

JUDICIAL DISCRETION AND THE VOICE OF THE CHILD IN RESOLVING CUSTODY DISPUTES: COMMENTS ON THE THINK TANK REPORT

Hon. Sondra Miller

Dear AFCC Think Tank on Research, Policy, Practice, and Shared Parenting:

Thank you for your impressive report and the opportunity to review and reflect on its considerations and concerns.

My views reflect my experiences as a judge (21 years: 3 years, Westchester County Family Court; 3 years, Ninth Judicial District Supreme Court; and 15 years, New York State Appellate Division, Second Department) as well as my experience prior to the judiciary as a practicing attorney and my current experience as chief counsel to McCarthy Fingar LLP in White Plains, New York, where I concentrate on mediations, arbitrations, collaborative law, and appeals.

Points of Consensus: I agree with Points 1, 2, 3, 4, 5, 6, 7, 9, 10, and 12.

As to Consensus Point 8, I do not agree with the majority of Think Tank professionals who support a presumption of joint decision making. I prefer the case-by-case approach per the views of the minority. In my experience, presumptions all too often are applied by the courts reflexively and, as noted in the report, under some circumstances, a presumption of joint decision making may result in harmful consequences to parents and children.

Consensus Point 11: I would add as an important decisional factor the “voice of the child,” which, if the child is competent and mature enough to express his/her wishes, should be accorded substantial weight (per New York law).

Domestic Violence: I am in agreement with the warning expressed by some commentators as to domestic violence concerns regarding shared parenting or decision making. The complexity of domestic violence requires the greatest protection for the victims and their children, which largely prevents the cooperation and communication required.

Research would be most welcome and valuable in the following areas:

1. Which is worse—the harm suffered by children from inappropriate shared parenting or the harm suffered by the lack of shared parenting when appropriate?
2. When there is “moderate conflict,” can shared decision making be workable, and how?
3. What are the positive/negative effects of children alternating between homes regularly? Does this cause more anxiety than benefits?
4. The effect on toddler/infants of overnight visitation.
5. How to deal with the “alienation” factor or the “friendly parent” factor, i.e., how much weight should be afforded those factors? Unfortunately, significant case law reflects the courts’ affording great weight to these factors while not considering the other multiple “best interest” concerns relating to custody and parenting time issues.
6. Should a judge be empowered to question parental decisions and on what basis? Manifest injustice? The best interest of the child? Judicial discretion? I vote for the latter. In my view, judicial discretion is inevitable in ultimately determining the “best interest of the child.” Clearly, we need competent judges who have appropriate training in order to reach reasonable conclusions. However, in any event, in the last analysis “the buck stops with the court.”

Correspondence: smiller@mccarthyfingar.com

Honorable Sondra Miller was appointed by Chief Judge Judith S. Kaye as Director of New York State Office of Court Administration, Office of Matrimonial and Family Law Study and Reform, (formerly, Office of Family Services). Judge Miller is also Chief Counsel at McCarthy Fingar, LLP. She leads the Firm's Appellate Practice. Judge Miller is a mediator, collaborative lawyer and a member of the Firm's Litigation and Matrimonial and Family Law groups.

Justice Miller was appointed to the Appellate Division of the Supreme Court, Second Department by Governor Mario Cuomo in January 1990 (retired January 1, 2006). She served as a New York State Supreme Court Judge in the Ninth Judicial District, having been elected in 1986, and served as a Family Court Judge in Westchester County from 1983–1986. Among Justice Miller's "firsts" are her law degree from Harvard Law School (she was in its first class to admit women); her election to the Supreme Court, Ninth Judicial District in November 1986 (the first Democrat to win a contested election in the 9th Judicial District in nearly 100 years); and her appointment as Associate Justice, Appellate Division, Second Department, in January 1990 (the first woman in the 9th Judicial District to be so recognized).

Judge Miller is the Co-Chair of the New York State Task Force on Family Violence. She is a Founder and Past President of the Westchester Women's Bar Association and former Vice-President of the Women's Bar Association of the State of New York. She is Founder and former Co-President, and former Vice President of Judges and Lawyers Breast Cancer Alert (JALBCA).

Judge Miller has participated in the following: Commission Member, Governor's Permanent Judicial Commission on Justice for Children; former Commission Member, NYS Child Support Commission; Member, New York State Bar Association Special Committee on Justice and the Community; Member, Board of Visitors and Jurist-In-Resident, Pace University School of Law; Director, Benjamin N. Cardozo Society; Member, Advisory Board, The Center for Children, Families and Law, Hofstra University School of Law/North Shore-Long Island Jewish Health System; and Member, Parent Education Advisory Board (statewide).