Parenting Plans and the Breastfed Child

A Look at How Breastfeeding is Used as a Factor in Parenting Time Allocations for Divorcing Parents in the U.S.

Kori Martin, JD, LLLL

Divorce has the potential to substantially disrupt a mother and baby's breastfeeding relationship due to the potential for separation inherent in custody and visitation schedules. This paper examines how breastfeeding is accounted for as a factor in the parenting plan guidelines actually used in the United States legal system. While some jurisdictions do include breastfeeding as a specific factor to be included in the allocation of parenting time, most courts have no legislative or rule-based guidance as to how breastfeeding should be accounted for post-divorce. The breastfeeding protections that do exist get noticeably more restrictive as the child ages, and mothers in the U.S. currently face significant hurdles in preserving breastfeeding post-divorce.

Keywords: Parenting plans, custody, breastfeeding, divorce
Clinical Lactation, 2011, *Vol. 2-3*, 25-29

Breastfeeding professionals know the important role a supportive father can play in the success of a breastfeeding relationship. Nursing mothers who experience marital separation and divorce during pregnancy or their children's infancy may suffer from the lack of direct spousal support and experience additional challenges to the maintenance of breastfeeding created by the added burden of custody arrangements and visitation schedules. Women who want to maintain their breastfeeding relationships through divorce often face inconsistent and unclear advice as to whether and/or how the legal system will consider breastfeeding as a factor in the allocation of parenting time (Sweet, 2010). Though there are some exceptions, family court systems in the United States are not adequately equipped with appropriate information to make consistent rulings that include maintenance of the breastfeeding relationship as a relevant factor in these decisions.

Child Custody and the Role of Parenting Plans

The term custody includes both *legal custody*, which is the ability of a parent to make decisions for the child, and *physical custody*, which refers to the physical possession of the child (Atkinson, 2000). In the United States, stability in the child's residential environment is prioritized, and rarely will even *joint custody* allocate a child's residential time fifty-fifty with each parent (Schepard, 2004). Typically, even when parents share *joint legal custody*, one parent will retain primary physical custody of the child. The parent without primary physical custody will then have visitation rights to ensure an ongoing relationship with the child. Even though courts no longer presume the mother is the most fit residential parent, in practice, mothers retain primary physical custody in up to 90% of divorces (Silverstein, 1996), and for purposes of this paper, we will assume, as is typically the case, that the mother is the breastfeeding child's primary physical custodian.

Since the traditional language of custody and visitation tends to increase parental conflict by creating a winner and a loser in the post-divorce parenting scheme, many jurisdictions have switched to the concept of *parenting plans*, which attempt to encourage the emergence of cooperative co-parenting relationships post-divorce (Schepard, 2004). As parents are better equipped than the court to evaluate their own unique parenting circumstances, parents will ideally negotiate parenting plans on their own, with the court stepping in only when they are unable to reach mutual agreement. Research has consistently shown that level of parent conflict is one of the largest factors relating to a child's adaptability and success post-divorce (McKnight & Erickson, 2004), so recent family law trends have been in the direction of encouraging parental cooperation and reducing the conflict inherent in repeated and drawn out court battles over custody.

Many courts, bar organizations, and commentators have developed parenting plan information sheets, forms, and guidelines for use in their jurisdictions. Even though relatively few custody arrangements are actually litigated in court, these standard parenting plan documents are very important to the actual child custody determinations made both in and out of court. First of all, a very large number of the divorces handled today are handled *pro se*, or without the parties hiring attorneys and standardized forms have the advantage of offering a framework for such applicants to develop appropriate plans (American Bar Association, 2001). Furthermore, parenting plan guidelines often provide a legal baseline that informs the parties decision-making in alternative dispute resolution processes, such as mediation and collaborative law (Murphy & Rubinson, 2009). From a practical perspective, when a father knows the minimum visitation that would be ordered in a court ruling, the mother may have little actual ability to negotiate for less visitation in order to best accommodate breastfeeding schedules.

© 2011 United States Lactation Consultant Association

The goal of this paper is to detail the kinds of accommodations for breastfeeding that divorcing mothers can expect to see in typical parenting plan guidelines actually used in the U.S. legal system. Though breastfeeding has a valuable role in fostering mother-child attachment and bonding, and there are substantial reasons to support breastfeeding from the perspective of a child's emotional development (U.S. Department of Health and Human Services, 2011), this paper focuses on the nutritive aspects of breastfeeding for the simple reason that it is what the courts do (Hofheimer, 1998). This is not an attempt to propose model accommodations for breastfeeding in parenting plans, and many of the guidelines described in this paper reflect either severe information gaps with regards to breastfeeding or most typically, fail to consider it as a factor at all. Mothers with low-conflict relationships with their ex-spouses, or with ex-spouses who are supportive of breastfeeding, may be able to negotiate parenting plans that take the needs of their breastfeeding child into greater account.

Real parenting plans in any given jurisdiction may be more or less protective of breastfeeding than what is described below, depending on applicable statutes, case law, the biases of individual participants in the process, and the unique fact scenarios involved. Furthermore, parents with multiple children will face added issues of accommodating the age-based needs of different siblings.

Breastfeeding Infants Under 6 months of Age

Generally, exclusively breastfed infants under 6 months of age are the most likely to have their breastfeeding status taken into account with regards to visitation or alternatively to have parenting plans that favor preservation of breastfeeding even when breastfeeding is not an explicit factor.

Several parenting plan guidelines explicitly take breastfeeding into account. A parenting plan guide used in Massachusetts suggests that for children under 9 months of age, "parents should consider the special needs of breastfeeding infants" (Massachusetts Association of Family and Conciliation Courts). Likewise, a model plan used in Utah suggests that parents should consider the needs of breastfed infants in making parenting plans (Utah State Courts). Unfortunately, neither plan offers suggestions as to how breastfeeding should be factored into the decision-making process.

Even when breastfeeding status is not explicitly accounted for, most jurisdictions tend to structure parenting plans for infants under 6 months old in ways that are protective of breastfeeding. The common preference for "short frequent visits" with the non-residential parent for young infants rather than "longer visits spaced farther apart" (Indiana Supreme Court, 2008) is appropriate from the perspective of lactation physiology. The guidelines used by the Los Angeles Superior Court are typical of those including developmental considerations without regards to breastfeeding, recommending for all infants visits of "three non-consecutive days per week for two hours each day" for the ages of birth to 6 months (Los Angeles Superior Court, 2007). Regular visits of 2 to 3 hours each offer the father and infant the benefit of regular contact, but are short enough to minimally impact the breastfeeding relationship. Many breastfeeding mothers will be able to accommodate such visits without even having to resort to expressing milk, though most guidelines do suggest shared caregiving responsibility, including feeding, as a goal (Massachusetts Association of Family and Conciliation Courts).

Some guidelines mention breastfeeding, but do not suggest it as a factor to be accounted for in plans. Arizona's parenting plan guide mentions breastfeeding, but largely as a caution to mothers not to use breastfeeding as a reason to preclude paternal access:

> Parents who are not raising their child together must balance the baby's need to nurse with its need to bond with the father. The parents should talk often and openly with each other about the baby. Breastfeeding shouldn't be used to stop the father from spending time with the child. Instead, mothers need to offer the father parenting time, and fathers need to be flexible regarding the need of the baby to nurse. The father can feed an infant with the mother's expressed (pumped) milk, particularly after nursing routines are well established (Arizona Supreme Court, 2009).

Similarly, a guide to developmentally appropriate parenting plans published by the ABA suggests that from 0 to 4 months, "if breastfeeding is chosen as the primary method of feeding at birth (unless committed to strict La Leche League standards), a bottle or nipple substitute could be introduced within the first month or two" (Hartson & Payne, 2006). While not particularly attuned to the maintenance of at-the-breast-feeding, as opposed to breast-milk feeding, this guide recommends visitation with the non-residential parent of 2 to 3 hours several days a week, with no extended or overnight visits, a schedule that does serve to allow a father frequent interaction with his child, with minimal interruption to breastfeeding. As these guides demonstrate, parenting plans tend to focus on the nutritional aspects of breastfeeding (Sweet & Power, 2009) and fail to consider the psychosocial effects, which may be the most important factors in a woman's decision to breastfeed (U.S. Department of Health and Human Services, 2011).

Breastfeeding Infants between 6 to 12 Months of Age

Sometime in the 6-to-12-months-age range, many jurisdictions will start adding overnight visitation with the nonresidential parent to the parenting time allocation. Overnight visitations present a unique challenge in the context of breastfeeding, as the length of mother-baby separation will require the mother to express her milk or run the risk of discomfort, pain, and

supply reduction. Some mothers will be able to accommodate this additional pumping with relative ease, but for many, overnight separations signal the beginning of the end of the nursing relationship (Sweet & Power, 2009).

Overnight visitation for young children has been one of the most hotly debated issues in family law in recent years. As it has evolved in recent years, attachment theory now emphasizes the possibility of multiple early attachments, rather than attachment to only one primary caregiver, and there is a substantial body of psychological research documenting the benefits to the child that result from increased paternal involvement in caregiving roles post-divorce. As summarized by Warshak (2000):

> Contemporary attachment theory has abandoned the notion of "monotropy"—the idea that children have a biological need to develop a selective attachment with just one person. The notion that children have only one psychological parent has been thoroughly discredited by a large body of evidence which has demonstrated that infants normally develop close attachments to both of their parents, that this occurs at about the same time (approximately 6 months of age), and that they do best when they have the opportunity to establish and maintain such attachments.

There has been quite a bit of debate in academic circles about the implications the changes in attachment theory have for overnight visitation, with some commentators still favoring blanket restrictions on overnight visits for young children (Solomon & Biringen, 2001), while many now argue that infants thrive with early overnight visitation (Kelly & Lamb, 2000; Pruett et al., 2004).

This growing body of research, combined with changes in women's roles in our society in recent decades, has resulted in an explicit rejection of the old "tender years doctrine," which presumed young children were best off with their mothers after divorce (Schepard, 2004). Modern courts are typically hostile to arguments against overnight visitation that are rooted in the notion of the primacy of the mother-baby relationship. Thus, in the current climate, any argument limiting overnight visitation for breastfed babies is best articulated for reasons other than the mother-baby attachment.

Unless a non-custodial parent has been uninvolved in a child's care before the separation, most parenting plan guidelines begin to add overnight visitation as an option at some point before the child's first birthday. Los Angeles guidelines suggest expanding visitation in the 7 to 12 months age range to "three non-consecutive days per week for three hours each day" and "overnight, if appropriate," with no discussion of breastfeeding as a factor limiting the appropriateness of overnight visits (Los Angeles Superior Court, 2007). Indiana's parenting time guidelines suggest that unless a non-custodial parent has not had regular care for the child, "parenting time shall include overnight," and includes the possibility of overnight visits starting at birth (Indiana Supreme Court, 2008).

Even those guidelines that explicitly protect breastfeeding for the young infant get noticeably less protective as the infant ages. The Massachusetts guidelines mentioned above, for example, only apply to infants under 9 months of age. In its discussion of the needs of breastfeeding infants between ages of four and eight months, the American Bar Association publication on creating developmentally appropriate parenting plans moves away from special accommodations for breastfeeding, asserting that "even if an infant was breastfed exclusively prior to four months, most mothers express breastmilk by this time in order to return to work or mix with cereal (most infants start cereal in addition to formula or breastmilk at about four months)" (Hartson & Payne, 2006), advice contrary to the recommended six months of exclusive breastfeeding before the introduction of solid foods promulgated by the American Academy of Pediatrics and World Health Organization. Hartson and Payne's developmental guidelines begin overnight visits in the 4 to 8 months age range, and stop mentioning breastfeeding as a factor after 8 months.

Breastfeeding Infants/Toddlers Over 12 Months of Age

Breastfed infants over 12 months of age are the least likely to have their breastfeeding status taken into account in custody determinations. Breastfeeding past one year of age is the exception, rather than the norm in the United States (U.S. Department of Health and Human Services, 2011). Despite the plentiful evidence of health and emotional benefits to nursing beyond one year, courts are much less likely to consider breastfeeding truly necessary for infants over 1 year of age, especially if it conflicts with paternal access to the child.

While the author has not been able to find any parenting plan breastfeeding protections explicitly applying to children over 12 months, some guidelines do include breastfeeding as a factor without age limitations. A proposed parenting plan used by one Hawaii court lists "breastfeeding infant," without regard to age, as a special concern to consider in drafting parenting plans (State of Hawaii Family Court: First Circuit, 2005). *Michigan's Parenting Time Guideline* has perhaps the most expansive protection of breastfeeding of any jurisdiction in its discussion of special factors for children under school age:

> By statute, the age of child(ren) is a factor when the child(ren) is receiving substantial nutrition through nursing. If the child(ren) is nursing, the parenting time shall be limited and arranged in a manner to accommodate the nursing pattern unless other provisions can be made (Michigan State Court Administrative Office).

Though Michigan's statute does include an age limit of 12 months for considering breastfeeding as a factor (Mich. Comp. Laws § 722.27a (2009)), the parenting time guidelines notably do not, though this may simply be due to oversight of the possibility that a child over 12 months could still be "receiving substantial nutrition through nursing."

Even with regular overnight separations, some mothers of toddlers are able to find ways to sustain their nursing relationships in spite of separations. If a mother is able to express her milk through separations, and her child is willing to nurse when he is with his mother and not nurse when he they are apart, a mother may find this kind of extended nursing strategy particularly empowering of her continued unique role in her child's life post-divorce (Sweet, 2010). Lactation consultants can be of particular help in this context, assisting mothers in developing strategies to sustain breastfeeding through regular overnight separations.

Suggestions for Divorcing Mothers

Parenting plans are not determined in isolation, but are just one of many decisions made in a divorce process that includes other considerations, such as child support and distribution of marital assets. Breastfeeding women going through divorce are often discouraged by their lawyers from raising breastfeeding as an issue in parenting time allocations. Considering that women are particularly likely to experience a negative change in financial status as a consequence of divorce (Silverman, 1996), and that there is a noted correlation between paternal visitation and child support payment (Seltzer et al., 1989), there may be valid reasons for this reluctance to assert breastfeeding as an issue, particularly in the context of high-conflict divorce. Under the rules of legal ethics, the lawyer sets the strategy of the representation, but the client sets the objectives (American Bar Association, 2010). If maintaining breastfeeding is an important objective to the mother, it is appropriate for her to assert that goal with her attorney or seek alternative representation.

Furthermore, mothers *do* sometimes attempt to use breastfeeding as a tool to limit paternal access to young infants, and courts are particularly hostile to attempted maternal gatekeeping (Pruett et al., 2007). Likewise, fathers sometimes try to punish mothers by limiting their contact with the children (Silverstein, 1996). But just as it is inappropriate to assume that all fathers seeking visitation are doing so to spite the mother, it is inappropriate to assume selfish motives on the part of all mothers who wish to sustain breastfeeding through divorce, particularly in the context of the major public health goal of increasing breastfeeding rates in the U.S (U.S. Department of Health and Human Services, 2011). In addition to Michigan, Maine (Me. Rev. Stat. tit. 19, § 1653(3)(P) (2011)), and Utah (Utah Code § 30-3-34(2)(n) (2008)), also have statutory provisions explicitly listing breastfeeding as a factor to be considered in parenting plans and custody decisions and this is a step in the right direction. Without statutory guidance on the subject, courts are ill equipped to tackle this issue on their own (Hofheimer, 1998). Even though few states explicitly account for breastfeeding in their family law codes, the vast majority of states have other legislation relating to breastfeeding (National Conference of State Legislatures, 2011). A divorcing, breastfeeding mother may wish to cite the legislative findings of her state's breastfeeding protection laws as persuasive authority in the absence of direct breastfeeding protections in the family-law context.

Like most issues in divorce, the best outcomes for women who want to continue breastfeeding happen when parents are able to set aside their differences and work together to create parenting plans focused on the best interests of the child. While not possible in every post-divorce relationship, the best strategy is for mothers to maintain open lines of communication in cooperative co-parenting relationships and stay flexible to options that while not ideal, allow for regular and increasing paternal access, while limiting interruption to breastfeeding.

References

American Bar Association: Center for Professional Responsibility (2010). *Model rules of professional conduct R. 1.2.* Washington, DC: American Bar Association. Retrieved from http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

American Bar Association: Center on Children and the Law (2001). *A judge's guide: Making child-centered custody decisions in custody cases.* Chicago, IL: American Bar Association.

Arizona Supreme Court, Court Services Division, Court Programs Unit. (2009). *Planning for parenting time: Arizona's guide for parents living apart.* Retrieved from http://azcourts.gov/Portals/31/ParentingTime/PPWguidelines.pdf

Atkinson, J. (2000). *Modern child custody practice* (2nd Ed.) New Providence, N.J.: Matthew Bender & Company.

Hartson, J., & Payne, B. (2006) *Creating effective parenting plans: A developmental approach for lawyers and divorce professionals.* Chicago, IL: American Bar Association Section of Family Law.

Hofheimer, K. D. (1998). Breastfeeding as a factor in child custody and visitation decisions. *Virginia Journal of Social Policy and Law, 5*, 433.

Indiana Supreme Court. (2008). *Indiana rules of court: Indiana parenting time guidelines.* Retrieved from http://www.in.gov/judiciary/rules/parenting/index.html

Kelly, J.B., & Lamb, M.E. (2000). Using child development research to make appropriate custody and access decisions for young children. *Family & Conciliation Courts Review, 38*, 297-331.

Los Angeles Superior Court. (2007). *Creating a parenting plan: Children under three.* Retrieved from http://www.lasuperiorcourt.org/familylaw/pdfs/parentingunder3.pdf

Massachussetts Association of Family and Conciliation Courts. *Planning for shared parenting: A guide for parents living apart.* Retrieved from http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/afccsharedparenting.pdf

McKnight, M. S., & Erickson, S. K. (2004). The plan to separately parent children after divorce. In J. Folberg, A. L. Milne, & P. Salem (Eds.), *Divorce and family mediation: Models, techniques and applications* (pp. 129-154). New York: The Guilford Press.

Me. Rev. Stat. tit. 19, § 1653(3)(P). (2011). Available at http://www.mainelegislature.org/legis/statutes/19-A/title19-Asec1653.html

Mich. Comp. Laws § 722.27a. (2009). Available at http://www.legislature.mi.gov/(S(zly4ak55ma2prjjhkfayox55))/mileg.aspx?page=getobject&objectname=mcl-722-27a

Michigan State Court Administrative Office. *Michigan parenting time guideline.* Retrieved from http://www.courts.michigan.gov/scao/resources/publications/manuals/focb/pt_gdlns.pdf

Murphy, J., & Rubinson, R. (2009). *Family mediation: Theory and practice*. New Providence, N.J.: Matthew Bender & Company.

National Conference of State Legislatures. *Breastfeeding laws* (updated May 2011). Available at http://www.ncsl.org/default.aspx?tabid=14389

Pruett, M. K., Arthur, L.A., & Ebling, R. (2007). The hand that rocks the cradle: Maternal gatekeeping after divorce. *Pace Law Review, 27*, 704-739.

Pruett, M.K., Ebling, R., & Insabella, G. (2004). Critical aspects of parenting plans for young children: Interjecting data into the debate about overnight. *Family Court Review, 42*, 39-59.

Schepard, A. I. (2004). *Children, courts and custody: Interdisciplinary models for divorcing families.* Cambridge, UK: Cambridge University Press.

Seltzer, J. A., Schaeffer, N. C., & Charng, H. (1989). Family ties after divorce: The relationship between visiting and paying child support. *Journal of Marriage and Family, 51,* 1013-1031.

Silverstein, L.B. (1996). Fathering is a feminist issue. *Psychology of Women Quarterly, 20*, 3-37.

Solomon, J., & Biringen, Z. (2001). Another look at the developmental research: Commentary on Kelly and Lamb's "Using child development research to make appropriate custody and access decisions for young children." *Family Court Review, 39*, 355-364.

State of Hawaii Family Court: First Circuit. (2005). *Proposed parenting plan.* Retrieved from http://www.courts.state.hi.us/docs/docs1/propparentplan030206mod.pdf

Sweet, L. (2010). Breastfeeding throughout legal separation: Women's experiences of the Australian Family Law System. *Journal of Human Lactation, 26*, 384-392.

Sweet, L., & Power, C. (2009). Family Law as a determinant of child health and welfare: Shared parenting, breastfeeding, and the best interests of the child. *Health Sociology Review, 18,* 108-118.

U.S. Department of Health and Human Services, U.S. Public Health Service, Office of the Surgeon General (2011). *The Surgeon General's call to action to support breastfeeding.* Retrieved from http://www.surgeongeneral.gov/topics/breastfeeding/calltoactiontosupportbreastfeeding.pdf

Utah Code § 30-3-34(2)(n). (2008). Available at http://le.utah.gov/~code/TITLE30/htm/30_03_003400.htm

Utah State Courts. *Pointers for parents and parenting plans.* Retrieved from http://utcourts.gov/howto/family/parenting_plans/docs/99_Pointers_for_Parents_and_Parenting_Plans.pdf

Warshak, R.A. (2000). Blanket restrictions: Overnight contact between parents and young children. *Family and Conciliation Courts Review, 38*, 422-445.

Late Preterm Infant Toolkit

The Oklahoma Infant Alliance has created these guidelines for healthcare providers and families, promoting better understanding of the issues concerning these just-a-little-too-early infants, born between 34 and 37 weeks gestation. The toolkit addresses both medical issues, as well as emotional issues that impact the families. To see sample pages from the toolkit and to order a copy, go to http://oklahomainfantalliance.org/lpi_guidelines.html.

Toward Improving the Outcome of Pregnancy III

Toward Improving the Outcome of Pregnancy: Enhancing Perinatal Health Through Quality, Safety and Performance Initiatives is a free report available from the March of Dimes. It explores the elements that are essential to improving quality, safety and performance across the continuum of perinatal care: consistent data collection and measurement; evidence-based initiatives; adherence to clinical practice guidelines; a life-course perspective; care that is patient- and family-centered, culturally sensitive and linguistically appropriate; policies that support high-quality perinatal care; and systems change.

Ultimately, reaching a more efficient, more accountable system of perinatal care will require a level of collaboration, services integration and communication that lead to successful perinatal quality improvement initiatives, many which are described throughout this book. In addition to the consistent collection of data and measurement and the application of evidence-based interventions, successful collaborations, like all perinatal quality improvement, depend on the engagement, support and commitment of everyone reading this book: healthcare professionals and hospital leadership, public-health professionals and community-based service providers, research scientists, policy-makers and payers, as well as patients and families.

http://www.marchofdimes.com/professionals/medicalresources_tiop.html