

## Judicial Guidelines on Children and Divorce

- 1. Child development occurs in the context of important relationships.**  
Development is enhanced and resilience is increased by important relationships with multiple, caring adults. If children do not have any relationship with a caring adult, development does not occur and they will “fail to thrive.”
- 2. Do not assume who is a capable caretaker based on gender, sexual orientation, disability, or age, or any other single factor.** Parental ability is learned, not inherited or given. It is learned “on the job” and is most dependent on two factors: time spent doing the job, and ability to tune in to the child’s needs.
- 3. Beware of (but not oblivious to) status quo arguments.** Divorce creates an opportunity for relationships to change and develop between parents and children. Status quo decisions have an unfortunate way of becoming the basis for long-term resolutions. On the other hand, it takes people time to adjust to dramatically different arrangements. If you do make a status quo decision, be prepared to monitor it and followup, especially if there is a domestic violence allegation.
- 4. Beware of checklists and custody guidelines suggesting specific schedules for specific ages.** There are such substantial differences between children and between families that following strict guidelines may do more harm than good. It may be difficult at first to know how psychological material will help and tempting to want to have a checklist. It is better to understand a bit of the background theory in order to know when to apply and when to deviate from a guideline.
- 5. Schedules and age.**
  - Babies and toddlers do not have a developed sense of time and cannot be reassured easily with words. Therefore, schedules must be in smaller time frames.
  - While one should be highly suspicious of guidelines for custody schedules because of temperamental differences and differences in developmental timing, a general rule to start with is that a child should not be away from a primary caretaker for more nights than the child has years.
  - The passage of time may be a change of circumstance. The cognitive ability of the child, the child's ability to cope with the transition, and the nature of the assistance provided by the parents dramatically change the type of schedule suitable to the child.
- 6. Mitigate conflict between parents.** This is one of the most important goals of Family Court Services and the court. Important interventions include:
  - Setting a tone and expectation that parents will rise above their differences for the sake of their children (except when there are concerns about safety, domestic violence, or substance abuse)
  - Providing education, especially in the form of orientation.
  - Ordering parents to take divorce education classes.

- Ordering coparenting counseling to help parents implement custody orders.
  - Ordering continuing mediation, to be held privately when appropriate.
  - Providing structure in the form of specific and detailed orders.
7. **Children, especially preverbal children, need caretakers to be in contact with one another.** Frequent contact with each caretaker and good communication between parents is more important than overnights in providing a base for attachment with each parent. Structuring this communication or ordering the parents to develop these skills is important to the success of a schedule.
8. **The major factors affecting the well-being of children of divorce are:**
- Not losing contact with a parent.
  - The well-being of their primary caretakers.
  - Lack of conflict between parents.
  - Minimizing other changes (stresses) (not losing friends, not changing schools, etc.).
  - Economic security.
9. **Children’s preferences.** Listening to children to find out what they want is a very tricky business. Their perspective changes easily and frequently and is highly dependent on the influence of the last person they spoke to. (For example, do you know who drove them to court for the interview?) Children want to take care of parents; often children are more attuned to what they believe will make a parent happier or more comfortable than they are to their own best interest. There is also a biological component; adolescents over 16 are developing cognitive abilities that allow them to take perspectives that are independent from their parents.
10. **Child and parent education.** Educating parents and children about divorce *does* make a difference. Education helps to encourage agreements, discourage conflicts, and minimize children’s guilt. Investigate what educational resources are available.
11. **Most people bounce back from the impact of divorce within two years.** Divorce itself seems not to be the crucial factor that permits children to do well or not. Predivorce family functioning and postdivorce changes in circumstance and relationship make a difference in how children will fare, independently of the fact of the divorce. Two years in the life of a child, however, is a very long time. If a case involving children has been pursued continuously over two years, consider radical solutions such as judicial activism, case management, minor’s counsel, etc.
12. **You cannot solve the unsolvable.** Family court is unusual because if you are going to survive as a judge, it is important not to become attached to an outcome. You can only do your part. The rest is up to everybody else.
13. **How activist should you be?** A good motto for checking your work is “Would the state be permitted to intervene if these folks were not getting divorced? On the other hand, is there some danger to the best interest of the child?” Another question might

be “Is what I am doing part of the solution, or am I being used by one of the litigants?”

14. **Avoid becoming cynical about families.** More than 50 percent of divorcing couples do not have disputes regarding their children. Of those who do, the majority are good people who have serious relationship problems and sincerely want to move on. The truly bad actors or those with severe psychological problems are a tiny minority, but they will consume a disproportionately large amount of your time.
15. **Custody issues are “problems to be solved,” but the system re-enforces “disputes to be settled.”** Disputes create winners and losers. This approach hurts children because it encourages the parties to emphasize weaknesses and failings of the other parent, and to memorialize those views in the record. Some attorneys encourage parents to view everything that happens as “evidence” in the service of winning, rather than “information” for use in solving a problem. Over time, this emphasis can distort how family members relate to one another. At the end of the day, however, the parents must still raise their children. Insofar as the process can support and maintain parental well-being, it will also serve the children.
16. **How a decision is transmitted is as important as its content.** Family law bench officers must deal with the parties’ perceptions of fairness. How parents feel about the court process often matters as much as the content of the order. How they feel about the decision affects their ability to make it work for the child, and how they feel has as much to do with the process as it does with the actual order.