Mandatory Guidelines – Standard Parenting Plans

By Louis Kiefer, Esq.

Children of separated parents have a need for frequent and continuing contact with both parents. Any disruption of that contact- even temporary – does a disservice to children. The Connecticut Legislature would be well advised to provide for shared parenting from the time the parties separate until a final decision on custody; the Judicial Department would be well advised to come up with procedures which would permit a meaningful and enforceable parenting plan entering at the time of the first court appearance. The adaption of a Standard Parenting Access schedule would go a long way toward addressing these issues.

PART 1 MAINTAINING THE RELATIONSHIP

1. TERMINATION OR LIMITATION OF PARENTAL RIGHTS

The court does not award custody. It removes custody rights and privileges from a person who, before entering the courthouse, was legally vested in joint, equal custody and shared parenting.

For example, CGS 45a-606 provides:

> **Father and mother joint guardians.** The father and mother of every minor child are joint guardians of the person of the minor, and the powers, rights and duties of the father and the mother in regard to the minor child shall be equal.

Because the question in the Family Court is framed as to which parent is more suited to have custody, it avoids the real issue: which person should have his or her rights suspended, limited or terminated and under what evidentiary standard or burden of proof.

Another question is why, if the state desires to terminate the rights of both parents, it has a higher standard of proof, but if it wants to terminate the rights of one parent, it has no standard of proof, other than the non specific, feel good "best interests of the child" standard.

In the termination of the rights of both parents, the U.S. Supreme Court held:

> "The right of parents to raise their children is fundamental and falls within the liberty interest defined by the fifth and fourteenth amendments. The parents'

> interest concerning the upbringing of their children are entitled to constitution protection. Due process protections are invoked when government action threatens parents' right to the custody of their children. Parents may not be deprived of the right to raise their children absent a strong governmental interest….The state may intervene only if the parents fail in their responsibility to care for their children." *Santosky v. Kramer,*455 U.S. 745 (1982)

Framed another way, absent a justification for different standards and procedures being used in different contexts, should the denial of parental rights be subject to the same protective procedures whether both parents have rights that are being limited or terminated or only one? [1]

As Profession Hubin stated: "No one is *awarded* rights; one parent is *deprived* of rights' The "award" of custody in such cases is neither the granting of rights, nor the transfer of rights; it is the denial of rights. And the temporary "awarding" of custody is really the suspension (temporary deprivation) of rights."[2]

The purpose of the article is to propose shared parenting *pendente lite or* mandatory access presumptions*,* to provide a procedure that would permit the both parties access to minor children with the minimal amount of disruption and to urge the adoption of meaningful and enforceable parenting plans

2 NEEDS OF CHILDREN AND PARENTS

As Wallerstein and Kelly,[3] dealing with children of all ages observed:

> "Successful outcomes at all ages, which we have equated with good ego functioning, adequate or high self-esteem and no depression, reflected a stable, close relationship with the custodial parent and the noncustodial parent."
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> "….the relationship between the child and both original parents did not diminish in emotional importance to the child over the five years. Although the mother's caretaking and psychological role became

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[1] See generally Hubin "Due Process in the Termination of Parental Rights" J*ournal of Law & Family Studies,* Vol 1, No 2 p.145 University of Utah College of Law (1999).

[2] Id p. 136

[3] *Surviving the Breakup*, Wallerstein and Kelly, p. 215, Basic Books, 1980, New York

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increasingly central in these families, the father's psychological significance *did not* correspondingly decline."[4]

"There is a critical period that strongly influences the nature of post divorce father-child relationships: the transition period from the point of …[separation] to approximately six months to one year after, a time when multiple stresses and adjustments impinge on all members of the divorcing family, *legal processes have their greatest impact and access patterns are established and consolidated.*[5]

Finely and Schwartz observed:

"Clearly, a post-divorce arrangement where one parent resides within the child's primary family system – while the other is marginalized or severed from the family system – does not fulfill the best interest of the child. …[D]ivorce decrees that include joint physical custody may represent one way to reduce the distress associated with the 'divided world' and to enhance quality of life for children of divorce. The …more the child's post life resembles that of an intact family, the better adjusted children of divorce are likely to be as they enter adulthood." *The Divided World of the Child: Divorce and Long-Term Psychosocial Adjustment, Family Court Review,* Vol. 48, No 3, July 2010 516-527.

Drs. Kelly and Lamb stated:

"The empirical literature also shows that infants and toddlers need regular interaction with both of their parents to foster and maintain their attachments (Lamb et al., in press). *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children* Family and Conciliation Courts Review; Los Angeles; Jul 2000; Joan B Kelly; Michael E Lamb; Volume: 38 Issue: 3 : 297-311, Sage Publications.

Extended separations from either parent are undesirable because they unduly stress developing attachment relationships. It is extremely difficult to reestablish relationships between infants or young children and their parents when the relationships have been disrupted*. Id.* The evidence further shows that children who are deprived of meaningful relationships with one of their parents are at greater risk psychosocially, even when they are able to maintain relationships with the other of their parents. Stated differently, there is substantial

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[4] *Id.* P. 307

[5] Hubin, id p. 138,citing Kruck (1994) *The Disengaged Noncustodial Father: Implications for Social Work Practice with the Divorced Family.* 39 Social Work, 15-25.

evidence that children are more likely to attain their psychological potential when they are able to develop and maintain meaningful relationships with both of their parents, whether the two parents live together or not*." Id.*

Kyle Pruitt. MD put It this way:

> "When the gravity of occasional parenting finally hits a father, it's like getting broadsided from a blind spot. Constantly playing hello-good-bye, feeling more grief than they bargained for, dealing with anxious, demanding, and sometimes hurt and surly kids, these fathers privately begin to wonder if their children really miss or even need them in their life. The typical noncustodial pattern – every other weekend and an additional few hours on a weekday, some holidays, and maybe a month in the summer – is hopelessly inadequate in terms of preserving a close relationship with another human being, especially one who happens to be growing and maturing at a dizzying rate. It makes critical day-to-day shared experiences, such as school involvement, a crucial benefit to a child and a sign of a father's interest in his life, a sad joke. And so fathers drift further and further out of the loop. God forbid that anything untoward should happen between a noncustodial father and his child, because it will take a month to work out a twenty-minute misunderstanding even with just an averagely mulish kid. Planned fun risks becoming the only relational currency, devaluing all others, since no other memorable human interaction can be crammed into such a schedule. *Fatherneed,* Kyle D. Pruett, MD. Free Press 2000, P. 111

Connecticut, by both case law and statutes have adopted a "best interest" standard which offers neither precision, guidance nor a measurable criteria. The standard is so broad, that almost without exception, whatever facts the trial court finds in support of "best interest" the court ordered custody arrangement will withstand appellate review. The standard depends more on the subjective parenting opinions of the jurist than empirical research.[6]

[6] "Best interests" of a child is an emotionally laden conclusory platitude, a slogan, a cliché, easily used to justify positions but lacking in definition or predictability. As Professor Diane S. Kaplan stated: " ….the best interests model…substitutes subjective, sentimental analysis for the certainties that inure from the rule of law." Kaplan, *Why truth is not a defense in paternity actions*, Texas Journal of Women & the Law, Vol 10, No. 1 p. 69

3. POLICIES TOWARDS PARENTAL ACCESS:

PRESUMPTION OF ACCESS

Connecticut Policy

Connecticut law provides: "…the court shall enter orders accordingly that serve the best interest of the child and provide the child with the **active and consistent** involvement of both parents commensurate with their abilities and interests." CGS §46b-56(b). Until the legislative changed the case law there had been no presumption, having decided that the burden of proof is on the plaintiff to show that visitation is in the child's best interest. *Temple v Meyer*, 208 Conn. 404, 544 A.2d 629 (1988). There are no appellate court cases that attempt to define what active and consistent means? There are no standards defining "how active" and "how consistent." The appellate courts for the most part defer to the subjective best interest feelings of the trial court and that is true even though the statute further defines joint custody as meaning: "…. an order awarding legal custody of the minor child to both parents, providing for joint decision-making by the parents and **providing that physical custody shall be shared by the parents** (emphasis added) in such a way as to assure the child of continuing contact with both parents" CGS §46b-56a

The Connecticut statute dealing with joint custody, has a presumption that joint custody is in the best interests of a minor child but only in those cases in which parties have agreed to joint custody. CGS §46b-56a (2) .[7] However, the court has grafted the principal that joint custody may be awarded if there is no agreement or meeting of the minds, if the court finds such an award is in the best interests of the children. *Giordano v Giordano*, 9 Conn. App. 641, 645, 520 A.2d 1290 (Conn. App. 1987) Instead of relying on a presumption, the parent who wishes to obtain joint custody has the burden of proof.

The closest Connecticut comes to adopting a recognition of the needs of children for frequent contact with both parents, post separation, pre divorce, comes in the language of the Automatic Orders, served when a dissolution action is commenced that contains the following language:

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[7] California Fam Code §3080 has identical language

> ”If the parents of minor children live apart during this dissolution proceeding, they shall assist their children in having contact with both parties, which is consistent with the habits of the family, personally, by telephone, and in writing unless there is a prior court order.” P.B. §25-5

If the parties have recently separated, as is often the case during the early stages of a dissolution of marriage action, there is no “habit” of the family that can be used as a standard. The Abuse of Spouse (§46b-15) action and criminal protective order often create the initial separation, so there can be no “habit.” Also, the automatic order concerning assisting the children with having contact with the other party is unenforceable as a matter of law,[8]

A parent who has separated from the parent of his or her child, has no meaningful right to access unless and until the court grants that right.[9] While it might be argued that until the court grants custody both parents have equal rights to physical custody, as a practical matter, unless a parent engages in a physical tug of war over the child, that right is illusory. If a parent were to attempt to exercise his or her rights by such conduct, the conduct itself would be evidence of unfitness. And yet, the courts seem unable to quickly address the needs of children. The inchoate right of equal custody is illusory and unenforceable.

Since there are no rights of access to the person without physical custody, the existence of parental access rights are wholly dependent upon immediate access by the disenfranchised parent to the court

4 BARRIERS TO IMMEDIATE AND MEANINGFUL ACCESS TO ONE’S CHILDREN

Three types of procedures presently exist to deprive parents of the speedy resolution of access rights. They are (a) the inherent delays in *pendente lite* hearings,

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[8] A litigant is not required to read the court’s mind. *Blaydes v. Blaydes***,** 187 Conn. 464, 446 A.2d 825 (1982)

[9] But see footnote 8, *Kennedy v Kennedy* 114 Conn. App. 143, 155, 918 A2d 1002, 1011(2008) “Those cases shed no light on custody disputes *between* parents because each parent has an equal and undiminished constitutional right to make reasoned decisions about the welfare of his or her minor children.”

(b) protective orders issued by the family court under §46b-15 – abuse of spouse [10] and (c) the conditions of bond, set initially by the arresting officer in a claimed domestic violence matter and usually continued automatically by the criminal court. The adoption of a model parenting plan would go a long way towards correcting the flaws of the present system, at least as applied by the family court, by explicitly defining the absent parent's rights to continue his or her involvement in the child rearing process. By providing a checklist to identify areas of agreement and disagreement, a detailed parenting plan form has the potential of becoming an efficient vehicle that articulates the parenting rights of each parent sooner rather than later in the process.

Most separations occur pursuant to a dissolution of marriage action. It is at this time that most separated children need immediate access to his or her parents. The writ, summons and complaint are served, returned to court and a motion for temporary custody or visitation is filed, known as a *pendente lite* motion. One can presume a delay of two weeks after service and another two to three weeks to have the motion placed on the calendar for a hearing.

Dissolution of Marriage Actions

Pendente lite motions for parental access have no guarantee that they will be heard promptly, nor is it likely that a self represented party will have the skill to prepare, file, and pursue the relief sought. It is also unlikely that a self represented party, at the first *pendente lite* hearing will have any comprehension of the many issues that should be addressed in fashioning a fair, comprehensive, workable and enforceable parenting plan. If the access schedule and parental responsibilities issues are not resolved at the first hearing, it may be scheduled 4 to 6 weeks from the first *pendente lite* hearing date. Delays in obtaining an attorney by either or both parties, the unavailability of either attorney, the possible appointment of *a Guardian Ad Litem* and the financial obligations in securing one, the consideration of a third attorney's schedule[11] all serve to delay the first hearing.

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[10] This is not to say that neither 46b-15 actions nor criminal protective orders do not have an appropriate place in preventing parental abusive behavior but this must be evidence based and require the safeguards commonly referred to and required by due process of law.

[11] The addition of a third attorney's schedule increases the delay exponentially.

Thus, starting from the time the papers are served, the delay may easily exceed 8 to 10 weeks even if one party is not attempting to deliberately delay the proceedings. If one party, for reasons of punishing the other party, for reasons of attempting to obtain a strategic advantage, or for no reason at all, wants to delay the proceedings, it may be three or four months before the court addresses the issue of access to the absent parent.[12]

At the first *pendente lite* hearing, it is not uncommon for the court to insist on an agreement on all aspects of custody, *pendente lite*. Either there is an agreement or not. The court seldom inquires whether there is a partial agreement or even whether there is or can be an interim agreement. If the parties haven't agreed to everything *pendente lite*, they have agreed to nothing, so reasons the court. Parties will be sent to the Case Flow Coordinator to obtain a hearing date

In view of the practical problems in addressing the needs of children at a meaningful time, the Judicial Department should consider the enactment of rules or policy to permit Pre *Pendente Lite* orders based upon partial access agreements or unchallenged parental history. A Rule of Court change that requires that a proposed parenting plan be submitted with a Motion for Custody, Visitation or Access *pendente lite*, to be answered prior to a hearing with an answer/cross complaint would be of assistance in defining the areas of agreement or the claims of fact if there is no agreement.[13] The same rule could be applied to CGS §46b-15 petitions that involve a child or children.

Domestic abuse petitions under CGS §46b-15

A second barrier to access to one's children is when CGS 46b-15 petitions are initiated. More often than not, the result of such an order is the immediate cessation of

[12] Because the court fails to enter any order, there is no case or controversy from which to appeal. As the Appellate court pointed out: "the longer the child is placed in some new setting in which he may be content, the more harmful the effects of a second uprooting. *Brennan v. Brennan* 85 Conn. App. 172, 857 A.2d. 927 (2004)

[13] P.B. §25-30 requires the parenting plan to be filed at the 10 days before the Special Masters date which is at least 90 days from the return date.

access between the respondent and his or her children especially if asked for by the alleged victim.[14]

CGS Sec. 46b-15 proceedings have an important function but when used give the applicant an advantage in a custody proceeding. There is no requirement that the court articulate or make specific findings of fact which clearly demonstrate the injury, harm or damage to the children that might reasonably be expected to occur if parental access is granted. (See e.g. Mass. G.L. c.208, §28A relating to post judgment *ex parte* modifications)

The form of the Application for Relief from Abuse, JD-FM-137 effectively denies parenting rights – without a hearing – by prohibiting the respondent from entering the family dwelling, having any contact, in any manner with the applicant, from coming within 100 yards from the applicant, from entering the premises of the children's school/day care.[15] It may also, by having two boxes checked, award temporary custody and deny visitation rights

It is presumed that the court has neither interest, time, nor ability to fashion an order *ex parte,* which would affirmatively grant specified periods of access to the respondent and his or her children prior to hearing. The expectation is that it is only for 14 days,[16] (and any continuances granted) and no harm will occur by reason of stripping a parent of his or her rights for that limited period of time.

Since the judge entering an *ex parte* order is not required to make any findings of fact, or otherwise explain the judicial thought process, we can only speculate as to the reasons. However, one must assume that a "presumption of guilt" is applied and no presumption of the needs of the children to have access are recognized.

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[15] The result seems to depend primarily on what the applicant for the restraining order checks on the form.

[16] 46b-15 (b) requires a hearing within 14 days, except for good cause. As a practical matter, if the hearing is lengthy it will be postponed for "good cause."

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5 REASONS WHY *EX PARTE* ORDERS DENYING ACCESS ARE SO EASILY OBTAINED

Judicial self preservation

It appears that judicial self preservation coupled with a devaluation of one parent, the ignorance to the consequences to the parent denied, the ignorance to the consequences to the children denied, as well as common but erroneous assumptions contribute to the nearly automatic wholesale issuing of *ex parte* orders. Judges are more apt to be criticized if they fail to issue a restraining order, in which actual violence thereafter occurs, than if they issue one that was undeserved.

The belief that an *ex parte* order is benign and causes minor inconvenience

To err on the side of caution suggests that issuing a restraining order which is undeserved is better than not issuing one that is deserved. The effects are anything but benign for a parent who suddenly and without warning finds him or herself without access to personal property, medicine, the extra pair of reading glasses, and more importantly access to one's children – either on or off the playground. Access to the home computer, telephone numbers and email addresses, documents records, bank statements is denied. A person who is removed from his home is in the position of one whose home has burned down or been destroyed by a flood. While the court believes that letting a person have access to the house for the limited purpose of obtaining personal property, the police have their own rule that requires the alleged victim be present and permit the accused to remove only those items that victim permits.

Furthermore, we see an increase in marginally adequate parents resorting to use of §46b-15 petitions as a way of levering into a custodial position not otherwise deserved. Thus the court, by the wholesale granting of *ex parte* orders, frequently places the children with the less stable, less competent parent. This is the natural consequence of one sided, self serving, unsubstantiated accusations.

Fallacy that those who are abusive towards a spouse will be abusive towards children.

Some judges believe that if a parent is abusive towards a parent he or she will be abusive towards a child. This is a common fallacy, because the evidence shows just the opposite. Wallerstein and Kelly observed: "…men who readily resorted to violence in response to their wives did not necessarily beat, or even spank their children" [17]

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[17] Wallerstein and Kelly*, supra* p. 15.

Fallacy that children would be better served if the arguing/fighting parents separated.

The second common fallacy is that if a child has been present during an altercation the child would welcome the decision of the parents to separate. This has been challenged by at least one landmark study.[18] In fact "The intensity of the fighting between the parents and the amount of violence within the marriage that the child witnessed were not by themselves associated with the child's feeling of relief at the time of divorce.[19] The judge who signs the *ex parte* §46b-15 orders, should search the affidavit for evidence that the children would be harmed by continuing a relationship with the soon to be absent parent, and issue orders that maintain that relationship if there is no evidence of potential harm. If necessary children could be picked up and delivered to school or daycare to avoid contact between the parents while yet permitting a parent to parent.

Unintended consequences of an *ex parte* order

Unintended consequences of the *ex parte* no contact order with one's child include the potential of inadvertently and irrevocably severing the relationship between a parent and child. If an allegation is made of child sexual or physical abuse, or that DCF is investigating some complaint or that the police are investigating some alleged crime involving a child, one can anticipate an indefinite delay until (a) the person enters a plea, (b) a dissolution of marriage occurs or (c) the person gives up. During this time the custodial parent may be able to alienate the child so that, if the charges are determined have been unfounded, the court has no suitable remedy to undue the estrangement.

During the initial period of separation, especially if under police escort, the young child may believe that the absent parent is a bad person who will go to jail and never see him or her again. The child may believe that he or she is unloved, and will be abandoned. The younger children consider the departure as terrifying, and internalize feelings of rejection. They often fear that they will wake up without either parent. After all, if one parent can abandon him or her, isn't it reasonable to assume that the other parent will also leave?[20] Sometimes the price of security for that child is adopting the custodial parent's belief system – no matter how at odds with reality it may be.

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[18] Wallerstein and Kelly found: "Less than 10 percent of the children were relieved by their parents' decision to divorce despite the high incidence of exposure to physical violence during the marriage*" supra*, p. 35.

[19] *Id.* p. 53

[20] See generally, Wallerstein and Kelly*, supra* pp 47, 48.

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Criminal Arrests – Condition of Bond - CGS §54-63(c)

A third barrier to parental access is the orders that flow from when a person is arrested for an incident that involves loosely defined domestic violence.

Although we try to protect children from testifying against their parent in open court, as a society we often subject children to witnessing a parent's arrest and being escorted out of the home, based on a claim of domestic violence. If not that, the parent disappears without explanation. Is he dead? Is he in prison? Will I ever see him again? From the child's point of view, the reassurance effectuated by having contact with his or her father or mother, will not occur. [21]

The minimum amount of proof necessary to prove domestic violence - visible bruise, blood or broken bone[22] - is not required. Not even the need for medical attention is a precondition for an arrest and the resulting no contact order. If a person claims that he/she was pushed or is afraid of being pushed in the future, that is all that is required for an arrest. The arrest may be based upon the acting abilities of the complainant.

If a person is arrested for a crime that involves family violence the arresting officer has the ability to impose certain no contact orders. Minor misdemeanors, such as disorderly conduct and breach of peace, now carry draconian penalties well beyond the customary treatment of Class C misdemeanors if it involves a spouse or protected person. Discretion of the arresting officer has been removed.[23]

> "(b) If the person is charged with the commission of a family violence crime, as defined in section §46b-38a, … the police officer shall, … promptly order the release of such person upon the execution of a written promise to appear …and may impose nonfinancial conditions of release which may require that the arrested person do one or more of the following: (1) Avoid all contact with the alleged victim of the crime, (2) comply with specified restrictions on the

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[21] Wallerstein and Kelly observed "For many children the visit to the father to establish where he was in space – that indeed he existed, and had a bed and a refrigerator – was immensely important in allaying the intense anxieties of the post separation period. *Id*. P 47

[22] Occasionally referred to as the Judge Draginis rule.

[23] See interview with Professor Suk, Harvard Law School, *op cit A Promise to Ourselves*, Alex Baldwin, St Martin's Press NY2008 pp 191-200.

person's travel, association or place of abode that are directly related to the protection of the alleged victim of the crime, or (3)…."CGS §54-63(c)[24]

The person will be presented to court. The bail commissioner, acting under CGS § 54-63d has the ability to order that the defendant "avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense." This may include children who were present or within hearing distance.

Consequently, without any sworn testimony before an impartial tribunal, the parenting rights of a parent have been stripped for an indefinite period of time because of the judgment of the arresting police officer who presumably was not present and has no knowledge of the parenting abilities of either parent or the needs and attachments of the children.

The criminal court may amend the order to state that "Visitation as may be arranged by a third party" is permitted. That hardly guarantees that the children will see the accused.

That uninformed judgment of the arresting officer is carried forward. Just as Newton's First Law of Motion that objects at rest remain at rest and objects in motion remain in motion until other forces are applied, the judgment of the arresting police officer often continues until the charges are finally disposed.

Although the Connecticut Supreme Court permits the criminal court to hold a "limited" hearing on the issue of the terms of the protective order, it must be sought at the first appearance[25] – a time when the defendant is often without legal representation. Most likely he is not aware of the need to request a hearing and is unaware that the no contact order will extend indefinitely.

At the first appearance the Family Violence Intervention Unit (Family Relations Office) [26] is not in a position to make anything but the safest recommendation: "No

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[24] Because violation of a Protective Order is a Felony, § 53a-223, scare family resources are often directed towards the retaining of a criminal lawyer, even though the underlying crime may be a Class C misdemeanor and does not involve assault.

[25] *State v. Fernando A.* 294 Conn 1, 981 A.2d 427 (2009)

[26] Authorized under 54-63c(b) and 46b-38c

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contact. Keep the orders in place." The alleged victim is represented by the government provided State's Attorney, the government provided Victim's Advocate, and perhaps a private attorney retained by the alleged victim. Since the use of these criminal protective orders provide a strategic advantage in obtaining custody and possession of the house, even if a parent were in favor of the children having access with the alleged perpetrator, his or her attorney might advise against it.[27]

During this proceeding, children are not represented. Judges will hear victim supporters. The needs of the children are overlooked by the criminal court and continue to be for as long as the criminal case is pending. The present system does not permit the Criminal Court to affirmatively address issues of the needs of the children which may be at odds with the need for protecting the alleged victim.

The appellate court has decided that the Family Court has no jurisdiction to modify a no contact order entered by the criminal court. *State v. Dellacamera,* 110 Conn. App. 653, 955 A.2d 613 (2008).

Even when the criminal court believes that parental access should be encouraged, it has no ability to fashion orders of visitation. Presumably there is no *in personam* jurisdiction over the victim and no subject matter jurisdiction over granting affirmative rights of visitation. Nor would the criminal court have the ability to enforce its order, lacking jurisdiction over the alleged victim.

It is through examination of these types of gaps and their unintended consequences that the importance of model parenting plans for resolving inadequacies of court proceedings becomes clear. The adoption of a model parenting plan, together with information in developing parenting plans would go a long way toward resolving the inadequacies of the family court in terms of parental access when most needed. Legislation may be needed to carve out parental access from criminal court protective orders and make Family Court approved detailed parenting plans binding notwithstanding conflicting Criminal Court orders.

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[27] It might also be considered inconsistent with the attempt to paint the perpetrator as a monster.

6. SOLUTIONS - EITHER PRESUMPTION OF SHARE PARENTING *PENDENTE LITE* OR THE ADOPTION OF MANDATORY ACCESS MINIMUMS

PENDENTE LITE PRESUMPTION OF SHARED CUSTODY

Three states provide a presumption of shared custody *pendente lite.*

Oklahoma requires the presumption to be applied to *pendente lite* orders

> 43 O.S. §110.1. Policy for equal access to the minor children by parents It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage.
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> To effectuate this policy, if requested by a parent, the court shall provide substantially equal access to the minor children to both parents at a temporary order hearing, unless the court finds that such shared parenting would be detrimental to such child. The burden of proof that such shared parenting would be detrimental to such child shall be upon the parent requesting sole custody and the reason for such determination shall be documented in the court record.

Alaska provides the same: Temporary Custody of the Child.

> Unless it is shown to be detrimental to the welfare of the child considering the factors under AS 25.24.150 (c), or unless the presumption under AS 25.24.150 (g) is present, the child shall have, to the greatest degree practical, equal access to both parents during the time that the court considers an award of custody under AS 25.20.060 - 25.20.130. AS 25.20.070.

Louisiana provides by statute: "To the extent it is feasible and in the best interest of the child, physical custody of the children should be equal." La. Rev. Stat. Ann. § 9:335 A (2)(b).

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MANDATORY MINIMUM PARENTING ACCESS:

Other states, or subdivisions have minimum access schedules.

All states with mandatory guidelines indicate that they shall not be applicable if the child is placed in danger. Some indicate that they are inapplicable if there has been any domestic violence. Others include risk of flight as a reason not to grant shared custody.

Indiana, although requiring that the Guidelines shall be applicable to all child custody situations, specifically excludes situations "involving family violence, substance abuse, risk of flight with a child, or any other circumstances the court reasonably believes endanger the child's physical health or safety, or significantly impair the child's emotional development."[28]

Mandatory

Those states that have a statutory recognition of the right of children to have frequent and continuing contact with both parents, provide language to that effect in their parenting plans. Some go further and specify minimum access schedules.

Arizona, Pima County has published guidelines "for all cases in which custody or visitation of minor children is an issue…and are intended to set forth a standard which can be adjusted depending upon the uniqueness and circumstances of each family."[29]

Delaware provides**: "**Parents are encouraged to create an agreed equitable written contact schedule that fits their circumstances and their children's lives, with the following serving as a schedule when the parents cannot agree."[30]

Florida's 4th Judicial District (Counties of Duval, Clay and Nassau Counties) provides that "if the parties cannot reach an agreement as to the details of visitation, the court may impose the following visitation schedule…"[31]

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[28] www. In.gov/judiciary/rules/parenting/
[29] http://www.sc.pima.gov/?tabid=203
[30] http://courts.delaware.gov/How%20To/Visitation/?visitation.htm

Florida's 14 Judicial District (Counties of Polk, Highlands and Hardee Counties) have Child Visitation Guidelines"… that are to be used as a starting point to begin negotiations on visitation." [32]

Indiana provides: "These Guidelines are applicable to all child custody situations, including paternity cases and cases involving joint legal custody where one person has primary physical custody. "

> **Presumption "**There is a presumption that the Indiana Parenting Time Guidelines are applicable in all cases covered by these guidelines. Any deviation from these Guidelines by either the parties or the court must be accompanied by a written explanation indicating why the deviation is necessary or appropriate in the case."[33]

Minnesota provides:

> "In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child" Minn. Stat. § 518.175

Ohio – Cuyahoga County "….the following Standard Parenting Time Guidelines are to be applied in all cases subject to deviation upon the consideration of the factors in O.R.C.§ 3109.051."[34]

Texas provides: "(a) If the possessory conservator [non custodial parent] resides 100 miles or less from the primary residence of the child, the possessory conservator shall have the right to possession of the child as follows:….." Tex.Fam.Code §153.312. Another scheme applies when the non custodial parent resides more than 100 miles away." *Id*.§.153.313. The Texas guidelines do not apply to children under three but the court may provide that upon the child reaching three, the standard visitation orders automatically apply. *Id* §153.254

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[31] http://administrativeorders.com/images/ado_95_16_date3_4_2003_familylaw_local.pdf
[32] http://www.jud10.org/AdministrativeOrders/orders/Section5/Apps5-20.3/5-20-3.app4.pdf
[33] http://www.in.gov/judiciary/rules/parenting/index.html
[34] http://domestic.cuyahogacounty.us/Rules/Rule18.htm

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Utah: "If the parties do not agree to a visitation schedule, the following schedule shall be considered the minimum visitation to which the noncustodial parent and the child shall be entitled……"(Applies to children 5 to 18 years of age). Utah Code § 30-3-35.

THE ADOPTION OF AN ACCESS SHEDULE AT THE FIRST COURT APPEARANCE.

One doesn't need a rule change to require that the parties submit a pre pendente lite proposal **prior** to a hearing on a motion for temporary custody. There is no reason why the court could not review both proposals and see where commonality of access exists and enter orders consistent with the agreement, pre pendente lite.

There is no reason why the court could not furnish a standard parenting plan and require the parties, at the first court appearance decide whether there is an agreement on some issues and if not, by way of an affidavit, why there cannot be an agreement.

If one parent has been abusive, or has a drug or alcohol problem, or is a flight risk, the other parent can and should bring it to the court's attention at the earliest possible time.

But where the parties can agree on everything except Halloween, there is no reason not to enter orders consistent with what the parents do agree on.

Indeed, some states have procedures for the use of affidavits in lieu of a *pendente lite* custody hearing.

New York provides: "…temporary custody may be fixed without a hearing where adequate facts are shown by an uncontroverted affidavit."[35]

Montana requires a party to move for an interim parenting plan, and to submit a parenting plan with an affidavit. The other party may submit an opposing affidavit. The

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[35] Sec. 10.31 Necessity for Hearing, *New York Family Law Practice* West 1996.

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court may either enter a temporary order or set it down for a show cause hearing. Mont. Code Ann. § 40-4-220.

South Dakota requires the movant to file and serve the parenting guidelines which become an order of the court upon service. So. Dak. 25-4A-11.

CONCLUSIONS AND RECOMMENDATIONS:

In view of the national consensus that, absent evidence to the contrary, non custodial parents are entitled to liberal and defined weekend, holiday, school break and summer vacation visitation, one should not require full hearing and a court order to obtain it.

Family Court

(a) Enactment of legislation that would create a rebuttable presumption of shared parenting from the time of separation until the final hearing.

(b) Adoption of a PPL (Pre *pendente lite*) procedure to permit immediate relief from *de facto* separations of children from one of their parents. This procedure could use the South Dakota model[36] in which a parenting plan is served with the complaint or answer and becomes an order unless an objection is filed; or it could be served with a Motion for Temporary Access, and "taken on the papers" unless an objection is filed.`

(c) Adoption of Standard Parenting Plan:

Judicial Department should adopt a model parenting plan, such as attached to permit the parents to negotiate a parenting plan that is fair, workable and enforceable yet meets the needs of the parents and the children.

(d) Adoption of Child Development Information and other advice describing various parenting arrangements. Although ambitious, such information would be helpful to the *pro se* in fashioning detailed parenting plans. Other states invest in providing information about child development to assist parents in coming up with good parenting plans.

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[36] SD 25-4A

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(e) Revision of the procedures for applications for 46b-15 orders that specifically address the need to maintain contact between the children and the absent parent notwithstanding a no contact order.

The applicant would be required to submit a proposed and detailed parenting plan specifically addressing the issue of parental access that the court would consider. When an *ex parte* order is granted, the affidavit will explicitly state why parental access should be denied. To deny visitation or access should require more than a check on a form granting custody to the petitioner.

(f) In Domestic Violence cases - CGS §46b-15 cases, family court judges should be encouraged to be sensitive to preserving contact between children and the absent parent.

(g) Adopt specific rules that apply to continuing access to children when the Criminal Court becomes involved.

1) If the children were not the object of domestic violence, the standard parenting form should be used to obtain by consent, minimum contact between the accused and his or her children within the Family Relations Division, attached to the criminal court. The Criminal Court could adopt the methods for parental access that do not require contact between the petitioner and the respondent. It should be more specific that "Visitation to be arranged by a third party.". The orders could permit the pickup and drop off at daycare or school[37]

2) In all misdemeanor cases, legislation should provide the family court with exclusive jurisdiction to enter orders of contact between the accused and his or her children, notwithstanding the earlier order of the criminal court. The approved family court parenting plans would have precedence over criminal protective orders as it applies to children.

[37] The author knows of no reason why the criminal court could not issue an order of visitation "as the family court has or will order."

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3) The Supreme Court or legislature should revisit the procedures articulated in the *Fernandes A* case, to permit more opportunities to review the lack of contact between the accused and his or her children.

4) The legislature should address who should have final jurisdiction on access between the children and one accused of a crime.

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_____
Docket Number

_____ **SUPERIOR COURT**
Plaintiff **Court**

VS **At**

_____
_____
Defendant **Date**

Standard Parental Access Guidelines

Because children do best when both parents have a stable and meaningful involvement in their lives, it is the policy of this state, unless it is clearly shown that in a particular case it is detrimental to a child, to:

(a) Support frequent and continuing contact between each child and both parents.
(b) Encourage parents to share in the rights and responsibilities of raising their children after the parents have separated or divorced.
(c) Encourage parents to develop their own parenting plan with the assistance of legal and mediation professionals.

Parents are encouraged to create an agreed equitable written access schedule that fits their circumstances and their children's lives, with the following serving as a schedule when the parents cannot agree. Nothing herein prohibits the parents from changing the schedule upon mutual agreement. In the event of conflicting dates and times, the following is the order of priority: holidays; birthdays; summer visitation and school breaks; weekends; then weekdays. This schedule presumes that if the parents have more than one child, the visitation will be exercised with all children together.

NOTE: THIS PLAN, WHEN APPROVED BY THE COURT, BECOMES A COURT ORDER WHICH MAY BE ENFORCED BY THE CONTEMPT POWERS OF THE COURT.

This parenting plan is (CHOOSE one)

[ ] Agreed upon [ ] Proposed by_____ [ ] Developed by court
Parent's name or GAL

This parenting plan is (CHOOSE one)

[ ] **PPL Pre Pendente Lite** - Interim until the court can hear evidence concerning the best interest of the child or children.

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[**]** **PL Pendente Lite** Temporary until the court hears all issues

[ ] **Final**. All completed paragraphs shall be incorporated in the Court's final order

[ ] **Post Judgment**

OR

[ ] The following_____objects to any parenting plan entering
P**arent's name or GAL**

at this time **because :**

Use additional paper if needed

This parenting plan is for the following child(ren) born to, or adopted by, the parties:

Full Name **Date of birth**

_____

_____

_____

Jurisdiction : Connecticut [**x**] is [ ] is not the "home state" and state of habitual residence of the above children for purposes of the Uniform Child Custody Jurisdiction Act, the Uniform Child Custody Jurisdiction and Enforcement and the Hague Convention.

A. Designation for State and Federal Statutes:

[ ]The child or children named in this parenting plan is / are scheduled to reside the majority of the time with [ ] Mother, [ ] Father solely for the purposes of any Federal, State or Local law that require a designation of "custodian." They shall attend school in the town of

_____. This designation shall not affect either parent's rights under this parenting plan.

or

[ ] Within_____

Name of town

B . Parenting Access

The_____shall have parental access at all times
Mother/ Father

except as herein stated. The _____, shall have access as follows:
Mother or Father

1. Weekends: The first, third and fifth weekend , (defined as the first Friday) of every month commencing:

[ ] after school on Friday and ending at the beginning of school on Monday **or**

[ ] _____p.m Friday until Sunday at _____p.m**. or**

[ ] Other:_____

2. Three day weekends

[ ] If the weekend is preceded or followed by a State or Federal Legal holiday, that holiday shall be attached to the weekend, extending it by 24 hours.

3. Weekday

[ ] Except during the time periods identified as Winter, Spring breaks and summer visitation, the nonresidential parent shall have visitation from [ ] after school **or** [ ]_____ 5 p.m. until
[ ] _____ p.m. each Wednesday evening.
Or
[ ] beginning of school Thursday

4. Holidays:

[ ]_____ shall have the children on the holidays in Column 1 in odd-numbered years and the holidays in Column 2 in even-numbered years.

_____ shall have the children on the holidays in Column 1 in even-numbered years and the holidays in Column 2 in odd-numbered years:

Column 1	**Column 2**
Easter or other religious holiday	Fourth of July
Halloween	Thanksgiving
Christmas Eve	Christmas Day
Veteran's Day Other:	

_____ _____

5. With the exception of Christmas and Halloween visitation, holiday visitation shall be from 9 a.m. until 6 p. m the day of the holiday. Halloween visitation shall begin at 5 p.m. and end at 8 p.m. on Halloween. Christmas Eve visitation shall begin at 6 p.m. on December 24th and end at noon on December 25th. Christmas Day visitation shall begin at noon on December 25th and end at 6 p.m. on December 26th. The period between 6 p.m. December 26th and 8 p.m. January 1st shall be spent with:

Mother odd years

Father even years

Other:

6. [ ] Other: _____

_____

7. [ ] Mother's day/Father's day: On Mother's Day and Father's Day, the children shall be with the appropriate parent from 9 a.m. until 6 p.m.

8. [ ] Birthdays: In odd-numbered years, _____ shall have all the children on each child's birthday from 5 p.m. until 8 p.m. In even-numbered years, _____ shall have the children on their birthdays.

9. [ ] School Breaks (Winter and Spring): In odd-numbered years, _____ shall have all the children for all breaks from school starting at 9 a.m. the day after school recesses until 6 p.m. the day before school resumes.

_____ shall have the children for school breaks in even-numbered years.

Other_____

10. [ ] Summer Vacation: The _____ shall have summer access for two consecutive weeks commencing on Friday and ending 16 days later unless otherwise agreed. This parent shall give the other parent written or e-mail notice of summer visitation plans between March 1 and April 1 of each year. The nonresidential parent has priority of choice of summer visitation dates if notice is given as required and unless the residential parent's vacation is an annual mandatory shut-down of the place of employment. If no notice is given by April 1, the residential parent has priority in the scheduling of any summer vacation plans and the nonresidential parent may choose only those weeks in which the residential parent is not scheduled to be out of town on visitation with the children.

The other parent shall be entitled to up to two (2) weeks for vacation , which shall not be interrupted by any conflicting visitation times.

OR

[ ] Summer Vacation: The parents shall alternate weeks, commencing on the first Friday after school lets out and until the Friday preceding the commencement of school in the fall.

Each parent shall provide the other parent with destination, times of departure and arrival, method of travel and telephone number where the parent can be reached in case of an emergency when taking the children outside the parent's community.

11. Late Pick-up: The residential parent shall have the children ready for pickup at the start of all access periods. The children and the residential parent have no duty to wait for the nonresidential parent for more than thirty (30) minutes, unless notified. The nonresidential parent who arrives more than thirty (30) minutes late without prior notification for a particular visitation, forfeits that visitation, unless the residential parent agrees otherwise.

12. Drop-off: The nonresidential parent will not return the children early from visitation unless the parents agree to a different drop-off time in advance. The residential parent or

other adult well-known to the children must be present when the children are returned from visitation.

13. Canceling Visitation: Except in emergency situations, the nonresidential parent must give at least twenty-four (24) hours advance notice when canceling a visitation period.

14. Medical Treatment and Emergencies: Both parents have the right and responsibility to attend to the children's medical care when in that parent's custody. If a visit to an emergency room is required, the other parent shall be immediately notified and afford the opportunity to attend.

15. Telephone/mail/e-mail/video teleconferencing: Each parent shall permit the use of existing facilities within their home for the purpose of the other parent communicating, at reasonable times and for reasonable duration, with his or her child(ren). Neither parent shall interfere with telephone, e-mail, mail, or video conferencing between the children and the other parent at reasonable times.

16. Transportation: [ ] The _____ shall pick up and _____shall return the children. Either parent may use others to assist in transportation provided the adult well-known to the children for picking up or dropping off the child(ren) when necessary. Any person transporting the children may not be under the influence of alcohol or drugs, and must be a licensed, insured driver. All child restraint and seat belt laws must be observed by the driver. Car seats shall be exchanged when required.

Decision Making by subject matter.

Subject	**Sole Mother**	**Sole Father**	**Either**	**Both**
Major medical	**[ ]**	**[ ]**	**[ ]**	**[ ]**
Orthodontic	**[ ]**	**[ ]**	**[ ]**	**[ ]**
Education	**[ ]**	**[ ]**	**[ ]**	**[ ]**
Driver's license	**[ ]**	**[ ]**	**[ ]**	**[ ]**
Body Piercing, tattoos	**[ ]**	**[ ]**	**[ ]**	**[ ]**
Psychological testing, counseling	**[ ]**	**[ ]**	**[ ]**	**[ ]**
Underage marriage	**[ ]**	**[ ]**	**[ ]**	**[ ]**
Military service	**[ ]**	**[ ]**	**[ ]**	**[ ]**
Religious	**[ ]**	**[ ]**	**[ ]**	**[ ]**
_____	**[ ]**	**[ ]**	**[ ]**	**[ ]**
_____	**[ ]**	**[ ]**	**[ ]**	**[ ]**
_____	**[ ]**	**[ ]**	**[ ]**	**[ ]**
_____	**[ ]**	**[ ]**	**[ ]**	**[ ]**

16. School work: Parents shall provide time for children to study and complete homework assignments, even if the completion of work interferes with the parent's plans for the children. The residential parent is responsible for providing the

nonresidential parent all of the school assignments and books. Summer school which is necessary for a child must be attended, regardless of which parent has the child during the summer school period.

17. Extracurricular Activities: Regardless of where the children are living, their continued participation in extracurricular activities, school related or otherwise, should not be interrupted. The parent with whom the children are visiting shall be responsible for providing transportation to activities scheduled during visitation with that parent. Each parent shall provide the other parent with notice of all extracurricular activities, complete with schedules and the name, address and telephone number of the activity leader, if available.

18. International Travel: Both parents [ ] consent [ ] object to the following named child or children_____ traveling out of country. The child(ren)'s passport and birth certificates shall be held by _____and surrendered to the other parent at the time travel arrangements are being made.

19. Out of State Relocation: Unless there is a written agreement signed by the parties or an order of the court, the children shall not be relocated from the State of Connecticut. Each parent who is contemplating relocation shall notify the other parent in writing of that person's intention 90 days prior to any relocation, if circumstances permit.

20. Notice of Change of Address – to Court and Other Parent: Both parents shall give written notice to the other parent immediately upon any change of address and/or phone number, unless a restrictive order has been obtained from the Court. If the party is self represented, that party shall file a substituted appearance with the Superior Court which has jurisdiction over this agreement.

21. Neither parent is permitted to make **plans for the children during the time period allocated to the other parent without written consent or order of the court**

22. Alternate dispute resolution:

a. The parties agree that in the event of a dispute, the parties shall consult _____ in an attempt to resolve the dispute. The parties agree to share the cost, if any, in the following manner:

i. [ ] 50/50

ii. [ ] a percentage as found on the child support guidelines worksheet.

This shall not apply to issues of contempt.

23. Breach:

[ ] If a breach of this parenting plan results in the other parent employing an attorney to enforce the terms of this plan, then the parent breaching the parenting plan shall pay the reasonable attorney's fees, costs and damages incurred y the other parent in the enforcement action, whether or not a finding of contempt has been made.

[ ] The breach of this parenting plan shall be construed by any court of competent jurisdiction as a substantial and continuing change of circumstances sufficient for the court to have jurisdiction to modify this agreement

[ ] A violation of this judgment may subject the parent in violation to civil or criminal penalties, or both.

23. Information Sharing and Access
Unless there is a court order stating otherwise:

Both parents have equal rights to inspect and receive the child(ren)'s school records, and both parents are encouraged to consult with school staff concerning the child(ren)'s welfare and education. Both parents are encouraged to participate in and attend the child(ren)'s school events.

Both parents have equal rights to inspect and receive governmental agency and law enforcement records concerning the child(ren).

Both parents have equal rights to consult with any person who may provide care or treatment for the child(ren) and to inspect and receive the child(ren)'s medical, dental or psychological records, subject to other statutory restrictions.

24. Other parenting agreements important to the parents or child(ren) are listed below or are set forth in the _____number of attached pages**.**

_____ _____
Plaintiff Attorney/witness for Plaintiff

_____ _____
Defendant Attorney/witness for Defendant

_____ _____
Guardian ad litem_

ORDER:

SO ORDERED:

_____

Judge Assistant Clerk

DATE_____

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