Oregon State Bar Section of Family Law
Parenting Plan Work Group

REPORT TO THE LEGISLATURE: ESTABLISHING AND ENFORCING PARENTING PLANS

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Reporter
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I. Introduction

In October 2009 the Judiciary Committees of the Oregon State Senate and House asked the Family Law Section of the state bar to form a work group to consider the question of parenting time plans and report back to the legislature before the 2011 session. The committees made the request as a way to approach the issues that were raised by HB 3402, which was introduced into the 2009 legislative session at the request of Matt Minahan of Dads America, but not enacted.

In response to this request, the Family Law Section of the bar recruited members for the work group during the winter of 2009, and the group met throughout the first half of 2010. The members of the work group were David Gannett, attorney in private practice, Portland (chair); Anna Braun, Oregon Judicial Department staff; Sonya Fischer, attorney in private practice, Lake Oswego; Jennifer Gilmore, attorney, Child-Centered Solutions, Portland; Susan Grabe, Public Affairs Director, Oregon State Bar; Leslie Harris, University of Oregon School of Law, Eugene; Sybil Hebb, Oregon Law Center, Portland; Ronald Allen Johnston, attorney in private practice, Portland; Robert McCann Jr., attorney in private practice, Albany; Margaret Olney, attorney in private practice, Portland; Kate Richardson, attorney, Oregon Department of Justice; and Sharon A. Williams, attorney in private practice, Portland.

The work group met with a number of interested people who were invited to give information and their perspectives on the issues. They included Phil Cook, Matt Minahan, Brenda Miller, Trudi Morrison, Theresa O'Halloran, and Nitin Ray. Mr. Minahan and the other interested parties presented their view of the issues and problems with parenting plans and explained their proposed solutions to those problems. The work group agreed with the presenters that some of the most important issues regarding parenting plans and their enforcement are that 1) the development of appropriate and effective parenting plans that work for children as well as parents is a complex process, and many parents need help with this process; 2) parents are often frustrated by the difficulty of getting timely resolution of disputes about enforcing and modifying parenting plans; and 3) these problems are exacerbated by the fact that many parents who need help do not have and are not able to afford legal assistance in navigating the system.

The work group then considered Mr. Minahan's suggested legislative solutions to these problems. The work group listened to the input of the interested parties and researched current Oregon state statutes, other state statutes, and relevant national reports and data. In addition, the work group members shared their experiences and perspectives on the issue. After consideration, the work group determined that the legislative proposal presented by Mr. Minahan would not be a good solution to the problems that the work group was examining. Indeed, the work group found that that the specifics of the legislative proposal presented would be potentially harmful to parents as well as children, by imposing standardized, one-size fits all, automatic provisions on unique and varied family situations. The proposed legislation would increase, and not decrease, conflict in families, and would be contrary to well-established public policy principles. For these reasons, the workgroup does not support the legislative proposal presented.

However, the work group agreed that children, mothers, and fathers have a compelling and common interest in easily obtaining and enforcing safe, appropriate, and fair parenting plans for their families. The group spent considerable time studying alternative ways of achieving these goals. In light of the financial difficulties currently facing Oregon, the work group

identified some inexpensive short-term, immediate solutions as well as some longer-term solutions that would require greater resources. In the short term, existing groups of experts could be encouraged to collaborate to develop training materials and assistance programs to help parents understand their rights and obligations and develop parenting plans that will work best for their families and children. In the longer term, additional resources and assistance sites could be ideally located at the courthouses to help parents in creating their documents, negotiating discussions, and if necessary, filing any paperwork to modify and/or enforce their plans.

The remainder of this report first describes existing Oregon law that is relevant to these issues, and then it outlines in more detail the problems that the work group identified. The next section discusses Mr. Minahan's proposal and the reasons that the work group does not support it, and the final section outlines solutions that the work group considers likely to be helpful.

II. The development of Oregon's law of custody and visitation

Note: The statutory citations in this section are to provisions of ORS Chapter 107, which governs divorce. However, all these rules apply to unmarried parents and their children as well, once legal paternity has been established. ORS 109.103 provides in relevant part that once paternity is established, ORS 107.093 to 107.425 that relate to custody, support and parenting time apply.

By the last quarter of the twentieth century, American families had begun to change significantly, and family law changed to accommodate these changes. During the 1970s, the federal and state governments had begun to construct a complex system for establishing and enforcing child support orders that grew increasingly effective over the next 30 years. Also during the 1970s unmarried fathers gained legal protection for their relationships with their children. In the area of child custody law, two of the most important changes were acceptance of the idea that both parents should play a significant role in a child's life when this is in the child's best interests, and that parents should work out how they will share parenting of a child, with judges make the decision only when parents cannot. These ideas were incorporated into Oregon law beginning in the 1980s, and they have continued to be the topics of legislative attention since then.

Statutes enacted in Oregon in 1987 first explicitly recognized the value of having both parents regularly involved in a child's life if in the child's best interests. The main child custody statute was amended to authorize both sole custody and joint custody.[1] In Oregon, "joint custody" is defined as "an arrangement by which parents share rights and responsibilities for major decisions concerning the child, including, but not limited to, the child's residence, education, health care and religious training."[2] In other words, in Oregon "joint custody" means "joint legal custody." This is a term that has nothing to do with where and how *time* with parents is divided, but rather addresses only how decisions, rights, and responsibilities are allocated between parents. Oregon, like the majority of states, recognizes that successful joint decision-making about children depends upon the existence of parents who are able to engage productively in that process. Parents who are unable to effectively communicate with one another – for whatever reason (fear, abuse, lack of skills, etc.) – cannot effectively make

[1] ORS 107.105(1)(a).
[2] ORS 107.169(1).

important decisions for or about their children. Putting children at the center of such conflict is not good for them. Therefore, Oregon's statutes are built to encourage joint legal custody (and joint decision making powers) when parents agree to it, and discourage joint custody when parents are not able (with assistance) to agree to it. Under those statutes, a court cannot order joint custody over the objection of either parent, and if the parents agree to joint custody, the court must order it.[3] If one parent requests joint custody and the other objects, the court must send the parties to mediation unless one of the parents objects and the court finds, after a hearing, that participation in mediation would subject the parent to severe emotional distress.[4] If joint custody is ordered but either parent becomes unable or unwilling to continue to cooperate, the joint custody order must be modified.[5]

If one parent is awarded sole legal custody, the other parent still has rights to information about the child and to make decisions for the child in emergency situations unless the court explicitly limits these rights. The legislation that makes this clear was enacted at the same time that the statutes allowing joint custody were enacted. Under ORS 107.154, the parent who does not have custody still has the right to inspect and receive school records and to consult with school staff, to inspect and receive government and law enforcement records concerning the child, to consult with anyone who provides medical, dental or psychological care for the child and to receive those records, and to authorize emergency health care if the custodial parent is unavailable. The parent may also apply to be the child's conservator or guardian ad litem. ORS 107.159 provides that if either parent intends to move more than 60 miles away from the other parent, he or she must first give notice to the other parent unless a court suspends this requirement.

For purposes of determining what legal custody and parenting time arrangement is in a child's best interests, the Oregon statutes focus on the child's emotional and psychological well-being and again expresses the importance of the child's relationship with both parents. The best interests of the child standard is nationally accepted as the key principle by which to make these decisions. Oregon's main statute is ORS 107.137, which says that in determining a child's best interests, the court shall consider:

> a) The emotional ties between the child and other family members;
> (b) The interest of the parties in and attitude toward the child;
> (c) The desirability of continuing an existing relationship;
> (d) The abuse of one parent by the other;
> (e) The preference for the primary caregiver of the child, if the caregiver is deemed fit by the court; and
> (f) The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. However, the court may not consider such willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in a pattern of behavior of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.

[3] ORS 107.169(3) and (4).
[4] ORS 107.179.
[5] ORS 107.169(6)(a).

The legislation introduced in 2009 at the request of Mr. Minahan's group, HB 3402, would significantly change Oregon law regarding both legal custody and parenting time. This is not the first time that such legislation has been proposed. Since 1987, bills that would create a presumption in favor of joint custody have been introduced into the Oregon legislature several times, but they have never been enacted.

III. Procedures for creating and enforcing parenting plans in Oregon

Since 1997 Oregon law has required that there be a "parenting plan" in every case involving minor children that sets out whether the parents will have joint or sole legal custody and how they will share parenting time. The law expresses a strong preference for parents to decide these matters themselves.[6] However, if the parents cannot reach an agreement or one parent asks the court to impose a plan, it will.[7] If the parents later agree to a modification of the parenting plan, they may submit a notarized stipulation signed by both of them to the court, and the court must either enter an order consistent with the stipulation or order the matter set for a hearing.[8]

The statutes also include a number of provisions that are intended to facilitate the creation and enforcement of parenting time orders. First, ORS 107.425(3) allows a court to appoint an individual, a panel, or a program to help parents create and implement parenting plans. ORS 107.425(3). However, the availability of this assistance depends on the presiding judge having established qualifications for the appointment and training of people or programs to fill this role. ORS 107.425(3)(d). This legislation has not been implemented statewide, probably because of lack of funds.

Second, ORS 107.434(1) requires that the presiding judge in each judicial district create an expedited parenting time enforcement procedure that is easy to understand and initiate. The court must provide forms for: 1) a motion alleging a violation of parenting time, 2) an order requiring the parties to appear and to show cause why the parenting plan should not be enforced in a particular manner, and 3) a motion, affidavit and order providing for waiver of any mediation requirement on a showing of good cause. The procedure must require that a hearing on a motion seeking enforcement of a parenting order be conducted within 45 days of filing. If the court finds a violation of the parenting time order, it may impose any of these remedies:

1) modification of the parenting plan,
2) ordering the party who violated the parenting plan provisions to post bond or security,
3) ordering either or both parties to attend counseling or educational sessions that focus on the impact of violation of the parenting plan on children,
4) awarding the prevailing party expenses, including, but not limited to, attorney fees, filing fees and court costs, incurred in enforcing the party's parenting plan,
5) terminating, suspending or modifying spousal support,
6) terminating, suspending or modifying child support as provided in ORS 107.431, or
7) scheduling a hearing for modification of custody.

[6] ORS 107.101, 107.102.
[7] ORS 107.102, 107.105(1)(b)..
[8] ORS 107.174(1).

If a parent's right to custody (but not visitation or parenting time) is being violated by someone else holding the child, the parent may apply to a court for an *ex parte* order of assistance directing the appropriate law enforcement agency to pick up the child and deliver him or her to the person or place that the court orders. ORS 107.437. The Uniform Child Custody Jurisdiction and Enforcement Act also provides expedited procedures for immediate enforcement of valid custody orders from out-of-state. See ORS 109.797-109.807.

In addition to these legislative provisions, intended to empower parents to make arrangements about how to care for their children following the parents' separation, the state judicial department has taken steps to make this process easier for parents. The State Family Law Advisory Committee to the Oregon judicial department and the staff of the judicial department have created model parenting plans with instructions in English and in Spanish that are available on the Web.[9] The judicial department has developed forms for unmarried parents to use to establish custody and parenting time orders that are available on the Web,[10] as well an informational brochure and forms for enforcing parenting time.[11] The web site also includes links to each county's website, where information specific to each locale is available.

While the legislation and materials provided by the judicial department are excellent, the work group found that parents still have problems creating and enforcing parenting plans. The work group concluded that part of the reason is that information is not always easy to find and is often difficult for parents to understand. These problems are aggravated by the fact that more than two-thirds of all Oregon family law cases involve at least one party who is unrepresented.[12]

IV. The work group's analysis of the legislative solutions proposed by Matt Minahan

On behalf of the Oregon Association for Children and Families, Matt Minahan submitted proposed legislative changes to the work group proposes legislative that he said are intended to make it easier to establish and enforce parenting plans. To a large extent, these recommendations mirror those in the legislation that Mr. Minahan supported in 2009. As stated above, the work group disagrees that these legislative changes are likely to be effective in reducing conflict and finds that some of the proposals are inconsistent with the fundamental goal of protecting the best interests of the children whose parents do not live together in the same household. This section describes each of the proposed legislative changes and the work group's analysis of them.

<u>Expanding Parenting Plans</u> The proposal says that parenting plans are only required in "custodial cases," that is, divorces. This is incorrect; as noted above, under ORS 109.103, all the rules set out for divorcing parents apply to unmarried parents once legal paternity is established.

<u>Maximizing Involvement From Both Parents</u> The proposal argues that the law should create a rebuttable presumption that a child attending school will spend half of his or her time with each parent if the parents live in the same school district, and makes similar proposals for

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[9] http://www.oregon.gov/OJD/OSCA/cpsd/courtimprovement/familylaw/parentingplan.page?
[10] http://www.oregon.gov/OJD/OSCA/cpsd/courtimprovement/familylaw/flpacket3.page?.
[11] http://www.oregon.gov/OJD/OSCA/cpsd/courtimprovement/familylaw/flPacket5.page?.
[12] State Family Law Advisory Committee, Self-Representation in Oregon's Family Law Cases: Next Steps (2007) (hereinafter SFLAC report), available at http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/FINALReportonSelfRepresentation9-6-07.pdf.

children of other ages. The work group rejects this presumption because such arrangements are not feasible in a vast majority of circumstances and do not adequately reflect the needs of most children. The work group also rejects the notion that the presumption of specific parenting time arrangements reduces conflict. The work group studied the parenting time statutes of all 50 states and the District of Columbia. No state in the United States has a statute that prescribes a specific division of parenting time; instead, all say that this should be determined on a case-by-case basis.[13]

Relocation The proposal recommends that parents be deterred from moving more than a certain amount of time away and apparently is intended as a proposal to amend ORS 107.159, which requires parents to give notice to the other parent before moving more than 60 miles away. The work group rejects this proposal because it penalizes a parent who moves without regard to the reason. Because of the great variety of reasons for which parents move, these issues are best handled by judges on a case-by-case basis.

Major Decisions This section of the proposal would apply when a court has ordered sole legal custody in one parent, rather than joint legal custody. It calls for the parent without legal custody to share the right to make major legal decisions, including whether to have children attend counseling, to authorize medical care, and to make educational decisions. This proposal in effect goes a long way toward mandatory joint legal custody, since these are the major issues that parents share when they do have joint legal custody. The proposal also recommends that parents be allowed to participate in their children's activities, which the law currently permits, and that parents be allowed extra parenting time to take their children to activities. The work group does not support the latter proposal as a legal rule, although it agrees that parents could be encouraged to address these decisions in their parenting plans and given guidance as to how to share authority and structure their parenting time if they desire.

The work group strongly rejects mandatory joint legal custody or a presumption in favor of joint legal custody. No state in the United States mandates shared decision-making authority as this proposal would do, and only 10 establish a presumption favoring joint legal custody other than where both parents request this arrangement.[14] Some states that at one time had presumptions favoring joint custody have since repealed these provisions, most notably California and Utah. California adopted joint custody in 1979 and repealed it in 1989; the Utah statute was enacted in 1988 and repealed in 1990.[15] The empirical evidence shows that imposing legal custody on parents who do not want it is inconsistent with the best interests of children.

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[13] The arguable exceptions are West Virginia and Utah. West Virginia which has a statute providing that time should be divided between the parents in approximately the way each parent spent time doing actual parenting before the parents split up, unless the parents agree otherwise or this arrangement is manifestly harmful to the child. W. Va. Code § 48-9-206 (2010). Utah has a statutory model parenting time plan that operates as a presumption. Utah Stat. § § 30-3-34 (2010).

[14] They are the District of Columbia (does not apply in cases of domestic violence or child abuse), D.C. Stat. § 16-914 (2010); Florida (unless detrimental to the child), Fla. Stat. Ann. § 61.13(c)(2) (2010); Idaho (does not apply in cases of domestic violence), Id. Code § 32-717B(5) (2010); Iowa (does not apply in cases of domestic violence), Ia. Code § 598.41 (2010); Louisiana, La. Stat. C.C. Art. 132 (2010); Minnesota (does not apply in cases of domestic violence), Minn. Stat. §518.17 subd. 2 (2010); New Hampshire, N.H. Stat. §461-A:5 (2010); New Mexico, N.M. Stat. § 40-4-9.1 (2010); Texas (does not apply in cases of domestic violence), Tex. Fam Code. § 153.131(b) (2010); Wisconsin (does not apply in cases of domestic violence), Wis. Stat. §767.41(2)(am). In addition, a number of states provide that a court should order joint custody if both parents request it, a position similar to that taken by Oregon.

[15] The legislative history of both statutes is discussed in Thronson v. Thronson (810 P.2d. 428 (Utah App. 1991)).

Input from the Child The proposal recommends that once children reach a certain age, they should be allowed to participate in decisions regarding what school to attend, which religion to follow, and how much time they should spend with each parent. Current Oregon statutes give judges discretion about how to gain information about children's needs and perspectives but does not give children decision-making authority. The work group believes that children's interests are not best served by telling them that they have the responsibility to decide matters which should be decided by their parents and possibly a judge and that the existing variety of mechanisms for including children's voices should be preserved.

Judicial Discretion The proposal generally seeks to reduce judicial discretion by creating rebuttable presumptions. The work group disagrees with this premise and instead believes that the best way to conserve judicial resources and to improve decision-making in these cases is to more effectively empower and assist parents in making their own decisions. As discussed above, the group does not believe that presumptions reduce conflict in this area.

Enforcement The proposal suggests that first time "offenders" be required to take parenting classes, that repeat offenders be fined, and that parenting time and custody be "reevaluated" for continued violations. The work group observes that courts already have the authority to impose these sanctions and more, as described above. The workgroup believes that automatic mandatory sanctions, as proposed by Mr. Minahan, do not reach the underlying problems that escalate to conflict over parenting plans and fail to capture the complexities of situations. Imposing mandatory sanctions could be harmful to children in some circumstances.

V. Recommended solutions

The working group supports the goal of promoting the involvement of both parents when this is in the child's best interests and recognizes the value of affirming the importance of fathers' roles in their children's lives. It also supports the policy of encouraging parents to work together to make their own plans. The group spent the great bulk of its meeting time discussing ways to help parents learn how to create their own parenting plans, to resolve conflicts before they become overwhelming, and to navigate the legal system. The group concluded that the most important tools that need to be developed would provide education and models for parents, as well as providing them expert assistance when they do not have attorneys. We understand that these proposals carry a price tag but argue that money spent helping parents solve their own problems will save judicial resources and, even more importantly, increase the well-being of children and their families.

A. More parenting plan models that are more accessible

The workgroup concluded there is a need for model parenting plans that are adapted to children's varying circumstances, including variations based on age of the child, geographical distance between the parents' homes, etc. The models should include language about modifications such as sunset clauses or dates of review and agreements to use particular dispute resolution processes such as mediation. The plans and instructions should include instructions on how to modify plans, including how to modify court orders based on the plans.

The group believes that the State Family Law Advisory Committee (SFLAC) has done good work in this area and is best situated to continue it. We urge the legislature to support SFLAC's work in this area.

The work group also believes that it is critical that the models be available on-line, easy to find, and reasonably easy to understand and use. The work group observes that SFLAC in 2007 recommended the development of "consumer-friendly, electronically-interactive forms."[16] Hard copies should also be available at county courthouses.

B. Expert assistance for parents

Even with simpler, more accessible forms and informational brochures, many parents will still need assistance to develop their own plans. Assistance by courts and state agencies is a necessary service that could be provided by personnel connected to child support enforcement services or a self-standing government entity. Another possibility would be for courts to employ contract attorneys or facilitators to assist parents in formulating parenting plans. Again, the work group observes that legislation already authorizes courts to appoint parenting plan coordinators but that funds are not available to implement the legislation.

C. More education about parenting rights and responsibilities

Information about available assistance in formulating and enforcing parenting plans and resolving disputes should be provided to people at the time paternity is voluntarily acknowledged or established through an administrative or judicial process and in child support enforcement and other appropriate cases. The state Department of Human Services could also provide this information to people seeking public assistance.

The work group recommends that interested parties consider opportunities to offer, where appropriate, user-friendly classes and clinics about establishing and enforcing parenting plans.

High schools should be encouraged to offer classes on the law of parentage and parenting, as well as healthy child development and the relationships between children and parents.

D. Mandatory alternative dispute resolution programs

The work group believes that in most cases alternative dispute resolution programs, especially mediation, are a better means of solving disputes about custody and parenting time than going to court, unless safety of a child or parent precludes this alternative. Since legislation already exists to allow courts to refer these disputes to mediation, the group recommends funding to make alternative dispute resolution services available statewide.

E. The relationship between child support and parenting plans

The work group recognizes that allowing state child support enforcement agencies to coordinate parenting plan disputes resolution would respond to the belief of some parents that the

[16] SFLAC Report, supra note 1.

state unfairly supports parents who claim that they are not getting the child support they are owed while not helping parents who claim they are not getting the access to their children that they should have. The work group also believes it is possible that if the child support enforcement agency coordinated parenting plan dispute resolution that child support compliance as well as parenting plan compliance might improve. However, the work group also recognizes that the child support agency is limited to using the federal funds it receives for purposes of the child support program. The work group has been informed that in some states, notably Texas, parenting plan mediators or coaches have offices in some child support offices to help parents with parenting plan disputes, and that the child support enforcement agency collaborates with other entities to provide clinics to parents with problems regarding custody and visitation. The work group recommends that the Department of Justice examine the feasibility of offering similar services in Oregon.