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Equal Custody

Background. Many people unfamiliar with Washington law might assume that shared custody arrangements, where children spend substantially equal time with each parent, would be the norm in our modern-day society. But, before July 1, 2007, the reality was that Washingtonôs legislature preferred a sole custody and visitation arrangement, with one parent being the primary custodial parent and the other, noncustodial, parent having visitation every other weekend. While Washington courts often called this arrangement ñshared custody,ò the truth was that it was not. Generally, Washingtonôs ñshared custodyòonly covered shared decision making regarding issues such as non-emergency medical care and public versus private school.

But it is an inarguable fact that mothers and fathers make decisions regarding parenting responsibilities and work-outside-the-home responsibilities during marriage that they might not have made as unmarried individuals. A family dynamic often includes one parent primarily responsible for outside employment and another parent primarily responsible for employment inside the home. That employment inside the home means, of course, primary responsibility for seeing to the childrenôs everyday needs.

For years, Washington custody laws essentially punished these more traditional families. Courts typically refused to allow the breadwinner to have equal time with the children *during* the divorce because Washington law required courts to consider, first and foremost, the historical division of parenting responsibilities in the preceding 12 months. The parent who provided the ñmajority of parenting functionsòwas made the custodial parent. The breadwinner was allowed to see the kids every other weekend.

After the divorce, courts typically found themselves again refusing to allow the breadwinner to have equal time with the children. This time the reason was more insidious: the parent who would otherwise have primary custody would refuse to agree to shared custody. Without that agreement, and without a history of shared parenting to trump that failure to agree, any request for shared parenting after the divorce was dead on arrival.

Changes to the Law. Thankfully, a potentially radical change to Washington's custody laws is now on the books. Courts can now grant temporary shared custody of children regardless of their parentsôhistorical parenting responsibilities and permanent shared custody regardless of consent.

Today, which parent was primarily responsible for caring for the children during the last 12 months of marriage is no longer a factor in determining the temporary parenting plan that will be in effect during the divorce. Today, the new RCW 26.09.197 simply asks the court to primarily consider (1) the strength, nature, and stability of the childrenôs relationship with each parent and (2) what parenting arrangements will cause the least disruption to the childrenôs emotional stability while the action is pending.

As for what the court should consider at the end of the case for a final parenting plan, the legislature made what can only be considered a fundamental move toward true shared parenting in Washington in crafting the new RCW 26.09.187. That statute, at subparagraph (3)(b), now states that ñthe court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child.ò

Although these changes are significant, much work remains. First and foremost, the policy statement at RCW 26.09.002 regarding parenting and the best interests of the children needs to be modified. Currently, it confusingly continues to state that ñthe best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship[.]ò That no longer appears to be a completely correct statement of the law. Rather, giving too much deference to a traditional familyôs existing patterns of interaction during marriage could very well lead a court to improperly reject shared parenting as something in the childrenôs best interests both during and after divorce.

So where do we go from here? Just as in other areas of the law, changes must continue to be advocated at the legislative level, and the new statutory language must be litigated at the judicial level so that it can be interpreted. So far as litigation goes, this means, first and foremost, arguing for shared parenting plans at trial and appealing those court decisions that do not award shared custody. Custody determinations remain within the sound discretion of the trial courts. However, getting each division, and ultimately the Supreme Court, to interpret and apply the new language is the best way to keep this important area of the law moving forward.

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