Presuming equal time sharing in custody arrangements

By Fred Silberberg

The body of law in California has many legal presumptions. Property acquired during marriage is legally presumed to be community (joint) property. A marriage of over 10 years in duration is, oddly, presumed to be a long-term marriage justifying a long-term spousal support order. These are just two such examples. Yet, there is one presumption that seems to be missing from the body of legal presumptions in family law: the presumption that equal custody timesharing is appropriate for children involved in divorce and paternity custody disputes.

Each year cases are tied up in court by one parent trying to maintain control over the custody of the children. In these situations, the parent who is seeking equal custody can be tied up in very expensive litigation to establish a right that had that parent not been divorced, they would automatically have.

Not only would this help address existing problems of court congestion, but it would also spare thousands of children each year from being dragged into the middle of a battle between their parents.

Let's face it: when people are living together (whether married or not, and in the present day it seems to be more often not), no one is mandating a specific apportionment of custody time between them and their children. In the day-to-day life of a family, whether one or both parents are working, it is likely that at some point in the course of a day both parents have interaction with their children. Moreover, when the parties had their children, no one examined them to make a determination at that time as to whether one of the parents was more fit than the other to spend time with the children or care for them.

The fact is, we don't license parents in the country. We let things take their course naturally and people have children whether they are good parents or not. It is not until the parents can't get along any further that someone is now called upon to determine whether it is in the children's "best interest" to spend time in the primary care of one parent or another, or whether that arrangement should be one involving an equal timeshare.

If we made it a matter of statutory policy that all in all cases children should spend equal time with both parents, several benefits would result from that. It would foster the existing public policy of "frequent and continuing contact" with both parents. It would send society a message concerning the importance of both parents being involved with their children. It would also result in a significant reduction in the amount of custody litigation that takes place in our courts. Not only would this help address existing problems of court congestion, but it would also spare thousands of children each year from being dragged into the middle of a battle between their parents. It would also discourage certain types of litigants from attempting to keep control over the children in the hope that it will result in greater financial remuneration in the form of child support.

Our state supposedly has a policy of no-fault divorce. It seems natural then that this policy would assume that both parents are equally capable of caring for the children. In doing so, we would be removing from the family unit the possibility of unnecessary governmental intrusion into private affairs.

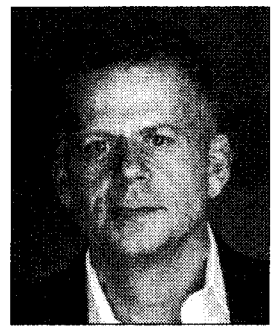
In the not too-distant past, being divorced had a stigma associated with it, in the same way that having children out-of-wedlock had a stigma associated with it. In those days, we had a legal presumption known as the "tender years doctrine" which contended that young children should be with their mother. That was abolished many years ago. It would seem to be logical that at this point the legal presumption to be implemented should be one of equal timesharing in terms of custody schedules.

Undoubtedly, there will be those that argue that invoking such a presumption is not in keeping with the interests of the children. They will argue that courts should consider the new living arrangements of the parents, as well as the effect upon the children of the parent's separation. But these arguments are not consistent with how life sometimes unfolds. Life often requires transitions, and sometimes those transitions are abrupt. People, including children, often have to deal with changes in life that occur without advance warning. Changes in health, financial situations, even natural disasters occur which can precipitate changes in living arrangements.

While no one wants to endure these situations, we do not have government run in and mandate whether the living arrangements are in the best interests of children unless there is abuse or neglect.

Consider the hypothetical situation where one parent passes away. The surviving parent may not have been as involved with the children prior to that occurrence as he or she was before that occurrence. However, we don't send anyone into the home of the surviving parent to determine whether it is in the children's best interest to remain in the custody of that parent. We don't second-guess that parent's caretaking arrangements that may then have to be made to allow that parent to continue working to support those children. Similarly, we shouldn't be requiring the divorced or separated parent to invoke the legal system to gain those rights to the children that he or she would have had in the event the other parent had predeceased him or her.

If the law presumed that any parent who wanted an equal timesharing arrangement was entitled to it, it would place the burden on the other parent to make a convincing case that there was a real reason to deviate from this custody arrangement. That would significantly change the dynamics of custody litigation and it would discourage certain individuals from engaging in litigation that serves no purpose other than to cause unnecessary expense, depletion of family resources, and significant unnecessary stress on the children and the other parent. This presumption would be consistent with the no-fault divorce concept, and it would reduce the amount of custody litigation taking place in this state. It is an idea whose time is long overdue.



Fred Silberberg *is a certified family law specialist and a partner at Silberberg & Ross in Santa Monica.*