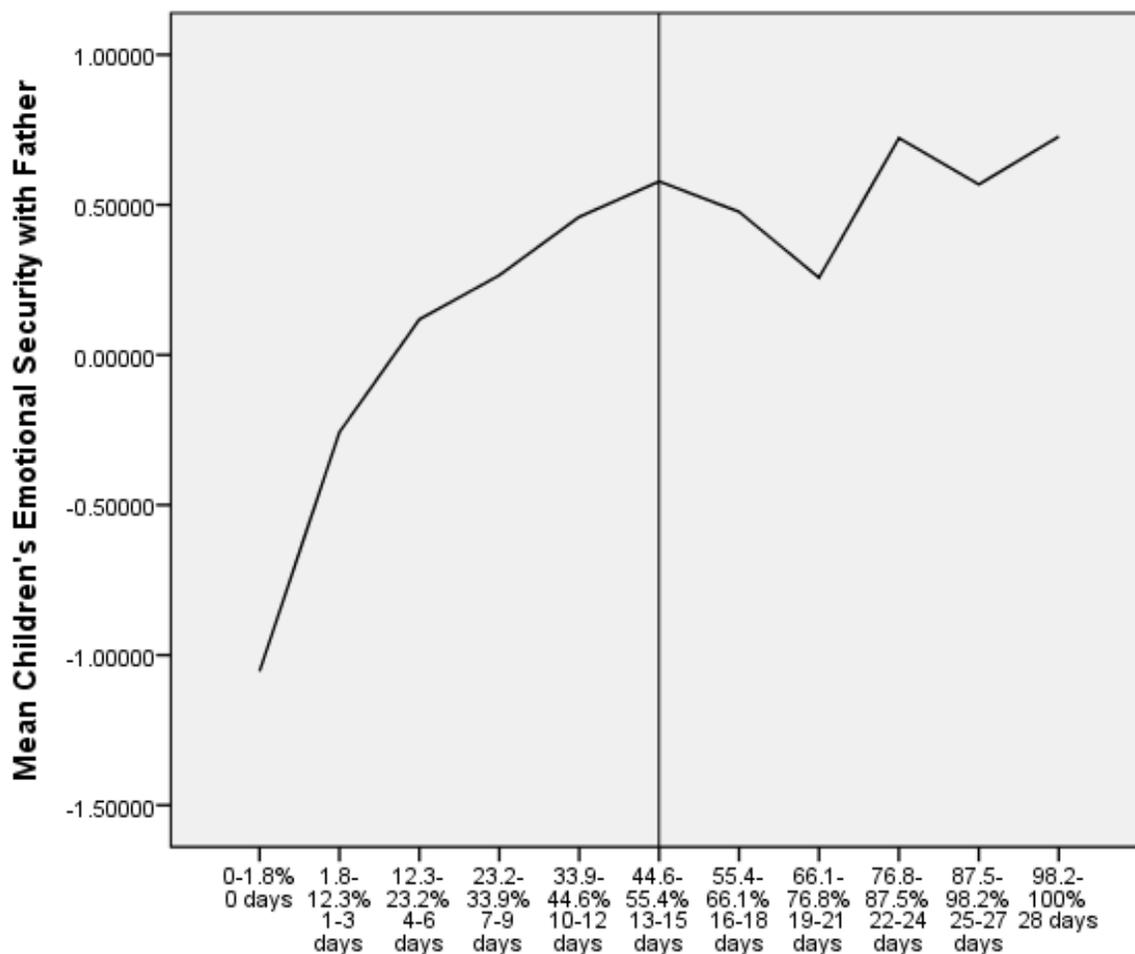
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- <sup>44</sup> Fabricius & Braver, “Relocation, Parent Conflict, and Domestic Violence”, 7-28.
- <sup>45</sup> Fabricius, Braver, Diaz, & Velez, “Custody and Parenting Time”, 201-240.
- <sup>46</sup> Fabricius & Hall, “Young Adults’ Perspectives on Divorce”, 446-461.
- <sup>47</sup> See also Fabricius, “Listening to Children of Divorce”, 385-396.
- <sup>48</sup> Braver, Ellman, Vortuba, & Fabricius, “Lay Judgments About Child Custody”, 212-240.
- <sup>49</sup> Fabricius, William V., Aaron, Michael, Akins, Faren R., Assini, John J., McElroy, Tracy. “What Happens When There is Presumptive 50/50 Parenting Time? An Evaluation of Arizona’s New Child Custody Statute.” *Journal of Divorce and Remarriage* 59, no. 5 (April 2018): 414-428.
- <sup>50</sup> Fabricius, Aaron, Akins, Assini, & McElroy, “What Happens When There is Presumptive 50/50 Parenting Time?”, 414-428.
- <sup>51</sup> Maccoby & Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody*.
- <sup>52</sup> D.C. Code §16-914(a)(2); §32-717B (1) and (4).
- <sup>53</sup> Shaffer, Martha. “Joint Custody Since Kaplanis and Ladisa – A Review of Recent Ontario Case Law.” *Canadian Family Law Quarterly* 26 (2007): 315-355; Birnbaum, Rachel, Bala, Nicholas, Polak, Shely, and Sohani, Nida. “Shared Parenting: Ontario Case Law and Social Science Research.” *Canadian Family Law Quarterly* 35, no. 2 (May 2016): 139-179.
- <sup>54</sup> Braver, Ellman, Vortuba, & Fabricius, “Lay Judgments About Child Custody”, 212-240.

<sup>55</sup> Fabricius, Braver, Diaz, & Velez, "Custody and Parenting Time", 201-240.

<sup>56</sup> Kelly, Joan B. "Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research." *Family Process* 46, no. 1 (2007): 35-52.



**Parenting Time with Father (percent and number of days per 28)**

Figure 1. Relation between the amounts of parenting time per month (4 weeks) students had with their fathers and the emotional security of their relationships with their fathers in young adulthood.

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