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THE CONVERSATION

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Child custody - parental rights vs the child's best interest

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How can parents who no longer live together continue to raise their children? via www.shutterstock.com

The November 2014 elections included a North Dakota voter initiative emblematic of the vigorous debate taking place nationwide about child custody.

The "Parental Rights Initiative" required courts to award "equal parenting time" to both parents after divorce or separation. The measure was defeated by a sizeable margin (62% to 38%) but it represents only the latest round in a combustible campaign to change how child custody cases are decided.

A history of child custody (in a nutshell)

Colonial Americans followed the English common law rule that upon divorce the father retained custody of his children. Fathers had the right to the physical custody, labor and earnings of their children in exchange for supporting, educating, and training them to earn their own livelihoods or, in the case of girls, marry a man who would support them.

Colonial mothers, though deemed worthy of honor and deference, were not endowed with legally enforceable parental rights.

This paternal preference continued well into the 19th century. In fact, the 1848 Women's Rights Convention in Seneca Falls – the first women's rights convention – listed the fathers' automatic custody rule among its principal complaints. But women began gaining the upper hand as our legal system dealt with two cultural transformations: the industrial revolution's remaking men into marketplace wage earners and the emergence of a "separate sphere" for women as domestic caregivers.

By the early 20th century, motherhood had attained near-mythical status. Under the "tender years" presumption, custody of young children was almost exclusively awarded to mothers upon divorce.

It took a social revolution to unseat the tender years doctrine and replace it with gender-neutral custody standards.

Mounting divorce rates in the 1960s and ensuing decades provoked a lively debate about parental roles and custody issues. The movement for gender equality, along with the rise of fathers' rights groups, called attention to the importance of both parents in the care of children at the same time as loosening the link between gender and parental roles.

The end of formal rules dictating a result favoring one parent over the other led to the adoption of a more inclusive but less definitive standard of deciding custody cases based on the "best interests of the child." This standard opened up the possibility of excessive judicial discretion as well as a threat of inconsistency in the results, resulting in hotly contested custody battles.

From the rule of one to the sharing of custody

No matter how child custody was determined, one rule continued to be ironclad: custody was indivisible. After a marital breakup, only one parent could properly raise the children, with the other parent entitled merely to visiting rights. Until the late 20th century, courts regularly refused to allow divorcing parents to share custody. The dominant view was that after divorce a child needed the full time stability of a home run by one parent.

The greater social and legal acceptance of shared custody in recent decades came about when parents began shouldering more equal parenting responsibilities. State legislatures, courts, and parents themselves began to value the opportunity for a child to continue a strong and meaningful relationship with both parents. The new approach sought to avoid treating one parent as merely a visitor, and to reduce the trauma of marital dissolution for children. Sharing custody also became a way to circumvent the brutal dynamics of adversarial child custody litigation.

An important 2014 study shows that child custody norms are significantly changing in the 21st century, with the proportion of parents sharing custody rising dramatically. In fact, we reached a major milestone in the past decade: for the first time since the mid-19th century, custodial arrangements that did *not* provide sole custody to mothers constituted a majority.

The vocabulary of child custody is also adapting to shared parenting.

"Decision making" and "parenting time" are replacing "legal custody" and "physical custody." The modern terms reflect a cultural pivot toward mutual child rearing responsibilities rather

than declaring a winner and a loser. On balance, then, it appears that our society has adapted the best-interest-of-the-child standard to provide some variant of shared custody. In custody cases today, both parents increasingly enjoy significant, though not necessarily equal, amounts of parenting time.

The problem with presumptions, and a better alternative

Legally enforceable presumptions, such as the one proposed and rejected in North Dakota or **the one** that the Governor of Minnesota vetoed in 2012, are problematic. An equal parenting presumption shifts the starting point for a custody determination from the child's best interests to how the parents will divide the 168 hours in a week so that each parent handles half the child rearing.

A 50/50 presumption alters the critical issue from what's best for the child to how we can treat the parents equally. That's not the same question at all. A legal presumption of equal parenting time effectively converts the current focus on the child's welfare to a best-interests-of-the-parents standard.

There is another alternative, better than having a judge decide the child's best interests and far better than a legal presumption.

In the past few years, separating and divorcing parents have begun taking matters into their own hands by crafting "parenting plans" for their children. These blueprints for post-divorce child rearing allocate parenting time and decision-making authority for each child, depending on the child's particular needs and circumstances. A good parenting plan also sets out dispute resolution options (such as mediation or a parenting coordinator) for the inevitable time when the parents will face unanticipated child rearing problems.

Many states - Arizona is a leader on the issue - are redefining the issue of parenting after divorce from a demand for custody by one parent to a requirement that both parents work together to create a "parenting plan." These plans further the public policy goal that children have frequent and continuing contact with both parents, and that both share in the responsibilities of raising their children.

Parenting plans may be crafted from scratch, or they may be customized from a menu of templates and sample plans available from court or private organization websites. Parents often negotiate these plans by themselves, with the help of a mediator, or through counsel. The plans should be flexible but fairly detailed, describing each parent's area of responsibility in providing for the child's residential and physical care as well as emotional well being, both at the time the plan goes into effect and as the child ages and matures.

Unlike a court custody order, a parenting plan can include mechanisms to adjust to children's developmental changes as they age and to other significant family transformations.

Parenting plans are homemade custody resolutions, and courts remain a last resort for deciding contested custody cases. But the parenting plan movement is providing approaches towards sharing custody more in keeping with child development research and less likely to lead to further damaging litigation.

The failed North Dakota “equal parenting time” initiative sought a rigid resolution of the most sensitive issue after divorce: how can parents who no longer live together continue to raise their children.

Our society is gradually adopting shared parenting by choice, not by mathematical formula. We should encourage the movement toward parenting plans rather than legal briefs, mediation rather than litigation, and sharing the parenting rather than dividing the child.