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Is a presumption of equal parenting time in a child's best interest?

From the enactment of the statutory guidelines for maintenance calculations in 2015, to the new "income shares" child support calculations passed in 2017, the Illinois legislature has attempted to streamline the divorce process by reducing financial support calculations to a series of various mathematical formulas. These changes in Illinois family law are intended to reduce litigation and create consistency in the financial awards of maintenance and child support for divorcing couples.

House Bill 4113, referred to the Rules Committee in October, seeks to treat parenting time in a similar fashion. The bill, in part, would create an equal parenting time presumption in all dissolution of marriage and parentage cases. In short, any divorcing couple would equally split parenting time except if otherwise agreed, unless the court finds by clear and convincing evidence that a 50/50 parenting schedule would seriously endanger a child's well-being.

The bill's enactment would represent a dramatic shift in current Illinois parenting laws.

Since the eradication of the "tender years" doctrine, where it was presumed that young children should spend the majority of their time with their mother, Illinois courts have been directed to make findings and order parenting time schedules which are in the best interests of the child.

As gender roles have shifted and evolved, judicial discretion and inconsistency applying this "best interests" standard often resulted in so called "custody battles" with parents fighting for each waking hour with their children.

This "best interests" standard has long been codified in the statute, with a specific series of factors a court must consider when allocating parental decision making responsibilities and parenting time, the two components of what we formerly referred to as "custody." These include the ability of each party to facilitate the relationship between the child and the other parent and the ability of the parties to cooperate with one another.

However, when analyzing the totality of these factors, the court does so through the lens of determining the best interests of the child and has significant discretion in makings its findings and how it weighs each enumerated factor.

House Bill 4113's proposed revisions to current law appear subtle on the surface. Shared parenting time has become more common in recent years and a presumed 50/50 schedule could be viewed as the law catching up with the reality of modern day parenting. However, there are two central issues which have the Illinois State Bar Association, The Chicago Bar Association and various other county bars and organizations opposing the bill.

First, the court must presume that 50/50 parenting time is in the best interest of the child. In order to deviate from 50/50, the court would have to find that a restriction on parenting time is appropriate.

Presently, with no presumptions in place relative to parenting time, a court can tailor a schedule other than 50/50 which takes into account all relevant factors without necessarily finding that a parenting time restriction is appropriate.

Under the proposed bill, the court is not held to the standard of a determination of the child's best interests, but instead that a shared parenting schedule would not seriously endanger the child's well-being. The legislature would effectively define the best interests of a child as being with each parent for half of the time. Thus, whether or not a court would have otherwise found that a different parenting time allocation is in the best interests of the child, the court is required to order an equal parenting time schedule absent clear and convincing evidence of endangerment to the child.

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Additionally, the standard previously considered in restricting a parties' parenting time was a "preponderance of the evidence" standard. House Bill 4113 proposes heightening that standard to one of "clear and convincing evidence."

Thus, the court would be precluded from restricting parenting time and ordering a schedule other than 50/50, even if it is more likely than not that a level of serious endangerment exists. Not only would the court be held to the presumption of equal parenting time, but in order to deviate and restrict either party's parenting time, the court would be held to this higher legal standard of substantially more likely than not.

Those who support the bill point to its merits of equality and inclusion for both parents. This would shift the burden off of a fit parent from having to prove why they should have shared parenting to the other party to prove why they should not.

Further, the enactment of House Bill 4113 would allow for a level of predictability for divorcing couples faced with the uncertainties of life after dissolution of their marriage. With a presumption of shared parenting, except in cases with a level of serious endangerment or abuse, parties can streamline the process of determining a parenting schedule. They argue that less litigation is in the best interest of the children and the parties, both from a financial perspective as well as reducing the emotional toll that litigation causes.

Those in opposition of the bill raise concerns over taking away judicial discretion in such an important area of the law which cannot necessarily be reduced to a "one size fits all" approach.

A 50/50 presumption shifts the focus from what's best for the child to how we can treat the parents equally. Further, a presumed 50/50 schedule could be problematic in cases where the parties don't live in close proximity and the court is tasked with coming up with a schedule for children who may be traveling far distances on a regular basis for school and activities.

Opponents of the bill argue that streamlining to this degree should not be done at the cost of determining a child's best interests.

Several states have explored the concept of a presumed equal parenting schedule, with many of those initiatives dying before reaching full momentum. House Bill 4113 is still in its relative infancy, but saw a near 2-to-1 ratio of proponents to opponents showing support at a recent hearing before the House Restorative Justice Committee.

Only time will tell if the bill will continue to build momentum, causing another shake up in Illinois family law.