Is mandatory joint custody really in the best interests of children and families?

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Currently pending in the Michigan Legislature is House Bill 4564 introduced April 5, 2007. This Bill would amend the Michigan Child Custody Act to provide that in a custody dispute between parents, the court must order joint custody unless the court determines by clear and convincing evidence one of the following:

a. A parent is unfit, unwilling or unable to care for the child; or

b. A parent moves their residence outside the school district that the child attended during the one year period preceding the initiation of the request for joint custody and is unable to maintain the child's school schedule without interruption. However, the proposed law would mandate that if a parent is unable to maintain the child's school schedule, the court must order that the parents submit to mediation to determine a custody agreement that would maximize both parents' ability to participate equally in a relationship with the child while accommodating the child's school schedule. However, a parent may restore joint custody by demonstrating the ability to maintain the child's school schedule.

Under the pending legislation if the parents agree to a different custody arrangement (parenting schedule), the court must grant that arrangement as long as it is in writing and presented to the court by the parents.

This proposed new law also sets forth that if the court awards joint custody it must include in its order a parenting schedule, which is called physical custody, that provides that children would be with each of their respective parents for specific and substantially equal periods of time.

In a perfect world, the concept of removing disputes regarding custody and parenting time of children from the court process, by mandating through legislation, the results of any child custody case (substantially that the parties would have joint equally custody and parenting time of their children) would at first blush appear to be logical and in a child's best interests. Certainly removing children from the center of family disputes can only help bring harmony and reduce acrimony.

However, in the real world it just does not work that way. Proponents of House Bill 4564 have stated that groups which oppose this legislation are either "special interest" groups or they characterize them as "misguided" or are in someway attempting to undermine the role of fathers in the lives of their children, and fail to understand why this legislation may not benefit all children.

We do not support this mandatory law. We do not support it because we are a special interest group or because we are misguided. On the contrary, we do not support it because, despite its good intentions, it fails to recognize the reality of the times we live in and will change almost a half century rule, which we have followed, to wit: "the best interests of the child." This proposed law would replace that public policy with "the best interests of the adult." Perhaps that should be something we should expect from the "me" generation.

Let us discuss some of the problems we see with this proposed law:

First, mandatory guidelines bind family court judges from the discretion they require when they hear family law disputes. Unlike most other areas of law, which deal with black and white issues, which may often be plugged into black and white laws with the court possibly coming to a black or white conclusion, family law deals with more than just the law. In fact, we would say family law and the cases dealing with family law, especially divorce and custody cases, have as much emotional and behavioral science ramifications to their makeup than the actual legal statutes themselves.

That is why most cases must be decided on a "case by case basis." That means that discretion must be left to an individual family court judge to make determinations based on the family and the facts that come before them.

Certainly the presumption under our current law, which mandates that parents should have joint legal custody of their children, is a good presumption. That means that parents, unless otherwise incapable, should share the major decision making regarding their children's education, religious training, and medical treatment.

However, to mandate a child's physical parenting schedule, by law, without any regard for the specifics of a case, completely disregards the rights of children and puts them second to the needs of their parents. That is unfair and unfortunate to the innocent victims of divorce, the children. Remember they did not ask for the divorce, but must learn to live with the result of the actions and decisions of their parents.

Second, by mandating that there must be substantially equal parenting time assumes that both parents are equally capable and fit to handle such a significant burden and task of co-parenting appropriately.

In our experience, if that is possible and parents do have comparable parenting skills and abilities equal or substantially equal parenting time can be a major benefit to the entire family, especially the children. However, as unfortunate as it might be, we live in a society where mental health is not a given, which we can all assume exists.

We're not talking about individuals who are "certifiable," we're talking about the individual who may not be appropriate for one or many reasons to serve as a co-parent on an equal basis regarding parenting time with their children. That is why guidelines, such as the twelve best interest factors are presently in our statute.

This proposed law appears to replace our twelve factors of the Child Custody Act by mandating a requirement that the court must order joint custody and must include in their award a physical custody order which is shared by the parents and provides for specific and substantially equal periods of parenting time.

No consideration is provided in whether or not this would be in a child's best interest. No consideration would be involved in where the parents live except that the parents must be able to maintain the child's school schedule. No consideration is given as to whether or not children are enrolled in their own activities and events, which are healthy for children as they grow older for their social development, such as school teams and extracurricular activities and outside sports teams, or religious training, all of which improve their health, education, and development. No consideration is given for the age of the child or any special needs of a child and which parent may be better able to provide for those special needs.

Sometimes it is just not possible to fulfill this 50/50 requirement. Sometimes it is just not possible or appropriate, based on a specific reason or reasons. Sometimes it's just not in a child's best interest and, sometimes it will only create more problems and more harm for a child in order to make parents feel good that neither one of them "lost."

The concept of changing our public policy mentality of "the best interests of the child" to "the best interests of the parents" is not necessarily progress. It is true that everything should be done to keep and incorporate both parents actively in the lives of their children.

It is important to make sure that good communication and sharing of information exists. It is desirable for parents to work together to ensure a positive relationship between children and both parents. But, to tie the hands of family court judges and preclude them from having the discretion, which currently exists, to make decisions to protect the welfare and best interests of children is not necessarily moving forward.

In fact, we think it just might be time for the "me" generation to get over themselves, at least on this issue.

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