

**Implications for Domestic Violence Cases  
of the Proposed  
Elimination of the Concept of Physical Custody in Minnesota**

At the request of the Ad Hoc committee, the author was asked to write a report detailing what she had learned from interviews with people, primarily attorneys, from a number of the states which have made changes similar to the one being proposed in Minnesota. The focus of the inquiry was the effect of these statutory changes on the litigation rates and on parental conflict and animosity, especially in domestic violence cases. The use of the term “batterer” is used herein to refer to the parent who has a history of perpetrating *coercive controlling violence* against the other parent. The term “battered mothers” is used to describe the victim-parent in light of the fact that the overwhelming percentage of the victims of this type of domestic violence are female.

The author attended one meeting of the Ad Hoc committee in December 2007 but did not attend any other of its other meetings.

Information was obtained from these jurisdictions:

Washington State

Wisconsin

West Virginia

Maine

New Hampshire

Australia (because research has been done there on the impact of similar laws)

Washington

In the 1987, Washington State changed its law by deleting the word “custody” and substituting “residential time” and deleting “legal custody” and substituting “decision making”. The law also requires that parents propose “parenting plans” which includes residential schedules designating in which household the children reside and when. A plan can also be established by the court if the parties do not agree on one. (Note that in WA, there can by law be no mutual “decision making”, which is tantamount to our legal custody, nor mediation in cases involving domestic violence.)

The impact of the terminology and parenting plan changes was explored in a study which, among other things, looked at 300 cases in King County (Seattle, WA) and interviews with King County attorneys:

“Interviews of King County attorneys showed a split of opinion with respect to whether parenting plans reduced hostility between parents and caused them to focus more on their parental responsibilities. Ten of the 24 interviewed felt the Act had not helped; 14 saw improvements in cooperation between parents. **Attorneys also split on whether use of the terms “parenting rights and responsibilities,” “residential time,” and “decision-making” instead of “custody” and “visitation” had any beneficial effects.”**

Jane W. Ellis: "Plans, Protections and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals" 24 U. Mich.J.L.Ref. 65 (1990)

A number studies have examined the impact of the changes, among them the **impact on litigation rates**. Three of the studies were commissioned by the government in WA over the 10 years since the changes took effect, all of them authored by Diane Lyle. The final report, Diane L. Lyle, *Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission*, (June 1999) included this alarming finding: "Modifications are common, especially four to six years after the original plan." Of the 395 parenting plans Ms. Lyle reviewed, 224 of the plans (57%) had been modified at least once.

Some of the quotes contained therein speak to the litigation/parental conflict issue:

*"Of course I fought. When my lawyer said I could get every other weekend, I said, 'No—she can get every other weekend—they can live with me.'"* P. 1-20

*"It makes you fight—you can't be a parent on 26 weekends. So if you want to be a parent, a real parent, you fight."* P. 1-20

*"Well now they have to decide every single thing ahead of time—where Johnny's going to be on Presidents' Day in odd-numbered years. And so they fight about every single thing."* –Attorney P. 2-12

A long-time family law attorney in WA who handles lots of custody cases involving domestic violence reported that even though they have no "custody" term in the law any longer, batterers "tend to think in those terms, despite the language". The exceptions (which she says are rare) are batterers who are being represented by highly competent counsel. She also handles a number of cases which are being transferred from California, where the residential time is likely to be divided between the parents by percentages. The batterer parents from CA are more likely than the local ones to seek a higher number of overnights with the child and to litigate the issue.

Finally, in her experience and that of another attorney and an advocate there, a decrease in post-decree custody litigation in domestic violence cases where the court order stabilizes the family situation, keeps both child and parent safe and very carefully and clearly limits the conditions the batterer's contact with the child.

### Wisconsin

In Wisconsin, the term "custody" is understood as encompassing decision-making capacity only (similar to MN's "legal custody"). "Placement plans" address where a child resides and who has day-to-day decision-making. Parties can request "primary" or "exclusive" placement but, according to the attorney for the Wisconsin Coalition Against Domestic Violence, it is rarely granted, even in domestic violence cases. This is true

despite the fact that the statute includes a presumption against both custody and placement if domestic violence is present.

Because the change occurred so many years ago, it is difficult to do a "before" and "after" analysis of the effects of the change on litigation rates or on domestic violence cases. The Coalition attorney and others I interviewed did note that it is clear that **litigious parties will fight over the details of a "placement" plan even though there is no "custody" term over which to battle**. She also has done a lot of national work and doesn't think there is less litigation in WI than there is elsewhere. Attorneys there reported that there is a great deal of custody related litigation that is **really about money**: more child access time equaling less child support. Of course, a state's child support guidelines will dictate how much impact its provisions have on the likelihood that a potential obligor will fight over time with children simply to avoid having to pay a higher child support amount.

### West Virginia

In 2000, the state moved from "primary caretaker" and "physical custody" concepts to "shared parenting", "allocations of custodial responsibility", "parenting time" and "decision making", adopting the American Law Institute standard which prefers parenting arrangements most reflective of the pre-separation situation.

Four experienced family lawyers reported the following about the impact of the change:

In one of the most telling exchanges, one of them (who primarily represents victims of domestic violence in custody matters), upon being asked whether in WV there has been a decrease in the number of contested custody cases, whether matters are resolved faster, or whether fewer parties return to court to relitigate things post-decree, responded, "Oh, HELL, no! It may work really well in low conflict, "normal" divorce cases, but I don't see any of those. In my clients' cases, the batterer may feel temporarily appeased by the "shared parenting" arrangement, but almost invariably, he finds ways to mess with her or with the kids to try and regain more control."

Another responded: "Since our caseload is almost exclusively comprised of cases that do not go through mediation, because there are allegations of some form of abuse, **we have not seen a reduction in the amount of time it takes to litigate a case**. If anything, it now takes much longer, and we have a much smaller pool of pro bono attorneys who are willing to help with domestic matters, as they are perceived to be much more time consuming, with the requirement of individualized parenting plans. We have not seen a decrease in the number of contested cases, either, but I suspect that has to do with the fact that batterers are more likely to contest custody than non-batterers".

One attorney said that the change has not improved the outcomes in cases involving battering, but "the group that has probably benefited have been families who have used the mediation process (assigned in contested cases where there is no domestic violence or substance abuse issues) to arrive at an outcome that is sufficiently individualized to serve the needs of the family."

With regard to the impact of the legislative change on child support enforcement, it appears that they have had some problems with interstate enforcement of their client's child support orders because there is no clear "custodial parent".

### Maine

About 10 years ago, ME changed from the use of the term "custody" to "Parenting Rights and Responsibility", which includes "residential time" and "decision making".

Deidre Smith, Assoc. Professor of Law and Director of the Cumberland Legal Aid Clinic, University of Maine School of Law, who supervises attorneys' family law (primarily post-judgment) work statewide, reported while she likes the change in terminology because it is easier to reach agreement initially in some cases, **she does not believe there has been a reduced caseload nor reduced litigation overall because of the increase in post-judgment motions.** She said it would be "highly speculative" to say that fewer matters would be litigated if the proposed law went into effect in MN.

Another attorney with 10 years of family law experience reported that regardless of the terminology, parents end up after a couple of years with the same parental responsibility distribution that they had before separation, regardless of what their parenting plan says and that few couples negotiate to 50/50 time.

Note that in ME, many victims of domestic violence first get into the courts through the civil protection order process for which they have counsel. These CPOs often include child custody orders.

### New Hampshire

A little over 18 months ago, NH eliminated all references to physical or legal custody or visitation. The law now refers to "parental rights and responsibilities", which is divided into residential responsibility and decision-making responsibility.

An experienced family law attorney in NH reported that, based upon her own observations, as well as anecdotal evidence from other attorneys, advocates and service providers, "today in NH petitions for modification are more prevalent than initial petitions for parental rights or divorces. **For highly litigious people the new language creates endless opportunities for argument and dispute around the edges of the parenting plans. Also, we see lots of conflict around child support orders and tax deductions and decision-making authority.**"

Furthermore, she reported that "(i)t seems that since the change, the number of cases in which batterers are gaining primary residential responsibility has increased. It seems that parents with less involvement in direct parenting pre-separation are successfully obtaining expanded rights post-separation. It seems to me that when the statutory language seemed to anticipate that each child would have one primary home, courts were comfortable with the construct, and shared arrangements were reserved for those cases in which the two parents were truly capable of working together for the children and putting

their personal conflict aside. Now that the statutory language has changed it seems that **courts are more inclined to create and/or approve schedules that require a high degree of parental cooperation, even when the parties' history would suggest that cooperation is not their strong suit.**

### Australia

The Family Reform Act of 1995 in Australia changed the wording from “custody” to “residence” for the purpose of reducing litigation and conflict over children. Three years later, the impact of the change was the subject of a study as reported below:

“One of the stated reasons for moving away from the language of custody and access was to disrupt the “win-lose” mentality that was seen to accompany that language. However, it seems that the change of language has not permeated the consciousness of those litigating under the Act: the vast majority of parents have never heard of “residence” and still ask for “custody”.

Even those people who work within the system on a daily basis have found it difficult to change their terminology, with some solicitors and judges agreeing to continue with the practice of using the old language. Our surveys of, and interviews with, practitioners also indicate that many solicitors use “residence/residence” orders for symbolic reasons – for example, to “placate” non-resident parents, rather than to represent any real sharing of parental responsibilities. The research also suggests that solicitors, judges and registrars continue to approach residence as involving the same legal concepts as custody”

Helen Rhoades, Regina Graycar and Margaret Harrison, *"The first three years of the Family Law Reform Act 1995"* (2001) 58 Family Matters 80, online: Australian Institute of Family Studies  
<<http://www.aifs.gov.au/institute/pubs/fm2001/fm58/hr.pdf>>  
(date accessed: January 3, 2008).

## **Preliminary Analysis of Proposed Legislation**

The premise underlying the proposal, as I understand it, is that Minnesota’s use of the statutory term “custody” is a significant factor in parties’ decisions to litigate and fight each other and that those disputes are driving up court caseloads. I did not find evidence that this is true. It is not clear, therefore, whether the intended effect would be seen here in Minnesota, although it is also not clear whether we would see an overall *increase* in litigation if the changes were enacted.

### **1. The vast majority of child custody related cases are successfully resolved without court intervention or the investment of community resources.**

It would be helpful to know what proportion of cases in MN actually fail to resolve themselves without major investments of state, county or private resources. But what we

know is that nationally, most cases are resolved easily and the ongoing litigation is limited to a small segment of the parties who file.

“While most separating parents are able to develop a post-separation parenting plan for their children with minimal or no intervention by the family court system, a small number require more direct guidance from professionals associated with the courts. **Approximately 20% of divorcing couples require greater intervention** by lawyers, court-related personnel (such as mediators and evaluators), and judges.”

Peter G. Jaffe, Claire V. Crooks, and Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, *Juvenile and Family Court Journal*, Fall (2003).

## **2. Of the approximately 20% of cases in North America that are not easily resolved and which are most likely to require custody evaluations, court hearings, attorney time and other resources, most involve domestic violence.**

“Although this 20% is typically referred to as “high-conflict,” this phrase may not capture the major issues related to violence and abuse. Indeed, **in the majority of these cases referred to as “high-conflict,” domestic violence is a significant issue** (Johnston, 1994). Estimates of the proportion of high-conflict cases that involve domestic violence can be drawn from data accessed through different court-related services. For example, in a review of one sample of parents referred for child custody evaluations by the court, domestic violence was raised in 75% of the cases (Jaffe & Austin, 1995). Even within a sample of families where domestic violence is purportedly an exclusionary criteria (such as those accessing mediation services), domestic violence is common. Of 2,500 families entering mediation in California, approximately 75% of parents indicated that domestic violence had occurred during the relationship (Hirst, 2002). In addition, in an examination of families where mediation failed to resolve child custody issues, a comparable incidence of domestic violence was observed. Between 70% and 75% of these parents who were referred by the family court for counseling because of failed mediation or continuing disputes over the care of their children described marital histories that included physical aggression (Johnston & Campbell, 1988).”

Peter G. Jaffe, Claire V. Crooks, and Samantha E. Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, *Juvenile and Family Court Journal*, Fall (2003).

Research shows that, in fact, **most contested custody cases do involve domestic violence**. See, for example, Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 *Mediation Quarterly* 319, 320 (1997) showing that 50% of contested custody cases involve domestic violence.

**“High conflict divorce cases, the ones that are most likely to end up in litigation, correlate with high incidence of domestic abuse.”**

Kathy Lynn Grant, *A Case Streaming Approach to Child Custody and Access in the Context of Spousal Violence*, 22 Can. J. Fam. L. 57, 73 (2005) citing to: Marie Gordon, *What, Me Biased? Women and Gender Bias in Family Law*, 19 Can. Fam. L.Q. 53 (2000) and Rosana Langer, *Post Marital Support Discourse, Discretion, and Male Dominance*, 12 Can. J. Fam. L. 67 (1994)

### **Between 25% and 50% of disputed custody cases involve domestic violence**

Chandler, D. B., *Violence, Fear, and Communication: The Variable Impact of Domestic Violence on Mediation*. *Mediation Quarterly*, 7, 331-46. (1990); Keilitz, S. L. *Domestic Violence and Child Custody Disputes: A Resource Handbook for Judges and Court Managers*. Alexandria, VA: National Center for State Courts (1997)

### **3. Considering the nature of the cases which get litigated now, it is purely speculation to suggest that fewer cases will require court resources if the proposed change is made.**

#### **(a) Batterers litigate for lots of reasons unrelated to the legal labels**

The attorneys interviewed in every state indicated that even where terminology has changed, batterers continue to battle over many issues, including child custody. Cases involving domestic violence are likely to continue to be “high conflict” matters requiring legal system intervention regardless of any change in the law as batterers often use the court system as another tool to punish, engage or control the battered parent.

Batterers seek custody of their children more often than non-battering fathers do. (L. Bancroft, Winter 2002, *the Batterer as a Parent*, *Synergy*, 6(1), 6-8 (Newsletter of the National Council of Juvenile and Family Court Judges).

#### **(b) Past legislative changes designed to decrease acrimony and reduce litigation have not had that effect, as far as we know.**

The same arguments were made in support of the following proposals, none of which apparently decreased acrimony between separating parents (although they might have had other positive or negative effects).

1. Adoption of the Income Shares model as a basis for MN child support guidelines
2. Change from “visitation” to “parenting time” terminology.
3. Adoption of the “parenting plan” concept in MN law

*(Note that the Minnesota Supreme Court Advisory Task Force on Parenting Coordination, excerpted in the appendix hereto, considered many of the same things being proposed this time around and they were not adopted after significant time was invested by a large and diverse group of professionals.)*

#### **4. To reduce litigation and improve outcomes for children, make outcomes more, not less, predictable especially in domestic violence cases.**

Batterers seek custody of their children more often than non-battering fathers do (L. Bancroft, *The Batterer as a Parent*, *Synergy*, 6(1), 6-8 (Newsletter of the National Council of Juvenile and Family Court Judges, Winter 2002).

And they obtain custody, generally, more frequently than do non-battering fathers. The American Psychological Association reported in 1996 that batterers are successful at obtaining custody about 70% of the time they seek it. If that were true in Minnesota (and we do not know at this time because it has not been studied), **the state should examine what could be done to ensure that children's safety and welfare is better protected** in these cases. A **more predictably protective and responsive legislative** framework for dealing with custody cases involving domestic violence is most likely to reduce litigation while protecting vulnerable parties and children.

Note that the *Final Report of the Minnesota Supreme Court Advisory Task Force on Parental Cooperation* (January 14, 2000) actually included a legislative recommendation, never implemented, which was designed to reduce conflict in cases involving domestic violence by **"limiting the likelihood that a perpetrator's quest for sole physical custody or sole legal custody will succeed"** (see appendix for full provision)

#### **5. Conclusion**

It would be more effective, in this author's view, to acknowledge that the problems in family court are complex, and that an increase in the numbers of pro se litigants as well as the decrease in resources available to help them resolve their problems is compounding matters. Victims of domestic violence continually find themselves struggling to get their very serious cases heard in family court. They face their batterers in court (if they can even get there) often without counsel or financial resources; they and their children pay the price. It is a real tragedy that court and legal system resources are limited. But surely it is hard to imagine another category of cases which are more deserving of them. The system needs to be reformed in order to be able to respond more effectively given the limited resources.

I am sure that on all sides, people can cite reasons for change in the way family courts function. Instead of the word-substitution proposal that is being advanced, it might be more helpful to clearly identify the problems and find appropriate solutions to those problems in a process that is open, engaging and based upon research and verifiable local data. I think there would be wide ranging support for a well-structured process for identifying problems, studying potential solutions: a full strategic planning effort.

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## Appendix

Excerpt from the *Final Report of the Minnesota Supreme Court Advisory Task Force on Parental Cooperation* (January 14, 2000)

### Implementation of Parenting Plans Concept, cont.:

15. In addition to other factors that a Court must consider in a proceeding in which the custody of a child or visitation is at issue and in which the Court has made a finding of domestic abuse:
  - a. The Court shall consider as primary the safety and well being of the child and of the parent who is the victim of domestic abuse. The Court shall make specific findings of fact to show that the custody or visitation arrangement best protects the child and the parent or other family member who is the victim of domestic violence.
  - b. The Court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person. In determining the existence of domestic abuse, the Court's consideration shall include, but is not limited to testimony of witnesses, the issuance of a final or temporary order for protection under section 518B.01, subd. 6 or subd. 7, violations of an order for protection, the response of a peace officer to the scene of alleged domestic abuse, the arrest of a parent following response to a report of alleged domestic abuse, or a conviction of a crime against a family or household member.
  - c. If the Court finds that both parties have perpetrated domestic abuse, the Court shall consider which of the parties was the primary aggressor and shall consider the primary aggressor to have acted contrary to the child's best interests. Perpetration of domestic abuse by a non-primary aggressor does not rebut the presumption in recommendation 14 above. In determining whether a person is the primary aggressor the Court shall consider:
    - i. The considerations listed in paragraph (b) above;
    - ii. Who has made prior reports to law enforcement of domestic violence;
    - iii. The relative severity of the injuries inflicted on each person;
    - iv. The likelihood of future injury to each person;
    - v. Whether one of the persons acted in self-defense; and
    - vi. Whether one of the persons has used methods of power and control over the other person.

**Comment:**

Current law has a rebuttable presumption against joint legal and joint physical custody where one parent has perpetrated domestic abuse against the other. This language would plug a gap and extend the presumption to sole physical custody and sole legal custody. **This presumption is designed to reduce conflict between parents where one or both have perpetrated domestic violence, by limiting the likelihood that a perpetrator's quest for sole physical custody or sole legal custody will succeed.** (*emphasis added*)

An Order for Protection must automatically supercede any inconsistent provisions of a prior parenting plan

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The following is excerpted from the *Minority Report E of the Minnesota Supreme Court Advisory Task Force on Parental Cooperation* (January 14, 2000)

Footnotes follow on the last page.

**PARENTING PLANS USED IN OTHER STATES SHOULD BE EVALUATED FOR REDUCTION IN PARENTAL CONFLICT BEFORE USING THEM IN MINNESOTA.**

“Washington State enacted parenting plans in 1987. Data from Washington suggests proceeding with caution. The settlement rate for parenting plans is only 51.5 percent,<sup>21</sup> compared to the 93 percent settlement rate in Minnesota for dissolutions.<sup>22</sup> These numbers suggest a considerably higher rate of conflict than experienced currently in Minnesota. Another study in Washington State found no benefits to children resulting from parenting plans, that parents’ well-being was *worse*, that parental conflict did not decrease but in fact intensified, and no improvement in child support payments.<sup>23</sup> Although the reliability of the study may be limited by the small response rate, the results underscore that we should not encourage use of parenting plans without data showing that they actually reduce parental conflict. Some Task Force members have suggested that in Washington parenting plans result in fewer post-decree modifications. The data do not support that statement.<sup>24</sup>

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<sup>21</sup> Diane N. Lye, *Progress Report to Washington State Gender and Justice Commission*, November 13, 1998, page 3 (describes study commissioned by State Representative Kastama).

<sup>22</sup> Trial Court Caseload Statistics for fiscal year 1998 and 1999, available from State Court Administration, 120 Constitution Avenue, Suite 120, St. Paul, MN 55155 (494 of 7,101 dissolution cases disposed of in 1998 were disposed of by trial; 497 of 7,101 dissolution cases disposed of in 1999 were tried).

<sup>23</sup> John E. Dunne, M.D., *Can Changing the Divorce Law Affect Post-Divorce Adjustment?* 12, 14, 20, 22 (undated) (unpublished longitudinal study, on file with Minnesota State Court Administration).

<sup>24</sup> Data from Washington State shows that modifications of parenting plans “are heavily concentrated in the fourth, fifth, and sixth years after the prior plan.” (Diane L. Lye, *Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission*, June 1995, Chapter 3, page 28.) However, the Washington State Parenting Plan Act Study did not compare modifications before and after Washington enacted parenting plans in 1987. No data shows whether use of

Other findings in the 1999 study of parenting plans in Washington State suggest significant problems where one parent has inflicted violence on the other:

“Domestic violence survivors find the civil justice system especially difficult to access and utilize, and often have [parenting] plans they believe compromise their own and their children’s safety.”<sup>25</sup>

Professional providers such as judges, attorneys, mental health professionals, parenting evaluators, guardians ad litem, and activists believe that “[T]he Parenting Act fails to adequately protect survivors of domestic violence.”<sup>26</sup>

Anecdotal evidence from Washington also warrants caution concerning parenting plans. Accounts range from those who believe that parenting plans help parents work cooperatively and focus on children’s needs, to those who believe parenting plans have increased attorney’s fees needed to divorce and increased conflict between parents by giving them more issues to fight about than before<sup>27</sup>.

Further study of parenting plans should be conducted before implementing them in Minnesota.

<sup>21</sup> Diane N. Lye, *Progress Report to Washington State Gender and Justice Commission*, November 13, 1998, page 3 (describes study commissioned by State Representative Kastama).

<sup>22</sup> Trial Court Caseload Statistics for fiscal year 1998 and 1999, available from State Court Administration, 120 Constitution Avenue, Suite 120, St. Paul, MN 55155 (494 of 7,101 dissolution cases disposed of in 1998 were disposed of by trial; 497 of 7,101 dissolution cases disposed of in 1999 were tried).

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<sup>25</sup> Diane L. Lye, *Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission*, June 1995, Introduction, page 1.

<sup>26</sup> *Id.*, page 2.

<sup>27</sup> Honorable Mike Brigner, memorandum to Ohio Association of Domestic Relations Judges dated September 17, 1997 (unpublished memorandum on file with Minnesota State Court Administration,

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<sup>26</sup> *Id.*, page 2.

<sup>27</sup> Honorable Mike Brigner, memorandum to Ohio Association of Domestic Relations Judges dated September 17, 1997 (unpublished memorandum on file with Minnesota State Court Administration, reporting interviews with Washington State attorneys, researchers, a social worker, a guardian ad litem, judges, and a law professor).

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