



## **WHY A PRESUMPTION OF 50-50 CUSTODY IS NOT IN THE BEST INTERESTS OF CHILDREN**

### **TALKING POINTS**

#### **I. 50-50 Custody Legislation Deprives Courts of Discretion**

- The essential goal of custody decisions is to ensure that the best interests of the child are protected.
- Courts do so by considering many factors, including the safety of the child, the child's relationship with each parent, and many other important factors.
- Courts are already able to, and often do, grant 50-50 custody whenever they deem such an order appropriate; equal or near equal placement is already a very frequent outcome of custody disputes.<sup>1</sup>
- Only a fact-intensive inquiry can take account of each child's unique situation and create a custody order tailored to their best interests. 50-50 presumption legislation takes necessary discretion away from courts and will result in outcomes that are harmful to children and survivors of domestic violence, as indicated by a recent Wisconsin study showing that joint custody orders were common despite proven domestic violence.<sup>2</sup>

#### **II. Requiring 50-50 Custody Would Not be in the Best Interests of Children**

- Research has shown that children's post-divorce well-being is **not** dependent upon the frequency with which they see both parents, *but upon the extent to which the custody agreement reflects pre-divorce caretaking and parenting.*<sup>3</sup>
- One study found that children only benefited from joint physical custody when both parents had previously, prior to the separation, been moderately or highly involved in their daily life.<sup>4</sup>

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<sup>1</sup> Meyer, Cancian & Cook, The Growth in Shared Custody in the United States: Patterns and Implications, 55 Family Court Review, 500-512 (2017) (estimating that shared custody is now the most common post-divorce parenting arrangement.)

<sup>2</sup> Meuer, Gibart & Roach, *Domestic Abuse: Little Impact on Child Custody and Placement*, 91 Wisconsin Lawyer (2018) (finding that joint custody was granted in 50% of cases where one parent had a criminal conviction for domestic violence), available at <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/article.aspx?Volume=91&Issue=11&ArticleID=26737>

<sup>3</sup> Anne-Rigt Poortman, *Postdivorce Parent-Child Contact and Child Well-being: The Importance of Predivorce Parental Involvement*, 80 Journal of Family and Marriage 671-683 (2018).

<sup>4</sup> Anja Steinbach, *Children's and Parents' Well-Being in Joint Physical Custody: A Literature Review*, Family Process, 2018, at (measuring "benefit" by using children's self-reports of their life satisfaction and



- Losing access to the support of their primary caretaker is painful and destabilizing for children; children placed in joint custody with both a more-involved and less-involved parent were found to experience more social, behavioral, and psychological problems than those whose post-divorce placement mirrored the pre-divorce caretaking.<sup>5</sup>
- Even when awarded substantial time with their children, less-involved parents tend to maintain their pre-divorce low level of involvement with children.<sup>6</sup>
- Adults who experienced divorce as children report better outcomes when exposed to **high quality parenting regardless of the custody arrangement**; they report worse outcomes when custody was shared, where one parent provided low-quality parenting.<sup>7</sup>
- One study indicates that frequent overnight visits with both parents has an adverse impact on children under the age of 5; the children studied demonstrated attachment issues and an increase in behaviors such as hitting parents, refusing to eat, and frequently worrying.<sup>8</sup>
- Experiencing high levels of parental conflict has negative outcomes for children.<sup>9</sup> 50-50 custody unavoidably places children in the middle of their parents' conflicts. The harms to children of highly conflictual parents can be mitigated when a court has discretion to look at the severity and frequency of the conflict, safety factors, and the ability of each parent to provide high quality parenting.<sup>10</sup>

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by using their feelings of depression as ascertained by responses to questions asking about loneliness, quality and amount of sleep, and frequency of moods such as happiness and sadness.)

<sup>5</sup> Poortman, *supra*, *Postdivorce Parent-Child Contact and Child Well-being: The Importance of Predivorce Parental Involvement* at 672, also citing Westphal, Poortman & van der Lippe, *Non-resident Father-Child Contact across Divorce Cohorts: The Role of Father Involvement during Marriage*, 2014 (finding that fathers who were involved with their children pre-divorce were much more likely to remain involved post-divorce.)

<sup>6</sup> Poortman, *supra*.

<sup>7</sup> Steinbach, *Children's and Parents' Well-Being in Joint Physical Custody: A Literature Review*, at 8.

<sup>8</sup> *Id* (concluding from a review of empirical research that there is no "one size fits all" best custody arrangement). and Jennifer McIntosh, Bruch Smyth, Margaret Kelaher, *Overnight care patterns following parental separation: Associations with emotion regulation in infants and young children*, 19 *Journal of Family Studies*, 224-239 (2013) (finding that joint physical placement was able to predict a higher level of these poorly regulated behavior in toddlers).

<sup>9</sup> Nicole Maher et al., *Does Shared Parenting Help or Hurt Children in High-Conflict Divorced Families?*, 59 *Journal of Divorce and Remarriage*, 324-347 (2018) (concluding that high conflict divorces were associated with poor child adjustment which could be somewhat mitigated if at least one parent offered high quality parenting).

<sup>10</sup> *Id* at 339.



### III. 50-50 Custody is Particularly Damaging in Families with a History or Risk of Abuse

- The overwhelming majority of custody agreements (90%) are reached in out of court settlements. **Only 10% of parents litigate custody.**<sup>11</sup> **Numerous studies have found that 75% of contested custody litigants report a history of domestic violence.**<sup>12</sup> Domestic abuse is an “adverse childhood experience” (ACE), even if they are not themselves directly physically or sexually abused.<sup>13</sup>
- Abusive parents often use custody litigation to extend their abuse into the legal forum. Parents seeking to keep their children safe from a domestic abuser spend, on average, \$100,000 attempting to ensure safe conditions of the abuser’s access to the child.<sup>14</sup> These costs and the extreme stress of fighting an abuser in court undermine safe parents’ capacity to parent to their full potential.
- The standard of proof in civil court is preponderance of the evidence. Imposition of a “clear and convincing” proof standard to rebut a 50/50 presumption would create an extremely high burden for domestic abuse victims trying to protect children from an abusive ex-partner.
- Numerous studies indicate that family courts frequently discount or disbelieve victims’ reports of abuse.<sup>15</sup> One study of adjudicated abusers who contested custody found that the vast majority of such abusers were actually granted sole or joint custody of children.<sup>16</sup>
- **In an early court-sponsored study, 94% of fathers who petitioned for custody received sole or joint custody regardless of whether they had a history of being abusive.**<sup>17</sup> Children living in a home where they are physically or sexually abused suffer

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<sup>11</sup> Ollendick, White & White, *The Oxford Handbook of Clinical Child and Adolescent Psychology*, 499 (2018).

<sup>12</sup> See generally, Jaffe, Zerwer & Poisson, *Access Denied: The Barriers of Violence & Poverty for Abused Women and their Children After Separation* 1 (citing four studies, all of which found 70-75% of cases in litigation involved allegations of domestic violence).

<sup>13</sup> E.g., Kitzmann, Gaylord, Holt & Kenny, *Child Witnesses to Domestic Violence: A Meta-Analytic Review* 71 *Journal of Consulting and Clinical Psychology* 339-352 (x) (concluding that children who witness parental violence have significantly worse social, psychological, and academic outcomes than children in non-violent homes); <https://acestoohigh.com/got-your-ace-score/>.

<sup>14</sup> Stahly, Stuebner & Krajewski, *Family Courts’ Failure to Protect Children in Custody Disputes*, data available at <https://irp-cdn.multiscreensite.com/0dab915e/files/uploaded/IVAT%20Poster%202014.pdf>.

<sup>15</sup> Dickson & Meier, *Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation*, 35 *Law and Inequality: A Journal of Theory and Practice* 311, 313 (2017) (summarizing other studies).

<sup>16</sup> Rita Berg, *Parental Alienation Analysis, Domestic Violence and Gender Bias in Minnesota Courts*, *Law & Ineq.*, Winter 2011, at 5, 19-21.

<sup>17</sup> *Gender Bias Study of the Court System in Massachusetts*, 24 *New Eng. L. Rev.* 831-832 (1990). This early finding is echoed by a very recent Wisconsin study finding that 50% of even cases *with criminal convictions* for DV resulted in joint custody; when the perpetrator was not incarcerated, that increased to 62%. Meuer et al, *supra*. Recent national research is also consistent. Dickson & Meier, *supra*. Findings of a much larger follow-up study (showing similar results) will be released later in 2019.



increased Adverse Childhood Experiences (ACES), which result in costly lifelong negative health impacts for the child victims.<sup>18</sup>

- A recent study of 240 cases around the country found that fathers accused of abuse who counter-accused the mother of “alienation” took custody from the protective mother at a greater rate (72%) than fathers who were not accused of abuse (67%). **Being accused of child sexual abuse by the mother increased fathers’ win rate to 81%, despite the fact that fabricated CSA allegations are empirically confirmed to be very rare (2%-6%).**<sup>19</sup> Mothers accused of alienation lost custody in approximately half of all cases, regardless of whether or not they had accused the father of abuse.<sup>20</sup> Even when courts believed a father had been abusive to a mother or child, they still granted custody to those fathers in 14-38% of cases.<sup>21</sup> Yet even alienation specialists have acknowledged that there is no current valid scientific support for the core tenets of parental alienation theory.<sup>22</sup>
- One estimate suggests that 58,000 children annually are ordered by courts to spend visitation or custodial time with an allegedly abusive parent.<sup>23</sup>

In sum, the growing body of evidence that children are being subjected to unsafe custody/visitation arrangements by family courts indicates that a presumption of 50-50 custody is likely to be harmful to the best interests of many children.

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<sup>18</sup> Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 56 *American Journal of Preventive Medicine* 774-786 (2019) (finding that people abused in childhood are more likely to develop potentially deadly conditions such as heart disease and cancer).

<sup>19</sup> Everson & Boat, *False Allegations of Sexual Abuse by Children and Adolescents*, 28 *Journal of the American Academy of Child & Adolescent Psychiatry* 230-235 (1989).

<sup>20</sup> Dickson & Meier, *supra*.

<sup>21</sup> *Id.* at 328.

<sup>22</sup> Saini et al, in Drozd, Saini & Olesen, *PARENTING PLAN EVALUATIONS: Applied Research for the Family Court*, 2d Ed, 374-430 (Oxford University Press.2016) (“the lack of consensus on the definitions of alienation and the use of varying non-standardized measures and procedures limit the ability of researchers to undertake methodologically sound research in this area”)

<sup>23</sup> Leadership Council on Child Abuse & Interpersonal Violence, *How Many Children are Court-Ordered into Unsupervised Contact with an Abusive Parent After Divorce?*, (2008).