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Task Force to Study Legal Disputes Involving the Care and Custody of Minor Children

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The Legal Services Resource Center of Connecticut (LARCC) represents the low-income clients of the legal aid programs in Connecticut. In the context of family law, those programs represent men and women, custodial parents and non-custodial parents, and children. We see the existing system from the diverse perspectives of all of our clients, and we believe that they are all entitled to fair treatment in the court system. This Task Force has requested comment on three particular issues. In summary, our conclusions are:

- (1) We OPPOSE creating a presumption in favor of shared custody.
- (2) We OPPOSE changing C.G.S. 46b-56(c)(6).
- (3) We OPPOSE changing the fundamental role of guardians ad litem and attorneys for minor children, but we do recommend changes to make the GAL system more effective, fairer, and less costly.

(1) Should the state should adopt a presumption that shared custody is in the best interest of a minor child in any action involving the custody, care and upbringing of a child?

We oppose a statutory presumption that assumes that in all cases an approximate 50-50 time residency division is better than other alternatives. A child is not a piece of property to be presumptively split exactly in half. The shared custody proposal tends to elevate the interests of the parents over the interest of the child. C.G.S. 46b-56(b) is correct when it requires the court to consider the rights and responsibilities of both parents but to enter orders based on the best interest of the child.

Legal presumptions change results by changing the burden of proof. They are desirable only if they produce the right result nearly all of the time. The key to successful shared custody is parental cooperation, especially if based on near-equal time. Divorces, however, often result from the inability of the parents to function well together. There are many, many circumstances in which joint legal custody with primary residence, or sole custody, is much better for the child. For example, there are many divorces in which the non-custodial parent is not involved with the child and, indeed, may not even file an appearance in the case. There are parents who are incarcerated, drug-addicted, abusive, or otherwise unable to parent adequately. Without parental cooperation and parental interest, forcing shared custody arrangements merely transfers the hostilities or the failures of the marriage into the post-divorce period. Moreover, large numbers of custody orders apply to short-term relationships in which the parents have never married or lived together and even to some in which one parent has never seen or has played no role in the life of the child. An across-the-board presumption of joint custody, and especially of equal-time custody, is likely to produce inappropriate, harmful, or even bizarre results in many cases.

Shared or joint physical custody should not be confused with liberal contact. Connecticut family policy should be -- and is -- to promote maximum contact between each parent and the child. Thus, C.G.S. 46b-56(b) requires custody orders to "provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests." Whether shared custody is the best way to do this in the particular case needs to be decided on a case-by-case basis and not by an inappropriate statutory presumption. Connecticut law already addresses this issue in the proper way.

(2) What is the extent of noncompliance with the provisions of section 46b-56(c)(6) and the role of the court in enforcing compliance?

No statutory change is needed. C.G.S. 46b-56(c)(6) authorizes the court, in issuing its orders, to consider "the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders." In addition, 46b-56 (c)(7) includes consideration of "any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute." If one party claims that the other is undermining their relationship with the child, these provisions encourage the court to examine the situation and, if it agrees, to tailor orders to the specific facts of the case. This provides exactly the right degree of review and discretion. We would oppose any proposal to mandate punitive sanctions or, worse, an automatic cutoff of custody or visitation rights, since in some cases that could be an extraordinarily inappropriate or dangerous remedy that would cause emotional and even physical harm to the child.

(3) What should be the role of a guardian ad litem and the attorney for a minor child in any action involving parenting responsibilities and the custody and care of a child?

It is important that children have access to independent representation and review in appropriate cases. The positions of guardian ad litem (GAL) and attorney for the minor child (AMC) are essential for this purpose. The primary job of the GAL is to represent the best interest of the child. AMCs are more appropriate for older children, because their primary role is to represent what the child wants, in the same way that a lawyer would represent any other client. For the system to function properly, however, GALs must do the work needed to make a thought report, which requires adequate contact with the child and the parents. There is no need to make changes to the role of GALs or AMCs, but we do think that the GAL system can be improved in ways such as these:

- The Judicial Branch should develop informational pamphlets for self-represented parties explaining the appointment, role, duties, and fees of GALs.
- The Judicial Branch should develop a formal protocol for GALs, articulating their duties, including the degree of investigation in which they are expected to engage.
- Judges appointing GALs should include in the file an order, probably in checklist format, spelling out expectations for the GAL in the particular case, what GAL fees are authorized (including maximum fees, if appropriate), and allocation of payment between the parties.
- The Judicial Branch should implement a mechanism for evaluating GALs at the end of each case, including a mechanism for input by attorneys and litigants.