

THE ORIGIN AND EVOLUTION OF FLORIDA'S  
PRESUMPTION AGAINST ROTATING CUSTODY: A  
GUIDELINE FOR FLORIDA JUDGES

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I. INTRODUCTION

Rotating custody, also known as joint, alternating, divided, split, and shared<sup>1</sup> custody, is defined as shared physical custody of a minor child and shared parental responsibility.<sup>2</sup> In rotating custody arrangements, the child lives with each parent for a substantial amount of time, or at least thirty percent of the time.<sup>3</sup> Some authorities define rotating custody more strictly, limiting the definition to an arrangement where each parent has custody of the child fifty percent of the time.<sup>4</sup> Because, however, Florida courts and other authorities consider custody arrangements providing that the child lives with each parent for a substantial period of time to be rotating, this Comment follows the more flexible definitions of the term.<sup>5</sup>

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1. Nelson v. Osgood, 689 So. 2d 1286, 1286 (Fla. 1st DCA 1997); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, COMM. ON THE FAMILY, DIVORCE, CHILD CUSTODY AND THE FAMILY 930 (1980) [hereinafter GROUP FOR THE ADVANCEMENT OF PSYCHIATRY].

2. See Wilking v. Reiford, 582 So. 2d 717, 719 (Fla. 5th DCA 1991).

3. CHILDREN'S RIGHTS COUNCIL REP. 102, THE CASE FOR JOINT CUSTODY 16 (1985) [hereinafter CHILDREN'S RIGHTS COUNCIL]; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 1, at 930.

4. Goins v. Goins, 762 So. 2d 1049, 1051-52 (Fla. 5th DCA 2000); Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 951 (1998).

5. Bracken v. Bracken, 704 So. 2d 746, 747, 748 (Fla. 4th DCA 1998) (affirming the trial court's final judgment of dissolution providing that the father have custody of the child for eleven consecutive days each month); Quinn v. Settel, 682 So. 2d 617, 618-19 (Fla. 3d DCA 1996) (affirming the trial court's order that the father have custody of the child

Rotating custody means more than just alternating the physical custody of the child. It also means that the parents have equal child-rearing rights and responsibilities.<sup>6</sup> Rotating custody arrangements allow the parents to continue to share authority over the child, just as they did in the marriage.<sup>7</sup> Therefore, “neither parent is in a position to unilaterally impose his or her will on the other parent.”<sup>8</sup> Furthermore, because each parent retains the authority to make decisions for the child, the parents must be able to cooperate for a rotating custody arrangement to benefit the family.<sup>9</sup>

Courts have consistently been reluctant to order rotating custody or to enforce agreements between the parents providing for rotating custody. For example, both the Roman law and the English common law preferred giving the father sole custody when the marriage terminated.<sup>10</sup> This presumption was so obstinately adhered to that the “law would not give effect to . . . the paternal right . . . being bargained away.”<sup>11</sup> In other words, upon dissolution of the marriage, the parents were not allowed to agree that the mother would have custody of the children. Instead, because the father was entitled to his child’s earnings and services and because the law obligated the father to maintain and support his child, custody of the child was always awarded to the father.<sup>12</sup>

In the early 1800s, some English courts began to abandon the idea of absolute paternal rights to custody and started enforcing rotating custody agreements to accomplish the goals of giving “both parents a fair intercourse with [the children]” and of encouraging an “affectionate regard for the character and person of both [parents].”<sup>13</sup> Although rotating custody was sanctioned as early as 1848 in England,<sup>14</sup> the courts subsequently adopted a preference for awarding sole custody of children under fourteen to the mother.<sup>15</sup> Finally, in

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during the eighth, eleventh, and twelfth grades and that the mother have custody of the child during the ninth and tenth grades); CHILDREN’S RIGHTS COUNCIL, *supra* note 3, at 15-17; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 1, at 930; MEL MORGENBESSER & NADINE NEHLS, JOINT CUSTODY: AN ALTERNATIVE FOR DIVORCING FAMILIES 30-31 (1981).

6. MORGENBESSER & NEHLS, *supra* note 5, at 30.

7. CHILDREN’S RIGHTS COUNCIL, *supra* note 3, at 16.

8. *Id.*

9. *Id.* at 17.

10. MORGENBESSER & NEHLS, *supra* note 5, at 6; LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987, at 174 (1990).

11. STONE, *supra* note 10, at 174.

12. MORGENBESSER & NEHLS, *supra* note 5, at 6.

13. STONE, *supra* note 10, at 177 (quoting an unidentified source).

14. *See id.*

15. *Id.* at 180.

1925, England enacted a statute providing that custody was to be determined based on the welfare of the child.<sup>16</sup>

Similarly, a majority of the states adopted the common law rule of absolute paternal control, but abandoned the notion for the first time in 1839.<sup>17</sup> As in England, most American courts then began endorsing rotating custody arrangements, but this preference was short-lived.<sup>18</sup> Courts subsequently began to regularly award custody to the mother,<sup>19</sup> but in 1889 the Kansas Supreme Court first held that custody arrangements should be decided based on the child's welfare and best interest.<sup>20</sup>

Florida jurisprudence has followed a similar historical pattern. In *Randolph v. Randolph*,<sup>21</sup> the Florida Supreme Court explicitly abrogated the common law presumption that the father had a superior right to the custody of his children. Even prior to *Randolph's* overt abolition of the preference for awarding custody to the father, the Florida courts had deviated from the common law rule several times.<sup>22</sup> However, contrary to the pattern established in England and in other states after the abolition of the paternal control presumption, the Florida courts were not partial to rotating custody arrangements, even for a short period of time.<sup>23</sup> Instead, the Florida Supreme Court was so opposed to the idea of rotating custody that it articulated a presumption against rotating custody arrangements in 1943

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16. *Id.*

17. MORGENBESSER & NEHLS, *supra* note 5, at 6.

18. *Id.*

19. *Id.* at 7.

20. *Id.*

21. 1 So. 2d 480, 481 (Fla. 1941).

22. See *Fields v. Fields*, 197 So. 530, 531 (Fla. 1940) (awarding the mother sole custody of the three-year-old, and custody of the five and seven-year-olds for nine months out of the year); *Green v. Green*, 188 So. 355, 356 (Fla. 1939) (affirming an award of custody of a three-year-old girl to the mother); *Putnam v. Putnam*, 186 So. 517, 518 (Fla. 1939) (affirming the modified decree of divorce which awarded custody to the mother for ten months out of the year); *Frazier v. Frazier*, 147 So. 464, 467-68 (Fla. 1933) (remanding with instructions to award custody to the father for not less than three months in each year); *Kennedy v. Kennedy*, 134 So. 201, 204 (Fla. 1931) (affirming award of custody to the mother for eight months each year); *Osceola Fertilizer Co. v. Sauls*, 123 So. 780, 780-81 (Fla. 1929); *Trigo v. Trigo*, 105 So. 123, 123 (Fla. 1925); *Harris v. Harris*, 61 So. 122, 122 (Fla. 1913).

23. From 1943 to 1985 only three rotating custody agreements were ordered. *Watson v. Watson*, 15 So. 2d 446 (Fla. 1943); *Alexander v. Alexander*, 473 So. 2d 236 (Fla. 2d DCA 1985); *Oldaker v. Oldaker*, 263 So. 2d 250 (Fla. 1st DCA 1972). Since the *Alexander* decision, Florida appellate courts have affirmed rotating custody arrangements only eight times. *Boardman v. Roy*, 775 So. 2d 334, 334 (Fla. 2d DCA 2000); *Voorhies v. Voorhies*, 705 So. 2d 1064, 1065 (Fla. 1st DCA 1998); *Bracken v. Bracken*, 704 So. 2d 746, 748 (Fla. 4th DCA 1998); *O'Brien v. Crumley*, 695 So. 2d 881, 882-83 (Fla. 5th DCA 1997); *Harpman v. Harpman*, 694 So. 2d 101, 103 (Fla. 5th DCA 1997); *Quinn v. Settel*, 682 So. 2d 617, 619 (Fla. 3d DCA 1996); *Sullivan v. Sullivan*, 604 So. 2d 878, 879 (Fla. 1st DCA 1992); *Parker v. Parker*, 553 So. 2d 309, 311 (Fla. 1st DCA 1989).

in *Phillips v. Phillips*.<sup>24</sup> From 1943 until 1997, the Florida courts abided by the presumption that rotating custody is not in the best interests of a minor child, and only affirmed rotating custody arrangements a handful of times.<sup>25</sup>

In 1997 the Florida Legislature enacted section 61.121 of the Florida Statutes, which provides that “[t]he court may order rotating custody if the court finds that rotating custody will be in the best interest of the child.”<sup>26</sup> Between May 23, 1997, and September 22, 1999, four awards of rotating custody were affirmed.<sup>27</sup> In other words, after the courts were ostensibly granted permission to order rotating custody, they affirmed four orders in twenty-eight short months.<sup>28</sup> However, prior to the enactment of section 61.121, the courts had affirmed only a few orders in fifty-four years.<sup>29</sup>

Curiously, though, the Second District Court of Appeal, in 1999, reined in the Florida courts’ apparent freedom to grant rotating custody.<sup>30</sup> In *Mandell v. Mandell*, the court, in dicta, stated that “[n]othing in the plain language of [section 61.121] suggests that the legislature intended to abolish the presumption” against rotating custody.<sup>31</sup> The court reasoned that because the legislative history of House Bill 1421, which enacted section 61.121, explicitly set aside another presumption found in section 61.13, “the legislature understood how to set aside a previously established presumption.”<sup>32</sup> Therefore, because House Bill 1421 did not also include language that unambiguously set aside the common law presumption against rotating custody, the court concluded that the presumption was not abolished by the legislation.<sup>33</sup> Since the *Mandell* decision, Florida courts have only ordered one rotating custody arrangement.<sup>34</sup>

Part II of this Comment examines the origin and evolution of Florida’s presumption against rotating custody arrangements. The advantages and disadvantages of such arrangements are also evaluated in Part II, including the psychological effects of rotating custody on minor children. Finally, Part III proffers a framework to guide the judicial system’s implementation of rotating custody orders.

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24. 13 So. 2d 922, 923 (Fla. 1943).

25. See *supra* note 23.

26. FLA. STAT. § 61.121 (2002).

27. See *supra* note 23.

28. *Id.*

29. *Id.*

30. *Mandell v. Mandell*, 741 So. 2d 617 (Fla. 2d DCA 1999).

31. *Id.* at 618.

32. *Id.*

33. *Id.*

34. *Boardman v. Roy*, 775 So. 2d 334, 334 (Fla. 2d DCA 2000).

## II. THE ORIGIN AND EVOLUTION OF FLORIDA'S PRESUMPTION AGAINST ROTATING CUSTODY

Florida courts have never been inclined to order rotating custody arrangements, and, instead, have usually awarded custody to one parent and granted visitation rights to the other parent.<sup>35</sup> The presumption against rotating custody originated in 1943 in *Phillips v. Phillips*.<sup>36</sup> The Florida courts embraced the *Phillips* court's absolute presumption against rotating custody, but gradually began to consider various factors when determining whether to order rotating custody instead of unquestionably applying the presumption.

### A. *The Origin*

*Phillips* was the first decision to demonstrate Florida's opposition to dividing the minor child's physical custody between the parents. Upon granting Beatrice M. Phillips's request for divorce, the judge awarded custody of the seventeen-month-old boy to the father.<sup>37</sup> Mrs. Phillips appealed, arguing that the custody order should be modified.<sup>38</sup> The appellate court agreed with Mrs. Phillips and awarded custody of the boy to the father for the first week of every month and to Mrs. Phillips for the remainder of the time.<sup>39</sup> The Florida Supreme Court, however, sided with Mr. Phillips on appeal and reversed the appellate court's modification of the original custody decree.<sup>40</sup>

The Court refused to uphold the modification order because the condition precedent to the modification of a final decree of custody, that the arrangement be "for the welfare of the child," was not satisfied.<sup>41</sup> The court reasoned that dividing custody of the child between the parents would be detrimental to the child's welfare because "no man can serve two masters and it is certainly true that no child can pursue a normal life when subject to the the [sic] precepts, example and control of first one person and then another, regardless of how well intentioned those persons may be."<sup>42</sup> The court extrapolated the idea that dividing custody confused the child from its "experience" and from its "common knowledge of man and affairs."<sup>43</sup> No other source of authority supported the court's conclusion.

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35. See *supra* note 23.

36. 13 So. 2d 922 (Fla. 1943).

37. *Id.* at 922.

38. *Id.*

39. *Id.* at 923.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

*B. The Early Evolution: 1943-1975*

Although the presumption against rotating custody originated as a product of judicial policymaking and was not based on precedent, the concept quickly had a strong influence on the Florida courts. After 1943, the majority of judges unquestionably applied the presumption against rotating custody, deriving it either from *Phillips* and other Florida decisions,<sup>44</sup> from their experience and common knowledge,<sup>45</sup> or from other states' judicial decisions.<sup>46</sup> Between 1943 and 1975, most courts employed similar language and, so long as both parents were equally fit, failed to articulate any rationale for the presumption.<sup>47</sup> Even as late as 1975, most courts were still blindly applying the rule that "unquestionably split custody decrees . . . are not encouraged."<sup>48</sup> During this time period, only a few decisions deviated from the rule against rotating custody.<sup>49</sup>

Five months after the Florida Supreme Court first announced its hostility toward divided custody in *Phillips*, the court affirmed a rotating custody arrangement in *Watson v. Watson*.<sup>50</sup> *Watson* involved the mother's appeal of the final decree of divorce that awarded custody of the two girls to the father for six months and to the mother for six months.<sup>51</sup> The court rejected the mother's request for full custody and affirmed the rotating custody arrangement because both parents could provide the girls with equal opportunities.<sup>52</sup> Furthermore, because both the mother and the father were employed outside the home, the court's usual preference for awarding custody to the mother was not applicable.<sup>53</sup>

The court in *Oldaker v. Oldaker*<sup>54</sup> also declined to exercise the presumption against rotating custody. Upon dissolution of the marriage, the court ordered the parents to share custody of their three-

44. *Stewart v. Stewart*, 24 So. 2d 529, 530 (Fla. 1946); *Jones v. Jones*, 23 So. 2d 623, 625 (Fla. 1945); *Peterseil v. Peterseil*, 307 So. 2d 498, 499 (Fla. 3d DCA 1975); *Unger v. Unger*, 306 So. 2d 540, 541-42 (Fla. 3d DCA 1975); *Julian v. Julian*, 188 So. 2d 896, 897, 902 (Fla. 2d DCA 1966); *Rudolph v. Rudolph*, 146 So. 2d 397, 399 (Fla. 3d DCA 1962). *But cf.* *Ritsi v. Ritsi*, 160 So. 2d 159, 164 (Fla. 3d DCA 1964) (overturning a reversal of a shared custody agreement and reinstating the original decree of shared custody).

45. *Hurst v. Hurst*, 27 So. 2d 749, 750 (Fla. 1946).

46. *Rudolph*, 146 So. 2d at 399.

47. *See supra* note 44; *see also Phillips*, 13 So. 2d at 922.

48. *Peterseil*, 307 So. 2d at 499.

49. *Watson v. Watson*, 15 So. 2d 446, 447 (Fla. 1943); *Oldaker v. Oldaker*, 263 So. 2d 250, 250 (Fla. 1st DCA 1972); *Lindgren v. Lindgren*, 220 So. 2d 440, 440 (Fla. 2d DCA 1969).

50. 15 So. 2d at 447.

51. *Id.*

52. *Id.*

53. *Id.* ("If she goes and returns as a wage earner like the father, she has no more part in this responsibility than he and it necessarily follows that all things else being equal, she has no better claim when the matter of custody is at issue.")

54. 263 So. 2d at 250.

year-old, rotating physical custody of the child every three months.<sup>55</sup> Both parents appealed the rotating custody arrangement, but the court affirmed the custody order saying “[i]n view of the child’s tender age of three, we do not feel that such an arrangement is against the child’s best interest or welfare. . . . Perhaps a different arrangement will be necessitated when the child reaches school age.”<sup>56</sup>

*Lindgren v. Lindgren*<sup>57</sup> is another decision that disregarded the presumption against rotating custody. The mother appealed an order awarding custody to the father for four days one week and three days the next week.<sup>58</sup> The court agreed that the general rule was not to affirm rotating custody orders, but recognized an exception to the general rule because the mother had an extramarital relationship.<sup>59</sup> In other words, because the father was more fit than the mother, the preference of awarding custody to the mother did not apply and rotating custody was acceptable.<sup>60</sup> *Lindgren* was the first case to recognize the presumption against rotating custody and then limit its application based on the circumstances of the case.<sup>61</sup>

### C. Modern Evolution: 1975-1997

Between 1975 and July 1, 1997, the courts further developed the *Lindgren* principle that “the prohibition against alternating custody is not absolute.”<sup>62</sup> Because the presumption was no longer “a rule of law,” and instead became “an exercise of discretion by the trial court,” the appellate courts were faced with the task of determining “whether reasonable men could differ as to whether or not rotating custody, under the circumstances of [the] case, is in the best interest of the children.”<sup>63</sup> Some courts applied various factor tests when deciding whether the circumstances of the case overcame the presumption against rotating custody.<sup>64</sup> Others determined whether to order

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55. *Id.*

56. *Id.*

57. 220 So. 2d 440, 440 (Fla. 2d DCA 1969).

58. *Id.*

59. *Id.*

60. *See id.* at 440-41.

61. *Id.*; *see also* *Wonsetler v. Wonsetler*, 240 So. 2d 870, 871 (Fla. 2d DCA 1970) (“Split custody can be condoned if there are special circumstances or legally unequal facts present to support such an arrangement.”).

62. *Gerscovich v. Gerscovich*, 406 So. 2d 1150, 1152 (Fla. 5th DCA 1981).

63. *Id.*

64. *E.g.*, *MacConnell v. Cascante*, 668 So. 2d 668, 670 (Fla. 4th DCA 1996); *Garvie v. Garvie*, 659 So. 2d 394, 395 (Fla. 2d DCA 1995); *Langford v. Ortiz*, 654 So. 2d 1237, 1238 (Fla. 2d DCA 1995); *Caraballo v. Hernandez*, 623 So. 2d 563, 564 (Fla. 4th DCA 1993); *Wilking v. Reiford*, 582 So. 2d 717, 719 (Fla. 5th DCA 1991); *Parker v. Parker*, 553 So. 2d 309, 311 (Fla. 1st DCA 1989); *Gerscovich*, 406 So. 2d at 1151; *Bienvenu v. Bienvenu*, 380 So. 2d 1164, 1165 (Fla. 3d DCA 1980).

rotating custody based on the facts of the case, but did not apply a specific factor test when making that evaluation.<sup>65</sup>

*Bienvenu v. Bienvenu*<sup>66</sup> was the first decision to delineate factors justifying a rotating custody order:

Such factors might include, for example, older and more mature children, parents who live near each other or are willing to cooperate in lessening the impact of the changes in custody, and a division of periods of custody which is related to actual events in the children's lives, such as between school and holiday periods.<sup>67</sup>

Although the court recognized that the presumption against rotating custody was not absolute, it reversed the order of rotating custody because two of the three factors justifying rotating custody were not satisfied; the children were two and four-years-old and the parents were very antagonistic toward each other.<sup>68</sup>

*Gerscovich v. Gerscovich*<sup>69</sup> clarified and added new considerations to the *Bienvenu* factors.<sup>70</sup> In addition to a division of periods of custody that relate to actual events in the child's life, another factor that courts take into account when deciding whether to allow rotating custody is the reasonableness of the "length of each period of custody."<sup>71</sup> Furthermore, the child's preference, considered in light of the child's maturity level, should also be weighed.<sup>72</sup> *Gerscovich* also broadened the *Bienvenu* factor of the proximity of the parents' homes to include any "disruptive influence[] created by differing surroundings in alternate custody periods."<sup>73</sup> Finally, *Gerscovich* clarified the *Bienvenu* consideration of the parents' willingness to cooperate, by

65. *E.g.*, *Quinn v. Settel*, 682 So. 2d 617, 619 (Fla. 3d DCA 1996); *Sullivan v. Sullivan*, 604 So. 2d 878, 879 (Fla. 1st DCA 1992); *Dobbins v. Dobbins*, 584 So. 2d 1113, 1116 (Fla. 1st DCA 1991); *Chiafair v. Chiafair*, 552 So. 2d 248, 250 (Fla. 1st DCA 1989); *ex rel. S.M.H.*, 531 So. 2d 228, 231 (Fla. 1st DCA 1988); *Gerner v. Gerner*, 529 So. 2d 1226, 1226 (Fla. 3d DCA 1988); *Alexander v. Alexander*, 473 So. 2d 236, 237 (Fla. 2d DCA 1985); *Elebash v. Elebash*, 450 So. 2d 1268, 1270 (Fla. 5th DCA 1984); *Tallent v. Tallent*, 440 So. 2d 623, 624 (Fla. 2d DCA 1983); *Frey v. Wagner*, 433 So. 2d 60, 62 (Fla. 3d DCA 1983); *Scott v. Scott*, 401 So. 2d 879, 880 (Fla. 3d DCA 1981); *Garvey v. Garvey*, 383 So. 2d 1172, 1173 (Fla. 2d DCA 1980).

66. 380 So. 2d at 1165.

67. *Id.*

68. *Id.* at 1164-66.

69. 406 So. 2d 1151.

70. *Id.* at 1151, 1153.

71. *Id.*

72. *Id.* at 1152. *Contra* *Garvey v. Garvey*, 383 So. 2d 1172, 1173 (Fla. 2d DCA 1980) ("Although the preference of a child is one factor to be considered, it cannot control the disposition of custody.")

73. 406 So. 2d at 1151; *see also* *Harpman v. Harpman*, 694 So. 2d 101, 102 (Fla. 5th DCA 1997) ("[A] [f]actor[] that influenced the parties to agree to, and the court to approve, rotating custody [was] . . . the fact that the children would attend the same school regardless of which household they were residing in."); *Wilking v. Reiford*, 582 So. 2d 717, 719 (Fla. 5th DCA 1991) ("Rotating custody between two distant cities should not be imposed when the child is of school age.")

stating that this factor also includes how the children will perceive the parents' attitudes toward each other.<sup>74</sup>

Several other factors that overcome the presumption against rotating custody were also set forth during this time period. First, courts more frequently order rotating custody when the child is not yet old enough to go to school.<sup>75</sup> Second, psychological or Guardian Ad Litem reports recommending rotating custody militate in favor of rotating custody.<sup>76</sup> The idea that animosity between the parents also overcomes the presumption against rotating custody was first introduced in 1992 in *Sullivan v. Sullivan*.<sup>77</sup> The court reasoned that the mother's hostile attitude supported rotating custody in order to prevent the mother from turning the child against the father.<sup>78</sup> This factor, however, does not usually support rotating custody and, conversely, is a circumstance that weighs in favor of the application of the presumption against rotating custody.<sup>79</sup>

Despite establishing that the presumption against rotating custody is not absolute, courts during this era continued to sparingly order rotating custody. During these twenty-two years, courts ordered rotating custody less than ten times.<sup>80</sup> Two of the orders were to terminate upon the child reaching school age.<sup>81</sup> Three were ordered, in part, because the children were sufficiently mature to state their preferences.<sup>82</sup> One order of rotating custody was ordered because of

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74. Gerscovich, 406 So. 2d at 1151.

75. See, e.g., *Mooney v. Mooney*, 729 So. 2d 1015, 1016 (Fla. 1st DCA 1999); *Bracken v. Bracken*, 704 So. 2d 746, 747 (Fla. 4th DCA 1998); *Langford v. Ortiz*, 654 So. 2d 1237, 1238 (Fla. 2d DCA 1995); *Parker v. Parker*, 553 So. 2d 309, 311 (Fla. 1st DCA 1989); *Alexander v. Alexander*, 473 So. 2d 236, 237 (Fla. 2d DCA 1985). But see *Hurst v. Hurst*, 27 So. 2d 749, 750 (Fla. 1946) ("[W]e have grave doubt that an infant three years old can develop normally and thrive if at the end of every six months he is removed from surroundings familiar to him and forced to become accustomed to new ones.").

76. See, e.g., *O'Brien v. Crumley*, 695 So. 2d 881, 882 (Fla. 5th DCA 1997). But cf. *Garvie v. Garvie*, 659 So. 2d 394, 396 (Fla. 2d DCA 1995). See also *Quinn v. Settel*, 682 So. 2d 617, 619 (Fla. 3d DCA 1996). *Contra Garvey*, 383 So. 2d at 1173 ("[A] trial court does not surrender its discretion to psychologists or other experts testifying concerning the welfare of children where best interests are to be protected by the court.").

77. 604 So. 2d 878, 879 (Fla. 1st DCA 1992).

78. *Id.*

79. *Boardman v. Roy*, 775 So. 2d 334, 335 (Fla. 2d DCA 2000); *Lamelas v. Granados*, 730 So. 2d 387, 388-89 (Fla. 2d DCA 1999); *Bracken*, 704 So. 2d at 748; *Garvie*, 659 So. 2d at 396; *Caraballo v. Hernandez*, 623 So. 2d 563, 565 (Fla. 4th DCA 1993); *Bienvenu v. Bienvenu*, 380 So. 2d 1164, 1165 (Fla. 3d DCA 1980).

80. *Quinn v. Settel*, 682 So. 2d 617, 618-19 (Fla. 3d DCA 1996); *Sullivan v. Sullivan*, 604 So. 2d 878, 879 (Fla. 1st DCA 1992); *Gerscovich v. Gerscovich*, 406 So. 2d 1150, 1153 (Fla. 5th DCA 1991); *Parker v. Parker*, 553 So. 2d 309, 311 (Fla. 1st DCA 1989); *Alexander v. Alexander*, 473 So. 2d 236, 237 (Fla. 2d DCA 1985).

81. *Parker*, 553 So. 2d at 311; *Alexander*, 473 So. 2d at 237.

82. The children in the cases were all in their pre-teen or teenage years. *Harpman v. Harpman*, 694 So. 2d 101, 102-03 (Fla. 5th DCA 1997); *Quinn*, 682 So. 2d at 618-19; *Gerscovich*, 406 So. 2d at 1153.

the mother's animosity toward the father,<sup>83</sup> and one was ordered simply because special circumstances justified the arrangement.<sup>84</sup>

*D. Section 61.121, Florida Statutes, is Enacted*

On July 1, 1997, section 61.121, *Florida Statutes*, became effective.<sup>85</sup> The section provides that "[t]he court may order rotating custody if the court finds that rotating custody will be in the best interest of the child."<sup>86</sup> Between July 1, 1997, and September 22, 1999, Florida appellate courts affirmed rotating custody orders three times.<sup>87</sup> Following the examples from *Lindgren*,<sup>88</sup> *Bienvenu*,<sup>89</sup> and *Gerscovich*,<sup>90</sup> the courts during this period also considered the special circumstances of each case.<sup>91</sup> In both *Mooney v. Mooney*,<sup>92</sup> and *Bracken v. Bracken*,<sup>93</sup> the courts' decisions to uphold the rotating custody orders were influenced by the fact that the rotating arrangement would terminate when the children reached school age.<sup>94</sup> The third affirmation of rotating custody occurred because there were no substantial changes in circumstance requiring modification of the original rotating custody order.<sup>95</sup>

*1. The Florida Courts' Reaction to Section 61.121*

On September 22, 1999, the Second District Court of Appeal, in *Mandell v. Mandell*,<sup>96</sup> interpreted section 61.121 for the first time. The court affirmed the trial court's rotating custody order because the husband rebutted "any presumption against rotating custody."<sup>97</sup> However, the decision's dicta, and not the holding, most greatly impacted Florida's rotating custody jurisprudence. In dicta, the court went on to answer the parties' question of "whether section 61.121, Florida Statutes (1997), effectively sets aside the long held presumption that rotating custody is not in the best interest of a minor

83. *Sullivan*, 604 So. 2d at 879.

84. *O'Brien v. Crumley*, 695 So. 2d 881, 882 (Fla. 5th DCA 1997).

85. FLA. STAT. § 61.121 (2002).

86. *Id.*

87. *Mooney v. Mooney*, 729 So. 2d 1015, 1016 (Fla. 1st DCA 1999); *Voorhies v. Voorhies*, 705 So. 2d 1064, 1065 (Fla. 1st DCA 1998); *Bracken v. Bracken*, 704 So. 2d 746, 748 (Fla. 4th DCA 1998).

88. 220 So. 2d 440 (Fla. 4th DCA 1969).

89. 380 So. 2d 1164 (Fla. 3d DCA 1980).

90. 406 So. 2d 1150 (Fla. 5th DCA 1981).

91. *E.g., Bracken*, 704 So. 2d at 747.

92. 729 So. 2d at 1015.

93. 704 So. 2d at 746.

94. *Mooney*, 729 So. 2d at 1016; *Bracken*, 704 So. 2d at 748.

95. *Voorhies v. Voorhies*, 705 So. 2d 1064, 1065 (Fla. 1st DCA 1998).

96. 741 So. 2d 617 (Fla. 2d DCA 1999).

97. *Id.*

child.”<sup>98</sup> The court concluded that the statute’s plain language did not indicate that the legislature meant to abolish the presumption, or, alternatively, if it did intend to abolish the presumption it failed to appropriately do so.<sup>99</sup> The court considered the fact that the bill enacting section 61.121 also enacted section 61.13, which provides that “[n]o presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent.”<sup>100</sup> According to the Second District Court of Appeal, this language demonstrated that the legislature understood how to abolish a presumption, and “[t]he absence of such language in section 61.121 leads us to conclude that either the legislature did not intend to set aside the presumption, or, if it did, it failed to appropriately implement its intent.”<sup>101</sup>

Since *Mandell*, the Florida appellate courts have affirmed rotating custody orders only two more times.<sup>102</sup> These courts affirmed the rotating custody decrees because “[t]he [trial] court found the agreement was in the child’s best interest”<sup>103</sup> and because an expert witness recommended rotating custody.<sup>104</sup> Although the Florida Supreme Court has not yet validated the dicta in *Mandell*, the case was cited favorably by the Fourth District Court of Appeal in *Mancuso v. Mancuso*,<sup>105</sup> and in *Hosein v. Hosein*.<sup>106</sup>

### *E. The Advantages of Rotating Custody*

There are numerous advantages to rotating custody. First, rotating custody can benefit both the parents and the child by fulfilling their desires to maintain a close relationship.<sup>107</sup> The concept of rotating custody recognizes the equal authority of both parents by allowing each parent to actively participate in the child’s life.<sup>108</sup> Because neither parent is treated as the visiting parent, the parent-child relationship is less likely to change.<sup>109</sup> In contrast, when one parent only has infrequent visitation rights, the parent-child relationship can be drastically altered.<sup>110</sup> The child, for example, may feel like he or she

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98. *Id.* at 617-18.

99. *Id.* at 618.

100. *Id.*

101. *Id.*

102. *Boardman v. Roy*, 775 So. 2d 334, 334 (Fla. 2d DCA 2000); *Goins v. Goins*, 762 So. 2d 1049, 1051-52 (Fla. 5th DCA 2000).

103. *Goins*, 762 So. 2d at 1051.

104. *Boardman*, 775 So. 2d at 334.

105. 789 So. 2d 1249, 1250 (Fla. 4th DCA 2001).

106. 785 So. 2d 703, 703 (Fla. 4th DCA 2001).

107. DEBORAH ANNA LUEPNITZ, *CHILD CUSTODY* 42 (1982).

108. MORGENBESSER & NEHLS, *supra* note 5, at 62.

109. *Id.*

110. *Id.* at 61.

has been abandoned by the nonresidential parent.<sup>111</sup> One study of four rotating custody families revealed that “[n]one of the children seemed to experience the severe loss of one parent reported in traditional custodial arrangements.”<sup>112</sup> Therefore, rotating custody arrangements help to minimize the child’s feeling of abandonment because “[b]oth parents remain active participants in their child’s upbringing through their input into decisions . . . and the child knows that both parents are available to give advice and guidance.”<sup>113</sup>

Another way that rotating custody benefits the parent-child relationship is by eliminating the parents’ need to compete for custody of the child, thereby removing the possibility that the child will be forced to choose one parent as the residential parent.<sup>114</sup> This compelled decision can be emotionally difficult for the child, especially when the child has a positive relationship with both parents.<sup>115</sup> Additionally, when parents agree to rotating custody arrangements the child is not exposed to “the legal custody battles and adversarial climate that surround sole custody contests.”<sup>116</sup> Rotating custody arrangements, therefore, allow the child to continue a relationship with both parents and remove the dilemma of a loyalty conflict.<sup>117</sup>

Yet another benefit of rotating custody for children is the fact that the parents are forced to cooperate.<sup>118</sup> Although the negative effects of divorce will always impact the child, the child’s attitude about the experience may be more positive if the parents are amicable.<sup>119</sup> Children subject to a rotating custody arrangement may, therefore, feel more optimistic about their future male-female relationships than will children subject to sole custody arrangements.<sup>120</sup> Additionally, children subject to rotating custody arrangements will be better prepared for future relationships because it is more likely that they will see each parent assume the roles of both a housekeeper and a wage earner.<sup>121</sup> Because parents today are more apt to share these roles, the sole custody arrangement, patterned after the “traditional family

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111. MEL ROMAN & WILLIAM HADDAD, *THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY* 120 (1978).

112. Alice Abarbanel, *Shared Parenting After Separation and Divorce: A Study of Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 320, 322-23 (1979).

113. MORGENBESSER & NEHLS, *supra* note 5, at 62.

114. *Id.* at 43, 64.

115. *Id.*

116. Robert D. Felner & Lisa Terre, *Child Custody Dispositions and Children’s Adaptation Following Divorce*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE* 127 (Lois A. Weithorn ed., 1987).

117. *Id.*

118. MORGENBESSER & NEHLS, *supra* note 5, at 65, 66.

119. *Id.*

120. *Id.*

121. RICHARD A. GARDNER, *CHILD CUSTODY LITIGATION: A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS* 152-53 (1986).

roles of the mother as sole homemaker and the father as the only breadwinner," does not provide role models compatible with modern family life.<sup>122</sup>

Parents also benefit from rotating custody arrangements. Most importantly, neither parent experiences the sense of loss and uncertainty about his or her parental role that is present in sole custody arrangements.<sup>123</sup> In addition to the loss of the child, the nonresidential parent may also suffer from a loss of self-esteem.<sup>124</sup> "If one parent is awarded primary custody after litigation, the visiting parent cannot help feeling that he or she has been judged the worse, or at least the less adequate, of the two parents."<sup>125</sup> Rotating custody arrangements can ameliorate the sense of loss, role ambiguity, and the loss of self-confidence.<sup>126</sup>

Another advantage of rotating custody arrangements is that the one parent no longer must shoulder the childrearing burden by himself or herself. Rotating custody involves a situation where each parent is equally responsible for the physical and emotional development of the child.<sup>127</sup> Both parents have an equal voice in the major decisions of the child's life.<sup>128</sup> Therefore, rotating custody "means being free and a parent at the same time" because each parent has "100 percent of the responsibility 50 percent of the time [rather] than 50 percent of the responsibility 100 percent of the time."<sup>129</sup>

Rotating custody also may avoid some of the conflicts associated with sole custody arrangements.<sup>130</sup> For example, a custody battle is not necessary and is instead replaced with an arrangement requiring cooperation and compromise.<sup>131</sup> Moreover, because both parents have equal authority, neither parent will resent the other's dominance, a feeling experienced by many parents in sole custody arrangements.<sup>132</sup>

Besides benefiting both the children and the parents, rotating custody is also advantageous to the courts.<sup>133</sup> So long as the parents request rotating custody and are both fit and competent, the judge is not required to spend time evaluating the reasons why one parent is more competent than the other.<sup>134</sup> Therefore, judicial energy and time

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122. *Id.*

123. GARDNER, *supra* note 121, at 153; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 1, at 930; Felner & Terre, *supra* note 116, at 127.

124. GARDNER, *supra* note 121, at 153.

125. *Id.*

126. *Id.*

127. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 1, at 930.

128. *Id.*

129. LUEPNITZ, *supra* note 107, at 43.

130. GARDNER, *supra* note 121, at 152.

131. MORGENBESSER & NEHLS, *supra* note 5, at 66.

132. GARDNER, *supra* note 121, at 152.

133. Felner & Terre, *supra* note 116, at 127.

134. *Id.*

are conserved when parents are appropriate candidates for rotating custody arrangements.

#### F. *The Disadvantages of Rotating Custody*

Opponents of rotating custody have cited various disadvantages of such an arrangement. The primary criticism of the Florida courts is that rotating custody is confusing to the child because each parent has different rules and the child will not know which ones to obey.<sup>135</sup> “[N]o child can pursue a normal life when subject to the the [sic] precepts, example and control of first one person and then another, regardless of how well intentioned those persons may be.”<sup>136</sup> Other authorities also recognize the concern that having two homes creates an unpredictable and interrupted life for a child.<sup>137</sup> Critics argue that such disruption will affect the child physically and emotionally.<sup>138</sup> However, this argument has been rejected by studies of rotating custody families. For example, one study concluded that after an initial adjustment period, the children were no longer confused about changing domiciles.<sup>139</sup> Another source stated that although frequent change is disruptive, children generally adapt well to change and are not harmed by shifting homes.<sup>140</sup>

Another common grievance about rotating custody is that children may be used as ammunition in parental battles.<sup>141</sup> For example, one parent may prohibit visitation when a support payment is overdue.<sup>142</sup> Additionally, either or both parents may bargain and beg for more time with the child.<sup>143</sup> Using a child this way can result in divided loyalties and psychological damage.<sup>144</sup> However, the same difficulties may be even more pronounced in sole custody arrangements because nonresidential parents do not have as much authority as residential parents and therefore, are more likely to need to use the children inappropriately.<sup>145</sup> Rotating custody arrangements, in contrast, involve shared parental authority and decision-making, thereby minimizing the need to use the children as pawns.<sup>146</sup>

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135. *E.g.*, Phillips v. Phillips, 13 So. 2d 922, 923 (Fla. 1943).

136. *Id.*

137. GARDNER, *supra* note 121, at 154; MORGENBESSER & NEHLS, *supra* note 5, at 69.

138. MORGENBESSER & NEHLS, *supra* note 5, at 69.

139. Judith Brown Grief, *Fathers, Children, and Joint Custody*, 49 AM. J. ORTHOPSYCHIATRY 311, 317 (1979).

140. GARDNER, *supra* note 121, at 154.

141. *Id.* at 153.

142. Grief, *supra* note 139, at 318.

143. *Id.*

144. MORGENBESSER & NEHLS, *supra* note 5, at 71.

145. Grief, *supra* note 139, at 318.

146. *Id.*

Critics of rotating custody also recognize the daily inconveniences for children. For example, a child may not be able to fall asleep at night because his or her favorite toy is at the other parent's house.<sup>147</sup> One family stated that although the rotating custody arrangement works, it has disadvantages.<sup>148</sup> "Carting possessions around is tough . . . Suitcases, nighttime animals, half an outfit here, half there—no steady routine."<sup>149</sup>

Another daily difficulty of rotating custody is the child's inability to establish meaningful relationships with his or her friends, unless the parents live near each other.<sup>150</sup> Additionally, when rotating custody arrangements involve long periods of custody, such as an arrangement where the child lives with one parent during the school year and with the other parent during the summer, the child may also have trouble maintaining relationships with friends.<sup>151</sup> Even more worrisome is the contention that the interruptions of rotating custody may hinder the child's ability to bond emotionally with either parent.<sup>152</sup>

Rotating custody may also have negative effects on the parents. One common complaint made by parents subject to rotating custody arrangements is that they cannot truly separate from each other.<sup>153</sup> However, many divorced couples with children could make this same complaint, regardless of the custody arrangement, because "[s]o many couples are legally divorced but emotionally still married; they simply carry on their marriages internally or through their children."<sup>154</sup> Therefore, few divorced couples will ever fully terminate their relationship, especially where children are involved.<sup>155</sup>

Another challenge for parents in rotating custody arrangements is the resolution of decisions about the child's life.<sup>156</sup> Opponents of rotating custody argue that it is unrealistic to expect that divorced parents can separate their marital and parental lives, and therefore, cooperate when making decisions about the child.<sup>157</sup> This argument, however, assumes that the divorced parents harbor hostile feelings toward each other, and that they do not mutually respect each other's opinions.<sup>158</sup> At least with time, divorced parents are more

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147. MORGENBESSER & NEHLS, *supra* note 5, at 72.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 73.

152. Felner & Terre, *supra* note 116, at 128.

153. LUEPNITZ, *supra* note 107, at 44.

154. MORGENBESSER & NEHLS, *supra* note 5, at 77.

155. *Id.* at 78.

156. *Id.* at 74.

157. *Id.* at 75.

158. *Id.*

likely to minimize the role of their marital lives, and instead place more emphasis on their parental lives, thereby permitting them to agree on decisions affecting their child.

Parents, like their children, may be inconvenienced by rotating custody arrangements. For instance, the children's movement from home to home creates logistical problems for parents who have to spend time and money transporting them.<sup>159</sup> Additional expenditures may be necessary to make the child feel comfortable in both houses.<sup>160</sup> Parents may have to buy duplicate toys, personal belongings, and extra clothes in order for the child's surroundings to be familiar.<sup>161</sup>

### III. JUDICIAL GUIDELINES FOR DETERMINING WHETHER TO ORDER ROTATING CUSTODY

Because *Mandell* rejected the contention that section 61.121 abolished the presumption against rotating custody, Florida courts continue to infrequently award rotating custody. Sometimes the application of the presumption is justified. However, regardless of the *Mandell* decision, rotating custody is preferable for some divorcing couples and their children.

#### A. *Justified Application of the Presumption*

In addition to the *Bienvenu-Gerscovich* factors and the position of a majority of the districts that rotating custody should not be ordered when the parents do not get along,<sup>162</sup> the Florida courts have recognized other situations where rotating custody should not be ordered.<sup>163</sup> Although judges and practitioners may not be presented with similar situations, assuming that they are, these cases may be useful in guiding their decisions or predictions.

For example, in *Jones v. Jones*,<sup>164</sup> a modification order granting rotating custody was reversed; the fact that the wife sent the children to boarding school and, in the husband's opinion, practically abandoned the children, did not justify the rotating custody order. Similarly, a court is unlikely to order rotating custody simply because one parent is a teacher and the other is not.<sup>165</sup> Also, "[r]otating

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159. LUEPNITZ, *supra* note 107, at 44.

160. MORGENBESSER & NEHLS, *supra* note 5, at 78.

161. *Id.*

162. *See supra* note 79.

163. *See Jones v. Jones*, 23 So. 2d 623 (Fla. 1945); *Wilking v. Reiford*, 582 So. 2d 717 (Fla. 5th DCA 1991); *ex rel. S.M.H.*, 531 So. 2d 228 (Fla. 1st DCA 1988); *Garvey v. Garvey*, 383 So. 2d 1172 (Fla. 2d DCA 1980); *Peterseil v. Peterseil*, 307 So. 2d 498 (Fla. 3d DCA 1975); *Wonsetler v. Wonsetler*, 240 So. 2d 870 (Fla. 2d DCA 1970).

164. 23 So. 2d at 626.

165. *Peterseil*, 307 So. 2d at 499.

custody between two distant cities should not be imposed when the child is of school age.”<sup>166</sup>

Although psychologists’ and Guardian Ad Litem reports militate in favor of rotating custody,<sup>167</sup> where the only other circumstance justifying rotating custody is the child’s stated preference, a court may not “surrender its discretion to psychologists or other experts testifying concerning the welfare of children where best interests are to be protected by the court.”<sup>168</sup> Likewise, the fact that the parents are ages fifteen and sixteen does not justify an order of rotating custody.<sup>169</sup> Finally, rotating custody is not warranted even when both parents and their families are competent and willing to provide an excellent environment for the child.<sup>170</sup>

Other sources can provide judges and attorneys with more general, and therefore more practical, guidance. For instance, one authority suggests that rotating custody may not be successful if the reason the parent seeks rotating custody is because the parent wants, but is afraid he or she will not get, sole custody, and is willing to settle for rotating custody.<sup>171</sup> If rotating custody is awarded, problems may arise if one of the parents cannot accept the arrangement and cooperate with the other parent.<sup>172</sup> In other words, if the parent’s desire to have sole custody outweighs his or her respect for the other parent’s decisions and opinions about the child, then the rotating custody arrangement will fail.<sup>173</sup>

When guilt compels a parent to seek rotating custody, a court should not order rotating custody. Some parents think that they should request rotating custody because, if they do not want custody of the child, it must mean that they do not love the child.<sup>174</sup> As rotating custody becomes a more common scenario, the parents may feel more pressure to seek rotating custody.<sup>175</sup> However, a rotating custody arrangement that is entered into because of societal and familial influences is not likely to be very successful.<sup>176</sup>

Besides guilt, other motivations inducing parents to seek rotating custody are vengeance and freedom.<sup>177</sup> For example, seeking rotating custody is an effective way to retaliate against a parent who desires

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166. *Wilking*, 582 So. 2d at 719.

167. *See supra* note 76 and accompanying text.

168. *Garvey*, 383 So. 2d at 1173.

169. *See ex rel. S.M.H.*, 531 So. 2d 228, 231 (Fla. 1st DCA 1988).

170. *Id.*

171. *MORGENBESSER & NEHLS*, *supra* note 5, at 144-46.

172. *Id.* at 146.

173. *Id.*

174. *Id.* at 145.

175. *Id.* at 146.

176. *Id.*

177. *GARDNER*, *supra* note 121, at 156-57.

sole custody of the child.<sup>178</sup> Although this motive may be a good battle strategy, courts and attorneys should not order rotating custody when vengeance is the incentive for the request, as this is an indicator that the parents do not get along.

The desire for more personal freedom influences some requests for rotating custody.<sup>179</sup> While rotating custody arrangements do provide more freedom to the parents,<sup>180</sup> that liberty should not be the primary reason for seeking rotating custody. In other words, parents should not use this option as a means to assume less responsibility for raising the children,<sup>181</sup> because in rotating custody arrangements, both parents “have 100 percent of the responsibility 50 percent of the time.”<sup>182</sup>

Rotating custody also may not be successful when divorcing parents answer any of the following questions negatively:

Do I think that my former spouse is a good parent?

Do I believe that the type of joint custody arrangement I want allows for the stability and consistency necessary for our child?

Am I willing to discuss matters related to our child with my former spouse?

Do my former spouse and I have compatible beliefs about raising children?

Am I willing to ask for help in settling major differences that might arise between my former spouse and I concerning our child?

As circumstances change, am I willing to make adjustments in our joint custody arrangement to maximize the potential for its success?<sup>183</sup>

Although a negative answer to all or any of the questions may not signify that rotating custody will fail, parents who answer “no” to any of the questions should think carefully about entering into a rotating custody arrangement.<sup>184</sup>

A 1997 study concluded that psychologists are less likely to recommend rotating custody if all or some of the following five factors are present: (1) “Parents do not cooperate or communicate”; (2) “Conflict or hostility between parents”; (3) “Geographical distance between parents”; (4) “Family or domestic violence history”; (5) “Children cannot adjust to transitions or are too young.”<sup>185</sup> The majority of

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178. *Id.* at 157.

179. *Id.* at 156.

180. *See supra* note 73.

181. GARDNER, *supra* note 121, at 156.

182. LUEPNITZ, *supra* note 107, at 43.

183. MORGENBESSER & NEHLS, *supra* note 5, at 147-48.

184. *Id.* at 147.

185. Marc J. Ackerman & Melissa C. Ackerman, *Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited)*, 28 PROF. PSYCHOL.: RES. & PRAC. 137, 143 (1997).

the psychologists interviewed agreed that the two most important considerations when deciding whether to recommend rotating custody are the parents' ability to cooperate and communicate, and the amount of hostility between the parents.<sup>186</sup> Additionally, forty-one percent thought that the proximity of the parents' homes was important, twenty-eight percent considered family or domestic violence as significant, and twenty-two percent thought that the child's ability to adjust or the child's age was important.<sup>187</sup>

### 1. *When Rotating Custody Should be Ordered*

The Second, Third, and Fifth District Courts of Appeal agree that rotating custody should only be ordered when the divorced parents can communicate and cooperate.<sup>188</sup> However, the Fourth and First District Courts of Appeal cite parental hostility as a factor in favor of ordering rotating custody.<sup>189</sup> Psychologists agree with the former position that antagonism militates in favor of applying the presumption against rotating custody.<sup>190</sup>

*Bienvenu* was the first case to indicate that parental hostility was not a special circumstance justifying a rotating custody arrangement.<sup>191</sup> The court reversed the trial judge's order of rotating custody to parents who were involved in a bitter custody battle.<sup>192</sup> The court reasoned that a presumption against rotating custody applies when the "mother and father are . . . mutually antagonistic."<sup>193</sup>

The Fifth District Court of Appeal first demonstrated its commitment to the idea that hostility militates in favor of applying the presumption against rotating custody in *Garvie v. Garvie*.<sup>194</sup> The court reversed a rotating custody order, in part, because the parents could

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186. *Id.*

187. *Id.*

188. See Boardman v. Roy, 775 So. 2d 334, 334-35 (Fla. 2d DCA 2000); Lamelas v. Granados, 730 So. 2d 387, 388-89 (Fla. 2d DCA 1999); Laskey v. Peeler, 704 So. 2d 1066, 1067 (Fla. 5th DCA 1997); Garvie v. Garvie, 659 So. 2d 394, 395-96 (Fla. 2d DCA 1995); Wilking v. Reiford, 582 So. 2d 717, 719 (Fla. 5th DCA 1991); Bienvenu v. Bienvenu, 380 So. 2d 1164, 1165 (Fla. 3d DCA 1980).

189. See Bracken v. Bracken, 704 So. 2d 746, 748 (Fla. 4th DCA 1998); Caraballo v. Hernandez, 623 So. 2d 563, 565 (Fla. 4th DCA 1993); Sullivan v. Sullivan, 604 So. 2d 878, 879 (Fla. 1st DCA 1992). *But cf.* Hosein v. Hosein, 785 So. 2d 703, 703 (Fla. 4th DCA 2001).

190. See Christy M. Buchanan & Kelly L. Heiges, *When Conflict Continues after the Marriage Ends*, in INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT 337, 353 (John H. Grych et al. eds., 2001); Felner & Terre, *supra* note 116, at 127-28; GARDNER, *supra* note 121, at 155; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 1, at 932; Ackerman & Ackerman, *supra* note 185, at 142-43; Susan Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403, 414 (1981).

191. 380 So. 2d at 1165.

192. *Id.* at 1164, 1166.

193. *Id.* at 1165.

194. 659 So. 2d 394, 395-96 (Fla. 5th DCA 1995).

not get along.<sup>195</sup> Applying the *Bienvenu-Gerscovich* factors, the court concluded that:

[A]lthough the record does not establish that rotating custody would have a disruptive effect on the child, it does establish that the parties have a great deal of animosity toward each other and have difficulty conferring on issues affecting the child. Thus, we can reasonably foresee that this mutual antagonism, coupled with this inability to communicate, would have a distressing effect on the child in a rotating custody arrangement.<sup>196</sup>

Subsequently, other courts in the Fifth District followed *Garvie*, citing similar rationales for overturning rotating custody orders.<sup>197</sup>

The First and Fourth Districts disagree, and conversely argue, that hostility between the parents is a special circumstance that overrides the presumption against rotating custody.<sup>198</sup> In *Sullivan v. Sullivan*,<sup>199</sup> for example, the court affirmed a rotating custody order where the parents did not live far apart, where the length of each period of custody was reasonable, where the child was not yet of school age, and where the mother's attitude was antagonistic. Evidence of the wife's hostile attitude included her refusal to allow the father to visit the child, her denial of his paternity, and her behavior during the hearing.<sup>200</sup> The trial court stated that "[t]he child is at a young and impressionable age and given the hostility evident in the mother's attitude, demeanor and testimony, the court is concerned whether or not she will imbue the child with her attitude against the father."<sup>201</sup> Therefore, to preclude the possibility that the mother would turn the child against the father, the trial court ordered rotating custody and the appellate court supported its decision.<sup>202</sup>

The Fourth District Court of Appeal follows an identical approach, reversing rotating custody orders when "there is no evidence to indicate that the parties harbor negative attitudes or hostility toward each other."<sup>203</sup> Rotating custody was also ordered by a trial court when the parental sentiments were less than hostile. In *Hosein v. Hosein*,<sup>204</sup> the trial court had ordered rotating custody because the

195. *Id.*

196. *Id.*

197. See *Lamelas v. Granados*, 730 So. 2d 387, 388-89 (Fla. 5th DCA 1999); *Laskey v. Peeler*, 704 So. 2d 1066, 1067 (Fla. 5th DCA 1997).

198. See *Bracken v. Bracken*, 704 So. 2d 746, 748 (Fla. 4th DCA 1998); *Caraballo v. Hernandez*, 623 So. 2d 563, 565 (Fla. 4th DCA 1993); *Sullivan v. Sullivan*, 604 So. 2d 878, 879 (Fla. 1st DCA 1992). *But cf.* *Hosein v. Hosein*, 785 So. 2d 703, 703 (Fla. 4th DCA 2001).

199. 604 So. 2d at 879.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Caraballo*, 623 So. 2d at 565.

204. 785 So. 2d 703, 704 (Fla. 4th DCA 2001).

parties had a tendency to unilaterally make decisions about the child. Rotating custody would prevent one parent from prohibiting the other parent's involvement in the child's life.<sup>205</sup> However, it is uncertain whether an appellate court would sanction this less-than-hostile standard because the rotating custody order was remanded so the court could apply the *Bienvenu-Gerscovich* factors.<sup>206</sup>

The Second District Court of Appeal first recognized the conflict between the district courts of appeal in *Boardman v. Roy*.<sup>207</sup> The *Boardman* court affirmed the trial court's rotating custody order, but disagreed with the trial court's reliance on the parents' hostility as a factor overcoming the presumption against rotating custody.<sup>208</sup> The court opposed the First and Fourth Districts' consideration of parental animosity as a factor militating in favor of rotating custody because that policy would encourage "untoward conduct with the hope that it will result in rotating custody."<sup>209</sup> The court also reasoned that the parents' inability to get along would result in a failed rotating custody agreement.<sup>210</sup>

For determinations of child custody in non-rotating arrangements, the Florida Legislature suggests that one factor in favor of awarding physical custody to a parent is the fact that the parent "is more likely to allow the child frequent and continuing contact with the nonresidential parent."<sup>211</sup> Furthermore, "[t]he willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent" also militates in favor of awarding a parent physical custody.<sup>212</sup> Therefore, because the legislature promotes friendly parenting in other child custody arrangements, it is likely that it would agree with the view of the Second, Third, and Fifth District Courts of Appeal that parental hostility does not militate in favor of rotating custody arrangements.

Psychologists agree with the Second, Third, and Fifth District Courts of Appeal. One survey of 201 psychologists revealed that two principle factors that psychologists consider when deciding whether to recommend rotating custody are the "[a]bility of the parents to separate their interpersonal difficulties from their parenting decisions" and "[t]he amount of anger and bitterness between the parents."<sup>213</sup> The survey concluded that rotating custody is preferred

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205. *Id.*

206. *See id.*

207. 775 So. 2d 334, 334-35 (Fla. 2d DCA 2000).

208. *Id.* at 334.

209. *Id.* at 335.

210. *Id.*

211. FLA. STAT. § 61.13(3)(a) (2002).

212. *Id.* § 61.13(3)(j).

213. Ackerman & Ackerman, *supra* note 185, at 142.

when there is more communication and cooperation between the parents, or at least the absence of conflict.<sup>214</sup>

Other authorities have reached similar conclusions. An article published in 1980 in the *American Journal of Orthopsychiatry* suggested that rotating custody is most successful when the parents are cooperative.<sup>215</sup> The article determined that certain parental characteristics are congruent with orders of rotating custody and stated that:

[T]he most crucial and beneficial components of joint custody for the children lie in the attitudes, values, and behavior of their parents. The cooperative and respectful relationship between the parents for the purpose of child-rearing, and each parent's support of the child's relationship with the other parent, seemed to be more significant in helping the children adjust to the divorce than making sure that the time the children spent with each parent was precisely equal.<sup>216</sup>

A child custody guidebook for parents and mental health professionals employs similar language, stating that rotating custody should not be ordered unless the parents can cooperate, communicate, and are willing to compromise.<sup>217</sup> A final authority standing for the proposition that a successful rotating custody arrangement requires cooperative parents concludes that rotating custody "should not be imposed on a fighting couple as a way of compromising or resolving the dispute."<sup>218</sup> Instead, rotating custody "should be a goal, an end for divorcing parents to work towards, assuming that both of them can see its value."<sup>219</sup>

The accuracy of the conclusion that parental animosity should not weigh in favor of a rotating custody order is reflected by children's adjustment to rotating custody. Children generally adjust more easily when cooperative parents voluntarily choose rotating custody.<sup>220</sup> When rotating custody is court-imposed on hostile parents, however, children may have more difficulty adjusting to the new situation.<sup>221</sup> Because children more readily adjust to rotating custody when the parents get along, the presence of parental animosity requires the application of the presumption against rotating custody. If the rule were otherwise, courts would be sanctioning a custody arrangement that children have difficulty adjusting to.

214. *Id.* at 143.

215. Steinman, *supra* note 190, at 414.

216. *Id.*

217. GARDNER, *supra* note 121, at 155.

218. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 1, at 932.

219. *Id.*

220. Buchanan & Heiges, *supra* note 190, at 353.

221. *Id.*

If, however, rotating custody is ordered in a situation where the parents do not get along, the potential conflict and its impact on the child can be minimized. One suggestion is to limit exchanges of the child to public places, such as the child's school, so that the parents can avoid contact and controversy.<sup>222</sup> Therefore, rotating custody arrangements may still be effective, even in the presence of hostile parents, so long as both parents care about the child.<sup>223</sup>

Another important consideration justifying rotating custody is the child's attachment to both parents, according to approximately 115 out of 201 psychologists.<sup>224</sup> The same survey revealed that other factors influencing psychologists to recommend rotating custody included the parents' emotional stability and desire to have a rotating custody arrangement.<sup>225</sup>

Rotating custody is only a viable option when "[b]oth parents are reasonably and equally capable of assuming the responsibilities of child rearing."<sup>226</sup> Capability of the parents includes availability and psychological stability.<sup>227</sup> For example, if one parent cannot assume the financial obligations inherent in raising children, then rotating custody should not be ordered.<sup>228</sup>

Similarly, another authority attributes successful rotating custody arrangements to four factors: (1) "commitment to the arrangement," (2) "the parents' mutual support," (3) "flexible sharing of responsibility," and (4) "agreement on the implicit rules of the system."<sup>229</sup> Commitment to the arrangement means that both parents believe that rotating custody is the best alternative.<sup>230</sup> Mutual parental support connotes the idea that each parent encourages and facilitates the child's relationship with the other parent.<sup>231</sup> This relationship can be achieved when the ex-spouses trust each other's parenting ability and promote the development of a relationship with the other parent.<sup>232</sup> If parents have mutual respect and the child is free to explore each relationship, the child will not suffer as greatly from the emotional trauma of divorce.<sup>233</sup>

In successful rotating custody arrangements, parents must also be

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222. Grief, *supra* note 139, at 318.

223. *Id.*

224. Ackerman & Ackerman, *supra* note 185, at 142-43.

225. *Id.* at 143.

226. GARDNER, *supra* note 121, at 154.

227. *Id.*

228. *See id.*

229. Abarbanel, *supra* note 112, at 325.

230. *Id.* at 326.

231. *Id.*

232. *Id.*

233. *See id.*

able to flexibly share the responsibilities.<sup>234</sup> Although parents do not have to see each other often, they must be willing to schedule and allocate responsibility.<sup>235</sup> Furthermore, an emergency plan needs to be in place in case the parent is unable to perform his or her duty.<sup>236</sup>

Parents subject to a rotating custody arrangement must also agree upon the implicit rules, meaning that parents must “[w]ork out . . . how much contact to have, both as parents and as people; how much to overlap the two households; what kind, how much, and how to share information; whether and how to give the other parent critical or positive feedback about his or her parenting.”<sup>237</sup> In other words, parents must learn how to co-exist as parents and friends, instead of spouses. If parents can make that transition, rotating custody arrangements are likely to be successful.

Some authorities suggest that the instability of rotating custody arrangements is detrimental to younger children and, therefore, it should not be ordered when the children are young.<sup>238</sup> However, Florida courts do not consider a child’s young age to militate in favor of applying the presumption against rotating custody.<sup>239</sup> Likewise, Florida courts are not deterred from ordering rotating custody when the child is older, if the presence of other factors indicates that rotating custody would be in the child’s best interest.<sup>240</sup> Therefore, although a child’s young age should be considered, it should only secondarily influence the decision whether to order rotating custody. Hence, where other factors demonstrate that rotating custody would be in the child’s best interest, courts should not be precluded from ordering such arrangements simply because the child is young.

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234. *Id.*

235. Abarbanel, *supra* note 112, at 326.

236. *Id.*

237. *Id.*

238. GARDNER, *supra* note 121, at 154 (“[Rotating custody’s] critics claim that having two homes can give a child a sense of unpredictability and a lack of environmental continuity. Although this is detrimental for a child, it probably is not relevant to children older than three or four.”).

239. *Watson v. Watson*, 15 So. 2d 446, 447-48 (Fla. 1943) (affirming rotating custody of a five-year-old girl and a three-year-old girl); *Bracken v. Bracken*, 704 So. 2d 746, 747-48 (Fla. 4th DCA 1998) (affirming rotating custody of a pre-school child); *Alexander v. Alexander*, 473 So. 2d 236, 237 (Fla. 2d DCA 1985) (affirming rotating custody of a two-year-old girl); *Oldaker v. Oldaker*, 263 So. 2d 250, 250 (Fla. 1st DCA 1972) (affirming rotating custody of a three-year-old); *Lindgren v. Lindgren*, 220 So. 2d 440, 441 (Fla. 2d DCA 1969) (affirming rotating custody of three-year-old twins).

240. *See Quinn v. Settel*, 682 So. 2d 617, 618-19 (Fla. 3d DCA 1996) (affirming rotating custody of a seventh grader); *Gerscovich v. Gerscovich*, 406 So. 2d 1150, 1152-53 (Fla. 5th DCA 1981) (affirming rotating custody of an eleven-year-old and a fifteen-year-old).

#### IV. CONCLUSION

Florida's presumption against rotating custody should be abolished in favor of a system that permits judges to order and approve rotating custody arrangements more frequently and more freely. Assuming that the divorced parents can cooperate, communicate, respect each other's parental authority, and separate their past marital roles from their parental roles, rotating custody is the most fulfilling arrangement for both the parents and the child. Rotating custody promotes continued contact with both parents, thereby ameliorating the feeling of abandonment that many children in sole custody arrangements experience. The child does not have to endure the emotional trauma of choosing a residential parent and the parents are not subjected to the taxing adversarial process. Florida's presumption against rotating custody deprives parents and their children of these, and other, benefits. Because the child's and the parents' best interests are only harmed by this limitation, the Florida courts must be permitted to equally consider rotating custody as an option for families desiring and deserving its benefits.