

Parenting Time Schedules and Overnights with Infants

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Over half the children who experience divorce are under the age of six and of those, three quarters of them are younger than three years of age.¹ By virtue of their complex developmental needs, very young children present unique challenges and considerations for judges, practitioners, and parents alike when addressing their post-separation care. Infancy is an important time of rapid cognitive, language, social, and emotional growth and foundational development.² Stable and sensitive caregiving during the first three years of life is critical to a child's immediate and long-term well-being. Id. A review of the current research, studies, and expert opinions reveals polarizing standpoints on the optimal post-separation care of very young children. Enduring diametrically opposed opinions have only served to kindle the debate rather than provide much-needed authority and guidance on the subject. The research and expert opinions have revealed the need for more specific, more detailed studies regarding overnight parenting time for young children as there is no consensus as to whether overnights for infants and young children are beneficial or harmful. Custody experts, attorneys, and judges should continue to analyze the each case on its own facts when determining an appropriate custody and parenting plan.

The contemplation of shared parenting arrangements for infants and very young children invariably arises in custody proceedings and, with it, age-related concerns. Where feasible and in the child's best interest, shared parenting time comports well with the established policy of this State – to “assure minor children of frequent and continuing contact with both parents” and

¹ Robb, Aaron, “Zero to Three: Parenting Issues and Parenting Plans for Young Children”.

² Kline Pruett, M. & DiFonzo, J.H., “Closing the Gap: Research, Policy, Practice and Shared Parenting AFCC Think Tank Final Report”, Family Court Review, Vol. 52, April 2014.

“encourage both parents to share the rights and responsibilities of child rearing in order to effect this policy.” N.J.S.A. 9:2-4. Consequently, “the rights of both parents [are] equal” in any custody proceeding. Id. The lodestar in determining custody nevertheless remains the child’s best interests. Kinsella v. Kinsella, 150 N.J. 276 (1997). “Each matter must be decided on its own merits with the best interests and welfare of the children as the paramount consideration. To this principle, even parental rights must yield.” In re Flasch, 51 N.J. Super. 1 (App. Div.), *certif. denied*, 28 N.J. 35 (1958) (citations omitted). Our Legislature has identified the following factors that the court must consider in determining custody and parenting time:

- (1) the parents’ ability to agree, communicate and cooperate in matters relating to the child;
- (2) the parents’ willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse;
- (3) the interaction and relationship of the child with its parents and siblings;
- (4) the history of domestic violence, if any;
- (5) the safety of the child and the safety of either parent from physical abuse by the other parent;
- (6) the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;
- (7) the needs of the child;
- (8) the stability of the home environment offered;
- (9) the quality and continuity of the child’s education;
- (10) the fitness of the parents;
- (11) the geographical proximity of the parents’ homes;
- (12) the extent and quality of the time spent with the child prior to or subsequent to the separation;
- (13) the parents’ employment responsibilities; and
- (14) the age and number of the children. N.J.S.A. 9:2-4(c).

These factors facilitate the court’s ability in determining appropriate custody arrangements based on each family’s specific circumstances, including already existing relationships and the quality of parenting time, that will mutually serve the best interests of the child as well as protect, encourage, and enrich the child’s relationship with both parents. The statute provides that a child’s age is a factor in the analysis. However, in New Jersey there is no specific statutory language or case law that prevents overnights for infants or requires overnights for infants. Instead, the analysis requires a complete review of the facts of each case

and there should not be any presumption as to a bar or a requirement for overnight parenting time for infants.

Opposing Opinions on Overnights

The two schools of thought on the issue of overnights for children ages zero to three years old are detailed further below. Essentially, an oversimplification of one point of view (referred to below as the “Attachment Theory” group) is that the studies demonstrate that overnight parenting time may be harmful for children under the age of three (3).³ The other point of view (referred to below as the “Joint Parental Involvement” group) is that the studies relied upon for the notion that overnight parenting time may be harmful for children under the age of three (3) are flawed, and there is no proof of any harm for young children to have overnight parenting time. For a variety of reasons discussed further below, the “Joint Parental Involvement” group believes schedules allowing for overnights with both parents are essential.⁴ Although identifying principal points of agreement between these two schools from the current literature has proven to be an ongoing challenge for policymakers particularly in regard to shared parenting arrangements for very young children, there is seemingly uniform accord on the following four principles related to their post-separation care: (1) children benefit from positive and secure relationships with both parents; (2) each family’s situation is fact-specific and best addressed accordingly; (3) recommendations of shared parenting schedules for infants rest on the assumption of extant relationships with both parents; and (4) the *quality* of parenting

³ McIntosh, J., Smyth, B., Kelaher, M., Wells, Y., and Long, C. (2010) “Post-separation parenting arrangements: Patterns and developmental outcomes for infants and children”. Three reports prepared for the Australian Government Attorney-General’s Department, Canberra

⁴ Warshak, Richard A. “Social Science and Parenting Plans for Young Children: A Consensus Report”, Psychology, Public Policy, and Law, 2014

provided over time is the most significant factor in forming healthy and enduring parent-child relationships.⁵

Ideally, shared parenting time schedules for infants would always accomplish these goals. A parenting plan should be more than a simple listing of dates and times, or a schedule of who will exchange the child and where. The parenting plan should serve as a road map for the parties' post separation relationship, and it should be crafted to maximize the chances of fostering positive relationships with both parents. However, while the distinct developmental needs of infants and young children are recognized by most experts and researchers when addressing their post-separation care, proffered approaches for meeting those needs are inconsistent and, often times, incongruent. The lack of consensus has resulted in the uneven application of findings and endorsements, causing one expert to remark that “[i]n response to this void, policymakers are making decisions based on pressures brought to bear by various contingent groups, concepts of ‘fairness’ and anecdotal evidence from highly litigated cases, rather than on accumulated social science knowledge.” *Id.* Sound research should be available as a guide to help judges in decision-making and legislatures in drafting informed statutes rather than provide a basis for undifferentiating formulae for all custody and parenting time decisions involving very young children. Reliance solely on either attachment theory or joint parental involvement research, as if only one or the other can be correct, has fostered polarization in legal and academic thinking and practice.⁶ While more research is needed, viewing the areas of overlap and integration of these points of view should be the focus. Fortunately, this process of focusing on the integration of these opposing schools has already started. In April of 2014, the

⁵ See Robb footnote 1, Kline footnote 2, and Pruett, M., McIntosh, J.E., Kelly, J.B. (2014), “Parental separation and overnight care of young children: Consensus through theoretical and empirical integration: Part I”, Family Court Review, vol. 52, number 2, April 2014

⁶ See Pruett, footnote 5

Association of Family and Conciliation Courts⁷ (AFCC), devoted the entire issue of their publication, the Family Court Review⁸, to this ongoing debate. Several of the articles focus on “how attachment and parental involvement contribute complementary perspectives that, taken together rather than apart, provide a sound basis from which to understand the needs of very young children in separated families.”⁹

Definition of “Shared Parenting”

Prior to reviewing the separate theories, it is important to understand the terminology of “shared parenting”. This is subject to various definitions. The majority of research on shared care arrangements identifies shared parenting as any arrangement in which the parenting time ratio constitutes anywhere from a 35/65 split (five [5] overnights out of every fourteen [14] days) to a 50/50 percent (50%) distribution of parenting time.¹⁰ In New Jersey, shared parenting for child support purposes refers to at least twenty-eight percent (28%) of the parenting time, an average of at least two (2) overnights each week.¹¹ This nomenclature of “shared parenting” is sometimes misused when referring to the “shared” parenting work sheet under the child support guideline calculation. However, a true “shared parenting” schedule is generally considered one in which both parents have the typical daily decision making and caretaking responsibilities for a child, such as making their meals, getting them ready for school, taking them to their activities, putting them to bed, etc. regardless of the specific amount of parenting time. Pascale v. Pascale, 140 N.J. 583 (1995). In New Jersey, shared parenting is

⁷ Association of Family and Conciliation Courts defines itself as “[a]n interdisciplinary and international association of professionals dedicated to improving the lives of children and families through the resolution of family conflict.”

⁸ Family Court Review, Volume 52, Issue 2, April 2014.

⁹ See Pruett, footnote 5 and McIntosh, J., Pruett, M.K., and Kelly, J., Parental Separation and Overnight Care of Young Children, Part II: Putting Theory into Practice, Family Court Review, Volume 52, Issue 2, April 2014.

¹⁰ Oregon State Family Law Advisory Committee, “Custody and Parenting Time; Summary of current information and research” March 2011

¹¹ 2015 New Jersey Court Rules, Appendix IX - A

as much about the type of parenting time or quality of parenting time as it is about the amount of parenting time.

Attachment Theory

Attachment theory relies on the importance of the parent/child relationship formed during infancy. Attachment specifically refers to a specific facet of the infant/parent relationship, and is a biologically based behavioral system in all infants, the goal of which is to ensure protection from disorganizing anxiety through proximity to responsive care givers.¹² One of the researchers in this area, Jennifer E. McIntosh, Ph.D, specifically notes that the growth of the human brain during the early years of a child's life is termed experience dependent, "the complexity of the brain's development depends on the nature and quality of care the infant receives."¹³ Much of the neuropsychological and biological research in this area is related to the biological differences between fathers and mothers. The research points to "evidence that a mother's sensitive response to stress enables the child to experience that the world is predictable, safe, and that the child can learn to manage his/her distress through the relationship." "Similarly, a father's sensitive challenging facilitates the child's learning to monitor and control his/her excitement, promoting the goal of self-regulation."¹⁴

Initially, there was a concept of attachment primacy, which referred to an infant's preference in their first two (2) years of life for seeking comfort from one (1) figure over others, with that figure usually being the mother. *Id.* An infant separated from this figure experienced a great deal of stress. As a result of the notion of a primary attachment figure, there were

¹² Schore, A. and McIntosh, J., "Family Law and The Neuroscience of Attachment Part One", 49 Family Court Review 501 (July 2011) and also Siegel, D. and McIntosh, J. "Family Law and the Neuroscience of Attachment Part Two", 49 Family Court Review 513 (July 2011).

¹³ McIntosh, J. E., "Special Considerations for Infants and Toddlers In Separation/Divorce: Developmental Issues in the Family Law Context", Encyclopedia on Early Childhood Development, 2011.

¹⁴ Pruett, M. , McIntosh, J.E., Kelly, J. B., see footnote 5.

doctrines known as “tender years” and overnights with fathers during infancy were widely discouraged. In recent years this school of thought has moved to the notion that infants bond with both parents and attach to each, although not necessarily in the same manner or at the same time. In addition, it is noted that in “contemporary family life” and particularly when fathers are involved in direct child care, mothers and fathers respond far more similarly than differently in the ways they soothe, play and teach, and mother and father attachments reinforce each other’s influence on the child’s development.¹⁵

In response to a shared parenting presumption under Australian law, the Australian government commissioned a study on shared parenting plans for young children. This study was led by Jennifer E. McIntosh, Ph.D. and is one of the more recent studies which seem to be at the heart of this debate on overnights for infants and young children.¹⁶ A portion of these studies focused on infants and toddlers in separated families in the general population. The core group of infants was divided into three (3) subcategories based on the number of overnights with the alternate parent:

- a) “Rare (if any) overnights” which equates to overnight stays less than once per year but with some day contact;
- b) “Primary care” which equates to an overnight stay at least once per month but less than once per week; and
- c) One or more nights per week with the parent living elsewhere.¹⁷

¹⁵ Pruett, M., see footnote 11 citing Grossman n , K., Grossmann, K. E., Kindler, H., and Zimmerman, P. 2008, “A Wider View of Attachment and Exploration: The Influence of Mothers and Fathers On The Development of Psychological Security From Infancy To Adulthood”; Parke, R.D. and Asher, S. R. “Social and Personality Development”, Annual Review of Psychology, 34, 465-509 (1983).

¹⁶ McIntosh, J., Smyth, B., Kelaher, M., Wells, Y., and Long, C., see footnote 3.

¹⁷ McIntosh, see footnote 3.

A summary of the study noted overnight care with the parent living elsewhere at the rate of once or more per week demonstrated:

1. Higher irritability than infants in primary residence arrangements;
2. More vigilant monitoring of, and maintenance of proximity with, the primary parent than was the case by infants with rare if any overnight care;
3. Higher rates of wheezing than infants in primary care;

The study also analyzed parenting arrangements for young children age two (2) to three (3) years old. The core groups were broken into three (3) subcategories:

- a) “Rare if any overnights” which equates to overnights of less than once per year but with some day time contact;
- b) “Primary care” which equates to an overnight stay at least once per month but less than five (5) nights every two (2) weeks; and
- c) “Shared care” which is based on the definition of five (5) or more overnights every two (2) weeks (thirty-five plus percent [35%] overnights per year¹⁸)

The study concluded that with shared care arrangements there was a:

1. Lower level of persistence (i.e. the ability to play continuously, stay with routine tasks, examine objects thoroughly, practice new skills, and return to an activity after a brief interruption) compared with children in the primary care or rare if any overnights groups;
2. More problematic behaviors on the Brief Infant – Toddler Social Emotional Assessment (BITSEA) Problems scaled and the primary care group. Id.

Specifically, the shared care group relative to the primary care group showed more distressed behaviors in the context of parent-child interaction and care giving (e.g., crying or

¹⁸ McIntosh, Smythe, Kelaher, Wells and Long, see footnote 3

hanging on to the parent when he/she tried to leave; worrying a lot or seeming very serious; not reacting when hurt; often becoming very upset; gagging or choking on food; refusing to eat; hitting, biting or kicking the parent).

It is important to note the study did address its own limitations, specifically in the context of a general population sample, the numbers of infants and young children in shared overnight arrangements in the analysis were inevitably small. Id. As a consequence some findings were treated speculatively by the researchers. This study also concluded that additional research on these issues was needed, and urged others to continue the analysis further.

Joint Parental Involvement

Several prominent psychologists and other experts have spoken out against the notion that research demonstrates that overnights are harmful for infants and young children. Psychologist Richard A. Warshak, Ph.D., considered by many to be an expert on divorce and child custody, recently published an article in an effort to provide “an overview of the research on parenting plans for child under the age of four whose parents live apart” and “provide empirically supported guidelines that reflect a consensus among leading researchers and practitioners about the implications of that research for policy and practice.”¹⁹ Over one hundred researchers and practitioners read, reviewed, offered comments and revisions, and ultimately endorsed the article’s conclusions and recommendations (although they did not necessarily agree with all of the literature review in the article). Id. Pursuant to Dr. Warshak’s findings, in normal circumstances, shared parenting should be the standard for parenting time plans for children of all ages, including very young children. Id.

Based upon research he reviews, Dr. Warshak provides “a summary on developing healthy parent-child relationships”:

¹⁹ Warshak, Richard A., see footnote 4.

1. Parent's consistent, predictable, frequent, affectionate and sensitive behavior toward their infants is key to forming meaningful, secure, and healthy parent-child relationships.
2. Having a secure attachment with at least one parent provides children with enduring benefits and protections that offset mental health risks of stress and adversity.
3. Having a relationship with two parents increases children's odds of developing at least one secure attachment.
4. The deterioration of father-child relationships after divorce is a pressing concern (citation omitted).
5. The majority of children from preschool through college are dissatisfied, some even distressed, with the amount of contact they have with their fathers after divorce and with the intervals between contacts (citations omitted).
6. Policies and parenting plans should encourage and maximize the chances that children will enjoy the benefits of being raised by two adequate and involved parents.
7. We have no basis for rank ordering parents as primary or secondary in their importance to child development.
8. Normal parent-child relationships emerge from less than full-time care and less than round-the-clock presence of parents.
9. Full-time maternal care is not necessary for children to develop normally. Children's healthy development can and usually does sustain many hours of separation between mother and child. This is especially true when fathers or grandparents care for children in place of their mothers.

10. These findings support the desirability of parenting plans that are most likely to result in both parents development and maintaining the motivation and commitment to remain involved with their children, and that give young children more time with their fathers than traditional schedules allow (generally daytime visits every other weekend with perhaps one brief midweek contact).

11. These findings do not necessarily translate into a preference for parenting plans that divide young children’s time exactly evenly between homes. Id.

Dr. Warshak did discuss the attachment theory research in detail. He specifically noted the limitations of the studies and the concerns “about the manner in which these results have been interpreted and promoted.” Id. Ultimately refuting the McIntosh study, he notes “[g]iven the numerous problems in the design, data analysis, and presentation of results, the wide gap between the actual data and the interpretation of the data, the selective focus on results that appear to support the authors’ theories, the de-emphasis of results that clearly support alternative viewpoints, and the failure to acknowledge or appreciate the extent to which the measures lack validity and reliability, we must agree with other scholars (citations omitted), that this study provides no reliable basis to support custody policy, recommendations, or decisions.” Id.

Shared Parenting for Infants and Young Children in New Jersey?

Dr. Warshak’s ultimate recommendation is consistent with a national growing trend and, in some states, a legal presumption in favor of shared parenting. In New Jersey, a bill was sponsored last year which proposed a presumption of joint physical custody with equal (50/50) parenting time, for all child custody determinations in New Jersey.²⁰ (See proposed bill attached as Appendix A). The bill not only provides a presumption of an equal parenting time

²⁰ NJ State Senate No. 113.

division (rather than simply shared parenting), it also requires a high burden of proof to overcome the presumption, a clear and convincing standard. Within the New Jersey State Bar Association, the Family Law Executive Committee Children's Rights Subcommittee recently submitted a recommendation for the Committee to oppose any presumption as to equal parenting, shared parenting, or any other type of schedule. (See Report attached as Appendix B). In Beck v. Beck, 86 N.J. 480 (1981), New Jersey's Supreme Court explicitly declined to establish a presumption in favor of joint custody in this State or any particular custody determination for that matter. The Beck Court expressed a well-founded "concern ... that a presumption of this sort might serve as a disincentive for the meticulous fact-finding required in custody cases." Id. at 488. The factors set forth above under N.J.S.A. 9:2-4(c), and the overriding principle of the children's best interest, provide the Court with the ability to make a well-reasoned decision on a case by case basis. A presumption for or against a certain type of parenting schedule does not take into consideration all of the factors and differences among families in divorce.

In cases which have two generally well-adjusted, involved, and active parents, healthy time sharing between parents should be considered. Nonetheless, shared parenting requires a willingness and ability to address the significant practical considerations inherent to parenting infants and very young children. Children under the age of six (6) require three (3) times as much parenting time as older children.²¹ The achievability of a shared parenting plan rests on realities such as work-life schedule and flexibility, financial resources, support networks, the

²¹ Neilsen, Linda, "Parenting Time & Shared Residential Custody: Ten Common Myths", The Nebraska Lawyer, January/February 2013.

proximity of the parents' homes, the number of children, a parent's willingness to accept that level of responsibility, and even breastfeeding.²²

In addition, the practicability of shared parenting also depends on the level of parental conflict, the "single biggest predictor of outcomes, positive or negative, for children of divorce."²³ In creating appropriate parenting time schedules, courts should ascertain the degree of hostility between the parents and establish plans that "minimize opportunities for parental interaction resulting in conflict...." *Id.* By the same token, a high level of parental conflict should not be a complete bar to shared parenting arrangements, as conflict generally declines post-divorce and it is important that parents are held accountable for same and incentivized to improve their communication skills for the sake of their child. Simple acceptance of the conflict and creating parenting time schedules accordingly may allow for the hostility to continue and potentially worsen without impressing upon the parents their shared responsibility to ameliorate the antagonism. By denying shared parenting because of "high conflict," it sends the message that generating or sustaining conflict can be an effective strategy to override shared custody, which discourages civil communication and cooperation. Shared parenting can also reduce the children's exposure to conflict by providing each parent with longer periods of time, reducing the number of transfers back and forth.²⁴ That being said, issues such as domestic violence, substance abuse, and a parent's overall psychological well-being cannot be overlooked in creating parenting time schedules. *Id.* Fortunately, the factors set forth in N.J.S.A. 9:2-4(c) already require thoughtful deliberation on these practical considerations rather than promote blind adherence to parties' "equal" rights as parents. The emphasis is, and should be, on the child's best interests and how best to protect it.

²² Kruk, Edward, "Co-Parenting Infants and Very Young Children, Co-Parenting After Divorce", March 29, 2013.

²³ Robb, see footnote 1.

²⁴ Robb, see footnote 1; Warshak, see footnote 4.

Shared parenting time disputes in cases involving infants and young children often focus on the issue of overnights. Not surprisingly, the current state of research does not support a conclusive supposition about the effect of some overnights, frequent overnights, or no overnights, on long-term parent-child relationships and child well-being.²⁵ Still, many studies have identified overnights as a protective factor associated with increased further commitment to child rearing and reduced incident of father drop-out.²⁶ Moreover, overnight parenting time provides the non-custodial parent with opportunities that “regular” parenting time does not, including bathing, bedtime and morning routines, and other activities that are important in establishing and maintaining healthy parent-child relationships for very young children. Attachment theorists believe that an infant or young child will suffer significant stress resulting in harm if the child is away from the parent with whom the child has primarily bonded with or “attached” in the early month of life.²⁷ In his article, Dr. Warshak contends that opposition to overnight parenting for very young children rests on “monotropy,” (sometimes called “attachment theory”) the now disfavored idea that infants form a primary attachment relationship with a single caregiver before all other important relationships and that this first relationship serves as a foundation and template for all subsequent attachment bonds.²⁸ Dr. Warshak and others strongly disagree with this notion.²⁹ However, the belief of a primary parent figure has had a profound effect in shaping policy and case law regarding custody determinations. For many years, New Jersey followed the “Tender Years” doctrine and overnights for infants with the parent of alternate residence were disfavored. In Nufrio v.

²⁵ Pruett & DiFonzo, see footnote 2.

²⁶ Warshak, see footnote 4.

²⁷ McIntosh, J., Smythe, B., Kelaher, M., Wells, Y., and Long, C., see footnote 3; Schore, A. and McIntosh, J., see footnote 9; Pruett, M., McIntosh, J. E., Kelly, J.B., see footnote 5.

²⁸ Robb, see footnote 1; Warshak, see footnote 4.

²⁹ Warshak, see footnote 4; Neilsen, L., see footnote 18; Neilsen, L., “Shared Physical Custody: Summary of 40 Studies on Outcomes for Children” (2014).

Nufrio, 341 N.J. Super. 548, 550-552 (App. Div. 2001), the Appellate Division adopted the concept of the “primary caretaker” in joint custodial relationships, stating:

In common parlance, a parent who does not have physical custody over [his or] her child is the “non-custodial parent” and the one with sole residential or physical custody is the “custodial parent.” Because those terms fail to describe custodial functions accurately, we adopt today the term “primary caretaker” to refer to the “custodial parent” and the term “secondary caretaker” to refer to the “non-custodial parent.” Although both roles create responsibility over children of divorce, the primary caretaker has the greater physical and emotional role. Id. at 597-98.

The Nufrio case, which is now thirteen years old, relies on the notion that a child is primarily emotionally attached to one parent.³⁰ However, the initial view among most attachment researchers and child development experts, of one primary attachment figure is highly contested.³¹ Many claim infants instead form strong attachments to both parents and generally do so at approximately the same time. They believe any original preference infants have for one parent disappears by 18 months. Id. Those opposed to “attachment theory” who favor “joint parental involvement” believe that limiting parenting time for one parent based on the mistaken assumption that attachment is a fixed state may unnecessarily prevent or impede children from developing strong bonds with both of their parents.³² Parenting time plans should encourage and maximize the chance that infants will be raised by two adequate and involved parents. Aaron Robb, Ph.D. suggests in place of primary and secondary terms, courts emphasize “reciprocal connectedness,” or the “mutual interrelatedness...characterized by two-way interaction between a child and an adult caregiver and by the caregiver’s sensitivity to the child’s developmental needs,” as this concept better reflects the fluidity of attachment and a

³⁰ Warshak (see footnote 4) notes “[t]he decade between 2001 and 2011 saw increasing acceptance of overnights among mental health professionals, courts, and parents of infants and toddlers.”

³¹ Nielsen, see footnote 7.

³² Warshak, see footnote 4.

child's changing needs and is "more useful than 'attachment' to the courts because it describes a child's requirements for healthy neurobiological, social, and emotional development and distinguishes them from simple dependency...."³³

Although those favoring "attachment theory" believe there may be significant concerns with overnights for young children, Dr. Warshak opines that research thus far indicates "[t]he theoretical and practical considerations favoring overnights for most young children are more compelling than concerns that overnights might jeopardize children's development."³⁴ The research more consistently recognizes that the quality of parenting time, not the amount or inclusion/exclusion of overnights, has the biggest impact on a child's well-being. Although more parenting time positively correlates with enhanced quality of parenting, most likely due to more opportunity to fine-tune parenting skills and strengthen the parent-child bond, the focus should not be on the label of shared parenting or the number of overnights. "Preoccupation needs to shift from number of overnights to more complicated assessment of parenting environment.... Schedule provides time and opportunity, but given that opportunity, what transpires between parent and child is most important."³⁵

As a result, equal parenting time should not be the primary consideration in determining custody arrangements for every family. The total amount of parenting time should be emphasized less than a schedule that allows both parents to be actively engaged and responsible for their child's care. The stability and consistency in caregiving and predictability of transitions between parents help foster quality parenting time especially with infants and young children.³⁶

³³ Robb, see footnote 1.

³⁴ Warshak, see footnote 4.

³⁵ Robb, see footnote 1.

³⁶ Kruk, Edward. Co-Parenting Infants and Very Young Children, Co-Parenting After Divorce, March 29, 2013.

The loss or attenuation of important relationships may cause depression or anxiety, particularly in the first two years, when children lack the cognitive and communication skills that enable them to cope with loss. The richer, deeper, and more secure the parent-child relationships, the better the child's adjustment to family transitions, whether or not the parents live together. When both parents have been actively involved as caregivers in infants' lives, continued frequent opportunities for routine interaction with both parents is crucial to children's well-being after divorce.³⁷

The quality of a child's connection is reliably associated with the quality of parental behavior.³⁸ Negative relationships and problematic child outcomes has been clearly demonstrated, further reinforcing that it is not just the child's attachment but reciprocal nature of interactions that should be assessed. Id. To that effect, courts should consider the answers to questions such as: With whom is the child connected and from whom is the child seeking attention? Is there evidence of multiple attachments? What is the frequency of various parenting interactions (i.e., touching, soothing, spontaneous anticipation of the child's needs and desires, etc.) by each parent? Does the parent seek out opportunities to interact with the child? Is child care "farmed out" to others even when the parent is available? Id. Recognizing the existing quality of a parent-child relationship will help courts better protect against losing that bond and, if applicable, identify a need for improvement. Parenting time schedules that take such aspects into consideration help provide much-needed opportunity and instruction for achieving better parent-child relationships and assist families in developing and preserving positive interactions.

Accordingly, the most effective decision-making regarding parenting time after separation is necessarily case-specific. Prescribing fixed formulas as to the number of overnights or type of arrangement may imprudently restrict a trial judge's vital discretionary power in fashioning parenting time schedules for infants that best safeguard their best interests

³⁷ Id.

³⁸ Robb, see footnote 1.

and, secondarily, those of the parents. “In considering all the circumstances upon which the child’s best interests hinge, a trial court judge has the opportunity to become fully immersed in the details of the case....” Palermo v. Palermo, 164 N.J. Super. 492 (App. Div. 1978). Courts should promote tailored parenting interactions with very young children that support the development and maintenance of strong, healthy attachments with each parent, including opportunities for direct care from each parent regardless of whether they are overnights. Furthermore, “[a]nticipated changes in the parenting plan should be made through a series of well-articulated ‘step-ups,’ implemented at a pace and level determined by the young child’s responses to each step and each parent’s ongoing ability to effectively enact the proposed plan individually and in concert.”³⁹ In other words, parenting time schedules should adapt to the child’s needs as he or she grows. If there are no overnights in an initial parenting schedule, there should be a transition to overnights, and an increase in overnights over time.

Parenting Plans For Infants/Young Children In Other States

Many states provide model or sample parenting time plans for parties going through a divorce. There are similarities among the states that provide detailed information and sample parenting plans. Many of the sample parenting plans for infants do not provide significant overnights for the alternate parent. By way of example, Utah’s model parenting time plan for parents/child access lists four (4) alternatives for children from birth to twelve (12) months.⁴⁰ (See Appendix C). Alternative one (1) provides the parent of alternate residence three (3) periods of three (3) to six (6) hours spaced throughout the week. The second plan provides two (2) six (6) hour periods spaced throughout the week. The third plan provides two (2) three (3) hour periods and one (1) eight (8) hour period spaced throughout the week. It is only the fourth

³⁹ Kline, Pruett & DiFonzo, see footnote 2.

⁴⁰Utah Model Parenting Plan

plan that includes overnights, noting two (2) periods of three (3) to six hours and one (1) overnight each week. The same model plans are listed for children age twelve (12) to twenty-four (24) months. For children age twenty-four (24) to thirty-six months (36), the model parenting times vary slightly with overnights in three (3) of the four (4) plans.

Massachusetts has very detailed model parenting plans which are noted not to be mandatory or presumptive, but designed to be educational, informational, and practical tools for parents.⁴¹ (See Appendix D). The Massachusetts plan for children from birth to twelve (12) months lists three (3) sample schedules:

1. There are three (3) time periods of two (2) to three (3) hours during the week;
2. Two (2) weekday contacts of two (2) to three (3) hours and one (1) weekend contact of four (4) to eight (8) hours; and
3. Two (2) weekday contacts of three (3) to four (4) hours and one (1) weekend contact, including an overnight if that parent has previously cared for the child overnight.

For children twelve (12) to twenty-four (24) months, sample plans include:

1. One (1) to three (3) time periods of four (4) to six (6) hours during the week;
2. Two (2) weekday contacts of four (4) to six (6) hours and one (1) longer weekend contact which might include an overnight; and
3. Two (2) weekday contacts of four (4) to six (6) hours and one (1) longer weekend contact, including an overnight if that parent has previously cared for the child overnight.

For children twenty-four (24) to thirty-six (36) months the sample plans include:

1. Three time periods of four (4) to six (6) hours per week;

⁴¹Massachusetts Model Parenting Plan

2. Two (2) weekday contacts of four (4) to six (6) hours and one (1) longer weekend contact which may include an overnight; and overnights if parent has previously cared for child overnight.

Arizona provides parties with a detailed booklet sixty-seven (67) pages long entitled “Planning For Parenting Time Arizona’s Guide For Parents Living Apart.”⁴² (See Appendix E). These detailed booklets list fourteen (14) model parenting time arrangements. For children birth to twenty-four (24) months they recommend the first six (6) plans. Of those plans, the first three (3) do not include overnights, but plan four (4) includes one (1) overnight each week, plan five (5) includes non-consecutive overnights each week and plan six (6) is an equal parenting time schedule where the child is not away from the other parent for more than two (2) consecutive days. With plan six (6) there is a big note of caution, as it is noted that the use of plan six (6) requires a “high degree of communication between the parents, a low level of conflict about how to parent, and work schedules and living arrangements that limit the stress on the child. Plan six (6) is designed only for those parents who can agree on this plan. Research clearly shows that children are at risk of being harmed if parents argue, act disrespectfully toward each other, and can’t talk to each other about their child.” The number of overnights in the respective plans appear to increase with the child’s age and the plans for older children all include overnights, at least two (2) every other week along with other parenting time.

Indiana provides parenting time guidelines on their State Judiciary Website.⁴³ For children birth through four (4) months, they recommend:

⁴²Arizona “Planning for Parenting Time, Arizona’s Guide for Parents Living Apart” (Ohio modeled their planning for parenting time guide directly from Arizona’s, it is virtually identical and thanks the Arizona Supreme Court and the Administrative Office of Courts for lending its materials during the drafting.

⁴³Indiana Parenting Time Guidelines

1. Three (3) non-consecutive days per week of two (2) hours in length;
2. Scheduled holidays of two (2) hours in length; and
3. Overnight if the non-custodial parent has exercised regular care responsibilities for the child, but not to exceed one (1) twenty-four (24) hour period per week.

For ages five (5) months through age nine (9) months, the guidelines list three separate parenting plans:

1. Three (3) non-consecutive days per week of three (3) hours per day with the child to be returned at least one (1) hour before evening bedtime;
2. All scheduled holidays of three (3) hours in length. Child is to be returned at least one (1) hour before evening bedtime; and
3. Overnight if the non-custodial parent has exercised regular care responsibilities for the child, but not to exceed one twenty-four (24) hour period per week.

For age ten (10) months through age twelve (12) months, the three (3) schedules listed include:

1. Three (3) non-consecutive days per week with one (1) day on a non-workday for eight (8) hours. The other days should be for three (3) hours each day. The child is to be returned at least one (1) hour before evening bedtime;
2. All scheduled holidays for eight (8) hours. The child is to be returned at least one (1) hour before evening bedtime; and

3. Overnight if the non-custodial parent has exercised regular care responsibilities for the child but not to exceed one (1) twenty-four (24) hour period per week.

For age thirteen (13) months through age eighteen (18) months the plans include:

1. Three (3) non-consecutive days per week with one (1) day on a non-workday for ten (10) hours. The other days shall be for three (3) hours each day. The child is to be returned at least one (1) hour before evening bedtime;
2. All scheduled holidays for eight (8) hours. The child is to be returned at least one (1) hour before evening bedtime; and
3. Overnight if the non-custodial parent has exercised regular care responsibilities for the child, but not to exceed one (1) twenty-four (24) hour period per week.

For ages nineteen months (19) months through thirty-six (36) months, they list four (4) plans including:

1. Alternate weekends on Saturdays for ten (10) hours and on Sundays for ten (10) hours. The child is to be returned at least one (1) hour before bedtime, unless overnight is appropriate;
2. One (1) day, preferably in the mid-week for three (3) hours, the child to be returned at least one (1) hour before evening bedtime, unless overnight during the week is appropriate;
3. All scheduled holidays for ten (10) hours. The child is to be returned one (1) hour before bedtime; and

4. If the non-custodial parent who did not initially have regular care responsibilities has exercised a scheduled parenting time under these guidelines for at least nine (9) continuous months, regular parenting time as indicated for a child three or older in the guidelines may take place.

For ages three (3) and older, the guidelines list regular parenting time on alternating weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m., one (1) evening per week for up to four (4) hours as well as holidays.

The common thread among these State parenting plans is that it is recommended that overnight parenting time for infants or younger children be limited unless a parent has already been exercising overnight care for a child. The plans also recommend increasing parenting time as a child matures until there are overnights on a weekly basis. These sample plans appear to coincide with the common tenants in the research relating to both attachment theory and parental involvement.

The New Jersey Judiciary does provide a document on its website entitled “Parenting Time: A Child’s Right” which includes general language regarding parenting plans, but does not provide any model or sample parenting schedules.⁴⁴ (See Appendix F). With regard to infants, the document notes “infants need regularity. The residential parent usually establishes the infant’s basic daily schedule of waking and sleeping cycles. Both parents need to be able to attend to the child’s basic needs: Feeding, diapering, bathing, and bedtime rituals. The residential parent should keep the non-residential parent updated as to all the foods that child is currently eating; a written list of such foods, including brand names, can be helpful. The non-residential parent needs to have access to the child’s medical information and should know the name and address of the child’s pediatrician. This will both insure the involvement of

⁴⁴ New Jersey “Parenting Time: A Child’s Right”

the non-residential parent and contribute to the child’s health and safety.” New Jersey does not provide the level of detail many other states provide in regard to sample parenting schedules.

Conclusion

Supporting co-parenting as a general rule does not mean adopting blanket presumptions against or in favor of shared parenting and/or a fixed number of overnights. In deciding custody and parenting time, the court’s goal is to arrive at a reasonable parenting-time schedule consistent with the best interests of the child and the rights of the parents. Wilke v. Culp, 196 N.J. Super. 487, 496 (App. Div. 1984). Prioritizing the quality of the interaction between parent and child helps to serve the best interests of the child and, as much as possible under the given circumstances, protect and encourage the child’s relationship with both parents. Statutory presumptions setting precise allocations of shared parenting time are unsupportable since no prescription will fit all, or even the majority of, families’ particular circumstances.⁴⁵ The merits of such presumptions remain unclear, especially for families with very young children, and both the courts and attorneys should be wary of advocacy based research which conclude otherwise.⁴⁶ It is clear that more long term research is necessary regarding overnight parenting/parenting plans for infants and toddlers.

Until there is more definitive research regarding parenting time schedules for infants and toddlers, to assist in developing custody plans for young children, the courts and attorneys should continue to encourage parents to try to resolve their own parenting schedules with any assistance that may be appropriate. Parents should utilize all resources available in generating parenting plans, including: mediation, collaborative approaches, use of mental health

⁴⁵ Kline, Pruett & DiFonzo, see footnote 2.

⁴⁶ Kline, Pruett & DiFonzo, see footnote 2; Warshak, see footnote 4, much of Dr. Warshak’s article is an analysis of and refutation of advocacy based research regarding overnights for infants and toddlers.

professionals through alternative dispute resolution, co-parenting counseling/education, and other non-adversarial methods.⁴⁷ All experts agree it is important for a child to bond with both parents. All experts agree that whether a parent has taken care of a child on a regular basis, including overnights is a relevant factor as to whether overnights for an infant are appropriate. All experts appear to agree that if a parent does not have overnights of an infant or young child initially, parenting time should be gradually increased so that they do have overnights. It is important for parents to have frequent contact with a young child, whether it be overnights or non-overnights. Children want and need to have a strong relationship with both parents, and a well-crafted parenting schedule can ensure they have and maintain that relationship.

Attorneys and the courts should continue to focus on the specific facts of each case in analyzing what is the best parenting schedule for the children. The focus needs to remain on the children, and what is in their best interests, rather than on the parents. Research continues to demonstrate that the children who have two involved parents, with little conflict between the parents, are best able to handle the difficulties of divorce. This should continue to be a priority for judges, attorneys, and the parties, regardless of the parenting schedule in place.

⁴⁷ Warshak, see footnote 4; Robb, see footnote 1.