

MUCHMORE AND JAYCOX: A Call for Developmentally-Responsive Parenting Plans

Editor's note: As this issue goes to press, legislation has been filed to address the Muchmore "problem." HB 52 permits the court to modify a permanent parenting order based on the best interests of the child if the modification makes no more than a minimal change in the allocation of parenting time. It also permits modification of sections of a parenting plan unrelated to relocation or the parenting schedule based on the best interest standard.

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The 2009 Supreme Court ruling in *Muchmore* and *Jaycox* (NHSC 2009-312)¹ has been largely received with grumbled complaint. Indeed, the court itself refers to the ruling as "regrettable." In short, *Muchmore* restricts the lower courts to modify parenting plans only when the conditions of 461-A:11 are met; that is, when,

- (a) The parties agree to a modification.
- (b) If the court finds repeated, intentional, and unwarranted interference by a parent with the residential responsibilities of the other parent, the court may order a change in the parental rights and responsibilities without the necessity of showing harm to the child, if the court determines that such change would be in accordance with the best interests of the child.
- (c) If the court finds by clear and convincing evidence that the child's present environment is detrimental to the child's physical, mental, or emotional health, and the advantage to the child of modifying the order outweighs the harm likely to be caused by a change in environment.
- (d) If the parties have substantially equal periods of residential responsibility for the child and either each asserts or the court finds that the original allocation of parental rights and responsibilities is not working, the court may order a change in allocation of parental rights and responsibilities based on

a finding that the change is in the best interests of the child.
(e) If the court finds by clear and convincing evidence that a minor child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature minor child as to the parent with whom he or she wants to live. Under these circumstances, the court shall also give due consideration to other factors which may have affected the minor child's preference, including whether the minor child's preference was based on undesirable or improper influences.

By effectively eliminating modification based solely on the child's best interests, *Muchmore* is commonly heard as a door slamming shut, leaving children to suffer until evidence of harm justifies hearing a motion to modify. Crusco (2010) observes that, "...without a provision to allow for some limited modifications based on best interests, a parenting plan that addresses the needs of a toddler may have to do for a tween."² In response, some attorneys and court officers are recommending that initial parenting plans be set forth as temporary, thereby allowing parties to "test-drive" the schedule before it is set in stone:

"One modification scenario where a temporary order would be useful is when an old parenting plan was made when the child was quite young, but doesn't fit now as the child enters first grade."³

We argue that *Muchmore* can equally well be heard as the opening of a door; that is, as a mandate for family law professionals to serve not only the best interests of the child in the present, but to craft parenting plans that anticipate the child's best interests over the likely course of development. Specifically, we posit that parenting plans which look beyond the present to anticipate each child's developmental needs are consistent with the law, better suited to the well-being of the child and the family, minimize the need for best interest modifications, and thereby have the incidental but not insignificant effect of minimizing the recidivist traffic that so burdens our courts.

Developmentally-responsive parenting plans. A developmentally-responsive parenting plan looks beyond the static, crisis-burdened, family-in-transition that stands before the court to anticipate

the child's reasonable and expectable growth and change across time. The courts presently require this sort of contingency planning in anticipation of both foreseeable annual events (e.g., holidays, birthdays) and potential future events (e.g., dispute resolution, relocation). Although there is no way to know with certainty, one assumes that these contingency plans minimize co-parental conflict which, in turn, minimize the child's experience of unnecessary anguish and associated post-divorce litigation.

More generally, we assert that the tiny minority of conflicted co-parents who demand the vast majority of the court's resources⁴ benefit from structure. Psychology has established that structure in the form of limits on behavior, boundaries defining space, and predictability across time decreases anxiety which itself decreases conflict. As applied to post-divorce parenting, the more forward-looking, unambiguous and comprehensive the parenting plan, the lower the risk for conflict, confusion and need for modification.

In the same way that structure can help one student to focus but may inhibit another student's creativity, highly structured, developmentally-responsive parenting plans will help to contain some families but risk needless restriction of others. The majority of divorcing co-parents — those mature and healthy adults who are able to embrace their continuing responsibilities as parents and co-parents even as they end their intimate adult relationship -- will cope with the inevitable bumps in the road as they arise without recourse to the courts. These co-parents have a demonstrated history of child-centered communication, collaboration and successful conflict resolution. They may be good candidates for collaborative law or a mediated settlement and will file their post-divorce modifications by agreement under 461-A:11(a) with nary a thought of *Muchmore*.

It is the high conflict co-parents (and their children, by extension) who benefit from structure. These are the contesting parties with little or no demonstrated history of constructive, child-centered communication, collaboration and conflict resolution. They are the revolving door litigants who are characteristically unable to cooperate, communicate and put their children's needs first. For these caregivers, every bump in the road is reason to do battle, and every battle is another opportunity to convince the world that the child's other parent is a despicable human being.

1. Bumps in the road. Certainly it is impossible to foresee every contingency in a child's life, but some are as expectable as the change of seasons. The *Muchmore* restriction on best interests modifications can be taken as sufficient cause to foresee and forestall as many of these concerns as possible.

The field of developmental psychology provides a roadmap with which we might anticipate many of the relevant bumps in the road. These are the sometimes gradual, sometimes abrupt, developmental shifts and emergent needs of children that healthy co-parents spontaneously accommodate, but which spur high-conflict parents to war. Unfortunately, the field's tremendous breadth and depth of knowledge is seldom explicitly considered by the courts unless and until experts are hired or *amicus curiae* briefs are filed (but see Garber, 2009).⁵

For the present purpose, we propose five broad, developmentally-responsive considerations. Each is posed as a generic point of reference,

acknowledging that each parenting plan must be carefully tailored to the child's unique needs and developmental course.

The child's ability to manage separation grows over time. Both the law and psychology strongly support a child's opportunity to make and maintain the healthiest relationship possible with each of his or her caregivers. One among the many variables which can either facilitate or undermine this goal is the duration of the child's separation from the absent parent.⁶

The common wisdom emphasizing the *quality* of parent-child time over the *quantity* of parent-child time is only half-right. Certainly, the quality of the interaction is critical to the child's emerging sense of security, first in the attachment relationship and later in self, where "quality" might best be understood as the child's experience of the caregiver's sensitivity and responsivity. However, quantity also matters, particularly as measured in terms of the period endured between contacts.

Children can experience extremely long separations as loss, compromising security, requiring re-familiarization upon renewed contact, and even prompting grief reactions. How long is too long varies with the child's cognitive, social and emotional development. We have recommended elsewhere (Garber, 2009) that a child should not be routinely separated from a primary caregiver for more consecutive nights than her age in years and, in the extreme (e.g., holidays, summer vacation), should not be separated for more consecutive nights than twice that period.

All other things being equal, this means that a one-year-old should enjoy contact with each of her parents no less than every second day, that a five-year-old might manage the school week exclusively in one parent's care, and that a 12-year-old might enjoy as many as three consecutive weeks on vacation with each parent.⁷ More important than these specifics, however, is the idea that a parenting plan can be written in a manner that accommodates the child's changing developmental capacities.⁸

2. The child's investment in her peer group and activities outside the family grows over time. The child's experience of family lays the foundation for the development of security and becomes a launching pad from which the child gradually experiments with greater independence and autonomy. When caregivers read parenting plans as spelling out their time with their child, the child's healthy and appropriate needs can be hindered. At one pathological extreme, this can contribute to role reversals (adultification, parentification and infantilization) by which the child compromises her needs in favor of fulfilling those of an enmeshed parent.

As verbally awkward as our shift from "custody" and "visitation" to "parenting rights and responsibilities" may be, it is definitely a step in the right direction (Hastings, 2010). We must go further, however, to communicate that parenting plans determine the child's time in each parent's care, rather than the "parent's time" in any sense of the phrase.

This distinction may be most relevant with regard to the child's participation in extra-familial activities, including simply hanging out with friends. The state's parenting plan template presently allows parties to optionally endorse the statement, "[e]ach parent shall be responsible for ensuring that the child(ren) attend regularly scheduled activities, including but not limited to sports and extra-curricular activities, while

the child(ren) are with that parent.” In fact, parenting plans must mandate that co-parents share the responsibility to support the child’s burgeoning interests, enrollment and active participation in appropriate extra-familial activities, groups and peer-oriented opportunities. Parents need to be prepared for the harsh reality that, no matter the care schedule, parenting time gradually becomes less about meaningful interaction and more about shepherding a child from one activity to the next.

3. School-related changes across grades must be anticipated and accommodated. Many high-conflict parents use the school day as a natural opportunity to transition care and avoid face-to-face confrontation. Such parenting plans commonly require, for example, that Mom relinquish parenting responsibility at 8:00 a.m. Friday morning and that Dad accept parenting responsibility at 3:00 p.m. the same day. Even if these times accurately reflect the child’s schedule when the parenting plan is drafted, this wording fails to determine who is responsible during the school day should the child wake up ill, the school open late or close early, and when a crisis requires that the school contact the responsible parent.

In the alternative, the parenting plan might instead clarify that the “sending parent” remains “on duty” throughout the school day (even in lieu of attendance) until the “receiving parent” assumes responsibility coincident with dismissal that day.

More to the point, a plan that ties parenting responsibilities to specific times rather than to relevant events invites unnecessary confusion and conflict over the years to come, conditions that might previously have prompted a best interests modification. Because school districts commonly stagger the opening and dismissal of their various schools (largely for the sake of bussing costs), a plan that ties parenting responsibilities to this year’s school schedule is likely to create caregiving gaps in the years to come. Strict interpretation of the parenting plan can create brief and stressful “hit and run” periods of care as when, for example, dad assumes parenting time at 8:00 a.m. for the 20 minutes before the middle school opens or mom assumes parenting responsibility at 2:15 for the 45 minutes until Dad is legally entitled to take over at 3:00.

4. Foreseeing and fulfilling a child’s unique medical, mental health, educational and/or developmental needs. The children of high-conflict co-parents have a disproportionately high percentage of special needs, some caused by the family conflict and others adding to the stresses which inflame the conflict (e.g., Garber, 2001; Wymbs & Pelham, 2010).⁹ Disputes over the evaluation, diagnosis and appropriate interventions for these special needs prompt a large but unknown number of modification actions each year. Tragically, some of these rise to the level of harm (e.g., medication non-compliance) and will continue to be heard post-*Muchmore*. However, those that constitute best interests concerns (e.g., establishing and revising an IEP, enrolling a child in psychotherapy) may now be left in legal limbo to the children’s great detriment.

In anticipation of this new reality, parenting plans must include language which will assure that children’s special needs are met without the delays and stalemates that can occur when co-parents fail to communicate and cooperate in their child’s best interests. In response, the courts can:

Establish a neutral, consulting expert in the relevant field to contribute to the terms of the initial parenting plan and to remain available thereafter for consultation and special needs-related dispute resolution. For example, concerns that a proposed parenting plan may not meet the needs of a nine-year-old boy with Attention Deficit Hyperactivity Disorder (ADHD) prompted the court to consult with the child’s outpatient psychotherapist. Confidentiality, limitations associated with *Berg* 152 NH 658 (2005), and the therapist’s ethical mandate to avoid dual roles precluded her contribution, but she identified a colleague to fill this role in her place.

The consultant reviewed the therapist’s notes and the child’s test results, spoke with the school and each of the parents so as to advise the court regarding parenting structures best suited to this child’s ADHD. These included recommendations regarding the frequency and nature of communication between the parents and between the parents and the school, the adequacy of the child’s present educational accommodations and modifications that may become necessary in the future, and the contingencies which should trigger a medication evaluation. The consultant furthermore set forth contingencies as to when and how private school placement should be considered, tutoring might be established, and when and how the child’s continuing psychotherapy might be modified. The court incorporated the consultant’s recommendations as “if . . . then” contingencies into the parenting plan, stipulating that the parents will first bring future disputes related to the child’s special needs to the consultant (or her successor) for resolution. Allocate residential responsibility so as to assure that the child’s special needs are met consistently in relevant circumstances. When one parent is better suited to serve the child’s special needs, and when those needs are particularly taxed in one environment more than others, residential responsibility can be assigned accordingly. For example, a parenting plan can determine that a learning disabled child who needs special guidance to complete his homework will spend all school nights in the home of the more structured, organized and expressive parent.

Designate one parent as final decision maker in matters directly related to the child’s special needs. High conflict co-parents fail to resolve child-centered disagreements by definition. When those stalemates are chronic and compromise the child’s opportunities and services, it may be necessary to break out decision-making authority in the relevant functional domains and allocate this authority to one parent (Saposnek et al., 2005). This unilateral allocation of narrowly defined responsibilities is often accompanied by caveats requiring the decision-maker to consult his or her co-parent before making a decision and granting the other (non-deciding) parent continuing access to all relevant professionals and information. This has been successfully ordered with regard to mental health decision-making (e.g., as regards psychotherapy and medication for a child with obsessive-compulsive disorder), medical decision-making specific to one child’s diabetes treatment and another child’s asthma, and both medical and educational decision-making (e.g., IEP planning, testing and placement) in response to a child’s visual impairment.

5. Parenting coordinators can resolve many best interests conflicts. High conflict co-parents will find loopholes and ambiguities in the most developmentally-responsive, forward-looking,

thorough and structured parenting plan. Even when the court allocates final decision-making authority of one type or another to one parent, these parties will contest whether a particular decision falls within the decision-maker's bailiwick or is just another *cause de guerre*.

Without recourse to best interest modifications, for fear that every disagreement will be left to escalate until clear and convincing evidence of harm has accrued, appointing a parenting coordinator (PC) may be the child's last, best hope. The PC role is presently recognized by many state legislatures and, although not yet legislated in New Hampshire, PCs are empowered in many courts by parties' mutual consent under the court's omnibus authority.

The Association of Family and Conciliation Courts (AFCC; see www.afccnet.org) and the Parenting Coordinators' Association of New Hampshire (PCANH; see www.pcanh.org) define the PC's responsibility as assisting co-parents to resolve child-centered conflicts within the parameters of the extant parenting plan through a successive process of education, mediation and, as necessary, arbitration. The PC's arbitrated decisions are taken as binding unless and until the court rules otherwise.

To the extent that *Muchmore* leaves high conflict co-parents without recourse to best interests modifications, we must craft developmentally-responsive parenting plans that anticipate the child's growing capacity to manage separation and healthy investment in extra-familial activities. We must anticipate and account for school-related changes and the foreseeable course of relevant special needs. We must furthermore establish avenues for dispute resolution that serve the child's needs promptly and effectively such as the appointment of parenting coordinators. A thorough and foresightful parenting plan of this sort can create the safety net necessary for those high conflict co-parents who might otherwise be forced to allow best interests concerns to remain unresolved or escalate to cause the child real harm in the aftermath of *Muchmore* and *Jaycox*.

REFERENCES:

- Duryee, Mary. (2002). Amicus Curiae Brief of Sandra Purnell for Mary Duryee, Ph.D., et al., filed in re: *Montenegro v. Diaz*, S090699, Supreme Court of the State of California, 30 July 2001. Accessed 12.23.2008 at <http://www.cflr.com/courses/study/montenegrobrieff.htm>.
- Garber, Benjamin D. (2004). Parental alienation in light of attachment theory: Consideration of the broader implications for child development, clinical practice and forensic process. *Journal of Child Custody*, 1(4), 49-76.
- Garber, Benjamin D. (2009). *Developmental Psychology for Family Law Professionals: Theory, Application and The Best Interests of the Child*. Springer.
- Garber, Benjamin D. (Anticipated April, 2011). Parental alienation and the dynamics of the enmeshed dyad: Adultification, parentification and infantilization. *Family Court Review*.
- Garber, Benjamin D. (February, 2001). ADHD or not ADHD: Custody and visitation considerations. *New Hampshire Bar News*, New Hampshire Bar Assn.
- Hastings "Family Law: Parental Rights and Responsibilities" NH Bar Journal 11.19.2010 at

<http://www.nhbar.org/publications/display-news-issue.asp?id=5803>

- Melton, G., Petril, J, Polythress, N., & Slobogin, C. (2007). *Psychological evaluations for the courts: A handbook for mental health professionals and lawyers*. (3rd ed.). New York, NY: Guilford Press.
- Papelian, Jeanmarie and McNamara, Marilyn. Modification after *Muchmore* New Hampshire Trial Bar News, Spring 2010.
- Richard A. Warshak, Brief of Amici Curiae on Behalf of Minor Children re: In the Matter of the Marriage of Navarro and LaMusca (2003).
- Ruoff, D. (Summer, 2010). *Lex Loci*. New Hampshire Bar Journal, 78-82.
- Saposnek, D. T., Perryman, H., Berkow, J. and Ellsworth, S. (2005). SPECIAL NEEDS CHILDREN IN FAMILY COURT CASES. *Family Court Review*, 43: 566-581.
- Shear, Leslie A. (2002). Amicus Curiae Brief of Leslie A. Shear, Esquire, et al., filed in re: Marriage of LaMusga S107355, Supreme Court of the State of California, July 6, 2002. Accessed and available in full at <http://www.thelibrary.org/lamusga/ShearFinal.pdf>.
- Wallerstein, J.S.: Amica Curiae Brief re Burgess v. Burgess. Filed Dec. 12, 1995, Supreme Court, State of California.
- Wymbs, Brian T.; Pelham, William E., Jr. (2010). Child effects on communication between parents of youth with and without attention-deficit/hyperactivity disorder. *Journal of Abnormal Psychology*, 119(2), 366-375.

ENDNOTES

1. Accessed 24 December 2010 at <http://caselaw.findlaw.com/nh-supreme-court/1499782.html>
2. See Kysa Crusco's excellent blog at <http://www.nhfamilylawblog.com/2009/12/articles/parenting-rights-responsibilit/muchmore-jaycox-a-parenting-plan-may-not-be-modified-solely-on-best-interests/>
3. Hastings (NH Bar Journal 11.19.2010 at <http://www.nhbar.org/publications/display-news-issue.asp?id=5803>):
4. Melton et al. (2007) suggest that 90% of "custody" matters are settled by agreement.
5. See for example: Duryea (2002); Shear (2003); Wallerstein (1995); Warshak (2003).
6. Another integral factor is each parent's (and all relevant parties') support for the child's relationship with the other parent regardless of the schedule of care. This factor is recognized under 461-A:11(c) as non-interference and is addressed in the literature as alienation (see for example, Garber, 2004).
7. When applied to sibling groups, it is sometimes useful to apply this metric to the youngest child's age.
8. Papelian and McNamara opine post-*Muchmore* that, "...if there is an agreement within the plan to make later changes, even if the changes are not specified in the parenting plan, there is an argument to be made that the court should consider such change 3even without a showing of 'detrimental environment.'" Modification after *Muchmore*, NH Trial Bar News, Spring 2010. The recent NH Supreme Court decision *In the matter of Kurowski* (slip op. March 16, 2011), lends validity to this theory. A provision in the parties' 2008 parenting plan reserved the issue of whether to transition their child to public school until a later date, contemplating that the parties would meet and confer on that topic. When the parties were unable to agree on placement, the court issued an order applying the best interest standard. The Supreme Court affirmed, noting that because the parenting plan's language on that topic was not a permanent order, it did not require mediation.
9. Saposnek et al. (2005) identify three general categories of special needs that are relevant to the allocation of parenting rights and responsibilities, only the first of which presumably bears on the *Muchmore* standard of harm: (1) acute, life-threatening medical conditions; (2) chronic developmental disorders; and (3) psychological and behavioral syndromes.

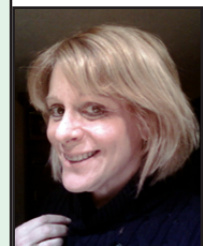
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