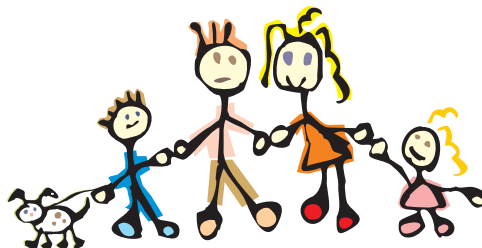


## Family Law A Practice Focus

# No Approximate Parents

*States should reject ALI's proposed standard for child custody disputes.*



BY LINDA A. DELANEY  
AND MARGARET J. MCKINNEY

Just when you thought it was safe to stay late at the office and (again) leave to your spouse the bedtime reading of *Goodnight Moon*, along comes the American Law Institute's Approximation Rule.

And this ALI proposal isn't a story that you can skip without risking nightmares. If states adopt this rule, the unfortunate result will be to limit parents' access to their children and jeopardize the children's best interests.

With the demise of the custody preference for mothers and the rise of joint custody, today's divorcing parents can reasonably expect to spend substantial time with their children after the split, irrespective of their parenting role during the marriage. The majority of the social science data validates those expectations. It seems that, as a rule, children really do fare better when both parents remain active participants in their lives.

Scientific data notwithstanding, some people remain uncomfortable with the rise of joint custody and the enigmatic "best interests of the child" analysis. When clients ask how a court determines a child's "best interests," we can provide no standard analysis. Certainly a jurisdiction's custody statute provides factors for the court's consideration, but the application of such statutes varies from judge to judge and family to family.

Into this murky landscape steps the ALI, proposing a new way to "standardize" the best-interests analysis. If adopted, the ALI's proposal could turn back the clock at least a decade to a time when wage-earning parents routinely had limited access to their children after a divorce.

### THE APPROXIMATION RULE

The American Law Institute was established in 1923 "to promote the clarification and simplification of the law and its better adapta-

tion to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." It is upon this foundation that the ALI put forth its 2002 *Principles of the Law of Family Dissolution: Analysis and Recommendations*.

While we wholeheartedly support the ALI's mission and some of its principles of family law, we are troubled by its framework for analyzing legal and physical custody. Known as the Approximation Rule, the ALI's recommended framework threatens to undermine the current, more forward-looking approach to custody arrangements.

Simply put, the ALI's principles state that unless the parents agree otherwise, "the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation."

This rule thus roots the determination of the child's best interests in the individual history of each family. The ALI proposes this standard of divvying custodial responsibility in an effort to avoid generalizations and subjectivity regarding custody determinations. It seeks to standardize the best interest analysis.

The ALI principles are percolating through legal communities and legislatures throughout the country. Proponents are trying to drum up support for implementing them. In Maryland, where legislation is pending to establish a presumption of joint custody, proponents of the ALI principles are expected to oppose the legislation.

To be fair, the ALI does qualify the rule to refine its application. For example, time allocation would not go below a "presumptive" amount so that each parent would receive minimally sufficient time to maintain a relationship with a child, even if this amount of time exceeds the parent's previous level of involvement.

The ALI also proposes that the court should accommodate the reasonable preferences of older children. If there were a distinct understanding of caretaking roles that could not be replicated using the Approximation Rule, that understanding would be considered in determining custody.

Finally, the principles suggest that practical considerations—of distance between residences, cost and difficulty of transportation,

**Family Law**  
A Practice Focus

and the daily schedules of those involved—should be considered.

Nevertheless, these considerations do not outweigh the substantial problems with the ALI proposal.

### **GIVE THEM TO THE NANNY?**

This backward-looking ALI standard may make a certain sense to the uninitiated. But like many other things involving children of separation and divorce, the right way to think about these issues is counterintuitive.

What children need after divorce does not really relate to the division of labor during the marriage. The family changes upon separation of the parents, and so must our analysis.

The problems with the Approximation Rule are numerous. In Washington, D.C., where many households have two working parents, should applying this rule mean that the children go live with the nanny?

That question may sound absurd, but in many D.C.-area homes, third-party caregivers spend more time with the children than either parent. Clearly, the essence of parenting is far more than just hours logged.

With long commutes and demanding careers, all too few D.C.-area parents spend as much time as they would like with their children. In our experience, this is particularly true for a parent who is the primary financial support of the family. The ALI rule would penalize these parents for the time they spent earning financial support for their children, a result that is unfair to children and parents.

Granted, more predictability in custody determinations might be beneficial to families (not to mention judges and lawyers). Whether such predictability can be achieved through standardization of the best-interest analysis is an open question, but the Approximation Rule is not the answer.

### **DISCOUNTING THE OBVIOUS**

How did the ALI come up with this idea? The rule is based on the assumption that the division of caretaking responsibilities during the marriage likely reflects various important factors, “including the strength of the emotional ties between the child and each parent, relative parental competencies, and the willingness of each parent to put the child’s interests first.” Proponents of the rule have argued that the division of labor during the marriage expresses the parents’ “true” preferences and that those preferences should be honored after divorce.

But as far as we can tell, the principles are not supported by any reliable social science data. And the rule discounts what we all know: Parents take on caretaking roles during a marriage as a result of many different factors, including intricate bargains between spouses. These factors are often unrelated to the way the parents would prefer to live. Parenting roles are influenced by earning capacities, family history, and assumptions about gender, to name a few.

Common sense, and our nearly 30 years of combined experience with parents and children of divorce, leads us to agree with opponents of the rule.

In our experience, the parent who spends more time with the children during the marriage is not necessarily the more emotionally healthy or competent parent. Nor is the parent who spends more time at work necessarily any less competent or any less interested in his or her children.

Although clearly relevant, the amount of time spent with the children before the divorce is not a reliable predictor of a parent’s ability to put the children’s needs first.

Most important, children do not necessarily have less of a connection with one parent just because he or she is home fewer hours. There are simply too many layers to a family’s dynamic to limit the analysis to historical roles.

We also have noticed that parents’ roles often change over time. The parent who spent the most time with the children as preschoolers may not be the parent who spends the most time helping with algebra or preteen sports.

Ask any custody evaluator, and you will hear that exposure to conflict is the single most important factor in determining how the children will survive the divorce. A competent custody evaluator will tell you that if a parent is wonderful in every way except for an inability to insulate the children from the adult conflict, that failing should be a major factor in the recommended custody arrangement. Indeed, such a parenting flaw may lead the court to significantly reduce the amount of time that parent ultimately spends with the children.

### **LOOK TO THE FUTURE INSTEAD**

Even if we could get beyond the principles’ failure to acknowledge the importance of conflict exposure and other complicated psychological dynamics, we shudder to think about the extremely problematic “he said/she said” aspect of relying on family history.

Sit with any two divorcing people, and you will likely hear diametrically opposed views of their marriage. What reason do we have to believe these views will not extend to their reported history of caretaking?

If family history becomes the driving factor in custody determinations, the motivation of parents to argue about who did what during the marriage and to engage in “divorce planning” will be even higher than it already is. The resulting protracted legal proceedings place children at risk.

And what about parents who share caretaking in a way that cannot be replicated post-divorce? For example, one parent handles mornings and the other handles evenings, or one is in charge during the week, but the other is in charge on weekends. In those instances, the analysis would return to the current best-interest standard.

So why abandon that standard in the first place? Children care much more about what their future holds than what happened in the past. Their anxieties generally revolve around when they will see their parents—both of them.

Divorce is a tragedy for children and parents. Children often feel the loss all the more keenly because their parents are so consumed with their own feelings that they become unavailable to the little people who were previously the center of their universe. For children, the loss has many layers, but it is usually tempered when they know that both parents will remain in their lives.

In fact, it is our experience that parents who were not very involved during a marriage often become better and more involved parents after divorce. Perhaps this occurs by necessity rather than conscious choice, but it occurs nonetheless. Children clearly benefit from that result.

We owe it to our children to give both parents a chance to be better and fully involved caretakers, rather than arbitrarily assigning them a role they may not have chosen in the first place.

---

*Linda A. Delaney and Margaret J. McKinney are partners in the Bethesda, Md., firm of Delaney, McKinney & Clark, which practices family law exclusively. Their e-mail addresses are ldelaney@delaneylaw.com and mmckinney@delaneylaw.com, respectively.*