

JOINT CUSTODY

LB 654 and the Current State of Joint Custody in Nebraska

by John A. Kinney



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Legislative Bill 654 was introduced on January 19, 2005 with the stated purpose of codifying the distinction between physical and legal custody and creating a "presumption" in favor of joint legal custody in domestic relations cases.¹ The bill's language creating the presumption states, "[F]irst consideration shall be given to placing the minor child in joint legal custody."² The Judiciary Committee's "Committee Statement" describes the purpose of this change as follows:

Current statute does not define joint legal or joint physical custody, nor does it separate joint custody into those two specific areas. Current case law provides that joint custody is not favored by the courts of this state and will be reserved for only the rarest of cases. *Wilson v. Wilson*, 224 Neb. 589, 399 N.W. 2d 802 (1987).³

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Neither the "Committee Statement" nor the "Introducer's Statement of Intent" describes why joint custody should be favored by the courts of this state. Further, there is no discussion of why "joint legal custody" and not "joint physical custody" should be given "first consideration."

The author posits the following with respect to LB 654 and joint custody generally: (1) frequent and continuing contact with both parents following divorce or separation is the public policy of the State of Nebraska; (2) creating a presumption in favor of joint legal custody does not advance the public policy stated in clause (1), above; and (3) changes to the Nebraska Child Support Guidelines (hereinafter the "Guidelines") might spur the development of more parenting plans with elements of joint physical custody.

The Parenting Act

The Judiciary Committee's reference to *Wilson v. Wilson* is likely to bring a wry smile to many family law practitioners. The rigid and formulaic parenting schedule that the case represents has been inserted into custody orders for nearly 20 years. It is the author's experience that most trial courts are willing to grant more parenting time (*it should be noted that the author will not use the word "visitation"*) to the traditionally non-custodial parent than that set forth in *Wilson*. This enlightenment is presumably based upon the empirical data that suggests that children are healthier when both parents are active and involved in parenting following divorce.⁴ The Nebraska Parenting Act (*the "Parenting Act"*), passed in 1993, while not a frontal assault on *Wilson*, certainly initiated an erosion process. The Nebraska Court of Appeals recognized



this development recently in *Kay v. Ludwig*. After quoting at length from the preamble to the Parenting Act,⁵ the court found as follows:

The preamble does not read as though the Legislature disfavors joint custody, if such will be in the child's best interests. By enacting the Parenting Act, the Legislature was attempting to adjust the then-current law, and the act clearly evidences an attempt to foster participation of both parents of a separated family in raising their children. The trial court has the authority to make a determination of joint custody if it follows the provisions of § 42-364(5). In the instant case, the trial court conducted the required hearing and made the required finding.

In fact, since the Parenting Act was passed in 1993, Neb. Rev. Stat. § 42-364 has contained a reference to the public policy of "frequent and continuing contact" with both parents, to wit: "Custody and time spent with each parent shall be determined on the basis of the best interests of the minor child with the objective of maintaining the **ongoing substantial involvement of both parents in the minor child's life . . .**" (*emphasis added*). This is the statute that LB 654 seeks to change, although the proposed bill would retain this language from the old law. In a sense, the reference to *Wilson* by the bill's sponsors fails to recognize the movement away from *Wilson* wrought, in part, by the very statute upon which the bill would operate. This is not to say that joint custody has become widespread since the passage of the Parenting Act. It has not.

The apparent goals of LB 654 are laudable, and the bill contains some logical and necessary changes to current law. For example, the bill would require decrees ordering joint legal custody to contain each parent's separate or shared role and responsibility to make decisions regarding a minor child. This would require judges and attorneys to be specific about the role of each parent in any order for joint legal custody, in effect providing a roadmap—limited, of course—for post-divorce parenting decisions. Too many decrees are issued with the label of "joint legal custody," with no real effort to clarify the meaning of the phrase. That being said, if LB 654 is designed to bring into fruition the "frequent and continuing contact" rubric first promulgated in the Parenting Act, it misses the mark.

Contemporary Research and Parenting Plans

The increasing divorce rate in the middle half of the 20th century gave rise to a significant growth in court-generated edicts concerning the living arrangements for children following divorce. These decisions were made within the framework of societal and cultural views that painted mothers as "caretakers" and fathers as "visitors." Beginning in the 1970s,

researchers began to study the impact of fathers on child development and the impact of divorce on children.⁶ More recent research has investigated the logic of the traditional arrangement of "every other weekend" with the non-custodial parent.⁷ In summary, the research seems to show that children in divorced families are more than twice as likely to have serious psychological and social problems, as measured by multiple objective tests.⁸ The every-other-weekend mandate exemplified by *Wilson* has been exposed as failing to consider a child's age, gender, developmental needs and achievements, the history and quality of the child's relationship with each parent, quality of parenting, and family situations requiring special parenting.⁹ One author has summarized the dilemma as follows:

[The] protracted separation from a loved parent caused great anguish and confusion for many children, particularly for the youngest children, with poor memory and sense of time, limited or no language skills, and no cognitive capacity to understand why this abrupt decrease in their contact with the object of their affection occurred. While older children had the capacity to understand the visiting schedule, intense dissatisfaction, upset, longing and feelings of deprivation, and in some cases, depression and anxiety about their changed circumstances was common. Early clinical research also documented many fathers' intense dissatisfaction, pain, and anger with the sudden and arbitrary limitations on their parental role.¹⁰

In addition to the above, daycare research provides evidence that young children can sleep apart from their primary attachment figures, and brief, regular separations do not harm infant-mother attachment. Children with interested and involved fathers, particularly young children, tend to do better when they have multiple contacts each week to deepen and strengthen their bond with the traditionally non-custodial parent. Separation anxiety is lessened, important attachment relationships are spared, and children are less at risk for depression and other problems.¹¹ School-age children with active and involved fathers perform better academically and adjust better to post-divorce life. In short, children with more than *Wilson* contact with the traditionally non-custodial parent are likely to be happier and healthier, as measured by multiple objective tests.¹²

It is interesting to note that the critical element for children's well-being seems to be "contact" or "time" with the traditionally non-custodial parent. There is no magic schedule with the requisite "overnights" that serves as a tonic for the pain of divorce. As is often stated, "Children spell 'love' . . . T-I-M-E."¹³ However, in cases with a medium to high level of conflict, transitions between households that involve neutral locations are preferred. Parenting plans that extend weekends to Monday morning and use mid-week overnights may avoid

exposing children to dangerous and damaging hostility. This "parallel parenting" was described in fascinating detail by two psychologists with years of experience in the field.¹⁴ In light of LB 654's emphasis on "joint legal custody," their thoughts are particularly revealing:

The courts have tried to resolve high conflict cases by insisting that parents participate in various psychological and educational programs such as individual therapy, couple's counseling, communication classes, co-parenting, parent education, anger management and various forms of mediation and psychological assessments. The hope for cooperation by the couple is based upon the belief that because these parents love their children so much, they should be willing to put their differences aside and learn to work together.

We have learned that court orders that put the parents into situations that require them to cooperate and co-parent actually increase the conflict. We believe that high conflict couples cannot work together and should not be encouraged or forced to do so. We have found that conflict results when parents have contact and communications with each other.

Although the authors may be referring only to high-conflict cases, when we combine these thoughts with the empirical data that suggests it is frequent and continuing contact between parent and child, not joint decision-making, that predicts for psychologically healthier children, LB 654 seems misdirected. Perhaps the only real criticism of LB 654 is that it is "adult-centered" and not "child-centered." In other words, joint decision-making may be preferable, but it is somewhat of a "control issue" among adults. The lodestar for judicial decision-making on custody and parenting issues in Nebraska has always been the "best interest" of the minor child.¹⁵ While a presumption of joint legal custody may make lawyers, judges, litigants and/or counselors feel better about the parenting plan process (*perhaps because it just sounds more fair*), children may not be impacted to any significant degree by the fact that their parents have agreed, for example, upon their orthodontist. It may be that imposing joint legal custody on parents who are not particularly comfortable with it does nothing to advance a child's best interest and increases the likelihood of conflict between the adults. Put in perhaps the most obtuse and ridiculously simple way, it seems that joint legal custody should be reserved for those divorced people who are mature enough, jointly, to decide, jointly, on a detailed parenting plan requiring them to make decisions . . . jointly.

Joint Physical Custody and Its Economic Impact

If LB 654 is not the elixir for healing the wounds that are caused by children feeling the loss of one parent,¹⁶ what is?

If we accept the notion that time can be shared (beyond the *Wilson* formula) even in situations with significant parental conflict, how do we allocate the time? About 25-30% of parents have a cooperative relationship, including joint planning, flexible schedules, and activity coordination. More than half of divorced parents fall into some type of parallel parenting where communication is limited, and conflict is hopefully avoided. Approximately 20% of post-divorce parents have high conflict and poor communication.¹⁷ Combined with this is the evidence that about half of all children polled in a comprehensive study stated a desire for more contact with their fathers.¹⁸ These statistics suggest that there may be a large number of children who want more time with another parent in situations where the parents do not effectively communicate or coordinate parenting time. This may just be one of the painful elements of divorce. But methods of providing more parenting time to the traditionally non-custodial parent are worth investigation.

LB 654 defines joint physical custody as "shared authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous physical custody by both parents over the child for significant periods of time."¹⁹ Nebraska cases have stated as follows: "[J]oint physical custody has been described as 'joint responsib[ility] for "minor" day-to-day decisions' and the exertion of continuous physical custody by both parents over a child for significant periods of time."²⁰ We have to assume that the *Wilson* schedule of every other weekend and one evening during the week (*about 14% of the overnight parenting time*) is not "significant." In *Elsome v. Elsome*,²¹ the Nebraska Supreme Court determined that approximately 40% of the overnight parenting time was joint physical custody (*and would thus, presumably, be "significant"*). The *Elsome* court held that when a parent has more than 40% of the overnight parenting time a joint physical custody child support calculation should be used. The joint custody calculation results in a dramatic decrease in child support.

The area between 14% and 40% of the overnight parenting time seems the range within which most courts are willing to provide more parenting time. Whether or not we call parenting plans within this range "joint physical custody" hardly matters to children and, at this time, does not require courts to adjust child support dramatically.²² In other words, a parenting plan or court order awarding the traditionally non-custodial parent 33% of the parenting time, for example, may provide "frequent and continuing contact" while not causing much controversy. Courts can depart from the Guidelines under this scenario pursuant to Paragraph J thereof, which provides in pertinent part:

An adjustment in child support may be made at the discretion of the court when visitation or parenting time substantially exceeds alternating

weekends and holidays and 28 days or more in any 90-day period. During visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80%. The amount of any reduction for extended parenting time shall be specified in the court's order and shall be presumed to apply to the months designated in the order.²³

Paragraph J allows trial courts to consider the economic circumstances of the parties in departing from the Guidelines. The joint custody calculation is more rigid. Most family law practitioners are familiar with the dramatic decrease in child support the joint custody calculation imposes. The dirty little secret about joint custody, even at levels below 40%, is that it presents real challenges to the entire child support structure, and it is the subject of fierce and often gamey posturing and bargaining in family law courts across Nebraska. Most practitioners have experience with some of the typical debacles: fathers who demand a parenting schedule in excess of 40% of the overnights regardless of the history of caretaking, and mothers who refuse to acknowledge a father's comprehensive involvement in parenting once the specter of a child support reduction is raised.

One difficulty is that the joint custody calculation is often not accompanied by a cost-sharing paragraph requiring the parties to share non-fixed costs (*such as activity expenses, tutoring, clothing, camps, education costs, etc.*). This seems intuitive: the child support is dramatically reduced because the assumption is that both parties are contributing economically in ways that are distinguishable from the traditional *Wilson* schedule. The problem with cost-sharing is that there is no meaningful enforcement mechanism for parents who pay their share of non-fixed costs and are ignored when they ask for contribution from the other parent. The contempt procedure is costly and cumbersome for post-divorce parents who do not want to reopen old wounds. But the more fundamental problem is that it is difficult to know what the economics of joint custody really are. It is difficult to explain to clients that if they agree to a parenting plan with a 39/61% split of the overnights, they may receive \$850 per month in child support, but at 40%, the child support will go down to \$150 per month. While this is perhaps an extreme example, it reveals the potential for arbitrary results.

The Example of Other States

Most states' guidelines address shared parenting time, but the adjustments vary widely. A timesharing threshold typically attempts to address the situation of a parent needing credit for substantial direct-child-rearing costs incurred when the child is in his or her care, such that the economic assumptions of the standard child support calculation are not applicable. Formulaic adjustments (*i.e., something other than a discretionary*


change) for shared parenting time basically fall into three categories: (1) the cross-credit approach; (2) the Indiana approach and variations of same; and (3) other methods. The cross-credit approach, currently implemented by 21 states, calculates a theoretical support amount for each parent and weighs those amounts for the time the child spends with the other parent. Nebraska currently uses the cross-credit approach. The Indiana approach, gaining in popularity, divides child expenses into three categories: variable (*e.g., food*); fixed, duplicated (*e.g., housing*); and fixed, nonduplicated (*e.g., children's clothing*). At low levels of timesharing, there are adjustments to child support for variable costs only. When timesharing becomes more substantial, adjustments consider all expenses because both parents incur such expenses. However, the Indiana approach assumes that only one parent (*i.e., the parent with more time, the parent who is the traditional "caretaker," the parent with "primary possession" and/or the parent living closest to school*) incurs fixed, nonduplicated expenses. This results in a child support award even with parents making the same amount of money with the same amount of parenting time, because it is assumed that one parent will typically incur nonduplicated, fixed costs such as children's clothing. The state of Arizona uses this approach and gradually reduces the order amount as timesharing increases. Anecdotal evidence suggests that the Arizona approach results in little bargaining of parenting time for money.²⁴

Most sole custody guideline models start with the presumption that a child is being raised in one home. Once the departure from a *Wilson*-type schedule becomes a possibility, child support guidelines must acknowledge that the parent with the alternate residence must incur additional child-rearing costs. At the same time, just because the child is spending additional nights with the other parent does not mean the parent with the primary residence can shut off the lights or turn off the heat. The threshold for beginning any adjustment in most states starts when somewhere between 20% and 30% of the child's time is with the parent with the alternate residence.²⁵ Comprehensive review of the various methods of joint custody child support calculation is beyond the scope of this article. However, the author suggests that any review of the Guidelines should consider the goals of the Parenting Act and the current state of joint custody. It could certainly be argued that improved clarity with respect to the joint custody calculation would open up greater possibilities with respect to shared parenting.

Conclusion

The author cautions that this article contains the opinions of only one member of the practicing bar. The author did not attend any committee meetings related to LB 654 or discuss the bill with any of its sponsors. The spirit of the legislation is above criticism. Any reference to gender in this article, as it

relates to custodial arrangements, is for ease of reference only and is not intended to convey the assumptions of the author.

Jane Venohr, Ph.D., the author of the report for the State of Washington upon which much of the child support discussion in this article was based, will appear at the July 21, 2006 Family Law Seminar sponsored by the Family Law Section of the Nebraska State Bar Association and NCLE. 

Endnotes

- ¹ "Introducer's Statement of Intent," LB 654, 99th Leg., 1st Sess. (Neb. 2005); "Committee Statement," LB 654, 99th Leg., 1st Sess. (Neb. 2005).
- ² The statute defines "joint legal custody" as "shared authority and responsibility of the parents for making fundamental decisions regarding the child's welfare, including choices regarding education and health."
- ³ "Committee Statement," LB 654, 99th Leg., 1st Sess. (Neb. 2005).
- ⁴ Joan B. Kelly, "Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce," *Journal of the American Academy of Matrimonial Lawyers*, Vol. 19 (2005).
- ⁵ Neb. Rev. Stat. §§ 43-2901 to 43-2919 (Reissue 1998).
- ⁶ Joan B. Kelly, "Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce," *Journal of the American Academy of Matrimonial Lawyers*, Vol. 19 (2005).
- ⁷ Joan B. Kelly, "The Best Interests of the Child: A Concept in Search of Meaning," 35 *Fam. & Council. Cts. Rev.* 377, 380 (1997).
- ⁸ E. Mavis Hetherington & John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002).
- ⁹ Joan B. Kelly, "Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce," *Journal of the American Academy of Matrimonial Lawyers*, Vol. 19 (2005).
- ¹⁰ *Id.*
- ¹¹ *Id.*
- ¹² Robert Bauserman, "Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review," 16 *J. Fam. Psychol.* 91, 95-99 (2002).
- ¹³ Attributed to Dr. Anthony P. Witham.
- ¹⁴ Deena L. Stacer and Fred A. Stemen, "Intervention for High-Conflict Custody Cases," 2002 *Family Law Update*.
- ¹⁵ *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004).
- ¹⁶ Joan B. Kelly, "Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce," *Journal of the American Academy of Matrimonial Lawyers*, Vol. 19 (2005).
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ LB 654, 99th Leg., 1st Sess. (Neb. 2005).
- ²⁰ *Elsome v. Elsome*, 257 Neb. 889, 898, 601 N.W.2d 537, 544 (1999).
- ²¹ *Id.*
- ²² *Id.*
- ²³ Nebraska Child Support Guidelines, Paragraph J (*emphasis added*).
- ²⁴ Jane C. Venohr, Ph.D., "Washington State Child Support Schedule: Selected Issues Affecting Predictability and Adequacy," *Policy Studies, Inc.* (2005).
- ²⁵ *Id.*



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