

Executive Editor's Column

Is 'Bird Nesting' a Hare-Brained Scheme or an Appropriate Custody Arrangement?

by Ronald G. Lieberman

Practitioners know that joint or shared physical custody is a situation where the parents not only share decision-making authority for a child or children, but share primary caretaking responsibilities so that 365 overnights are split equally, or just about equally. Such an arrangement has been defined to mean a situation where "the child lives day in and day out with both parents on a rotating basis...."¹ Under case law, specifically *Beck v. Beck*,² a joint physical custody arrangement is disfavored. But there exists in the law a trend of 'bird nesting,' whereby one parent vacates the home for a week and the other parent stays in the home for that week, with a rotation each week thereafter, while the children stay in the home at all times. This trend seems to be going in the opposite direction from case law.

The trend of bird nesting has been around for quite some time,³ but is an approach fraught with issues. On its face, bird nesting, hereinafter referred to as nesting, whereby a child or children remain in the home and the parents move in and out during their physical custody periods, would seem to provide the child or children with the stability of staying long term in a residence. At present, the author could find no studies that address whether nesting is an effective resource for minimizing any negative effects of divorce on children, let alone promoting positive adjustment in the children.

One of the seminal cases addressing nesting originated in California in the matter of *Lester v. Lennane*,⁴ although there were cases revealing that nesting has been around as early as 1979.⁵

The cases that do address the issue of nesting have not revealed whether it had been successful in minimizing the disruption to children. There seem to be advantages and disadvantages to nesting. The advantages of allowing a child or children stability in their home and allowing them to remain in school seem to be important. That way, by remaining in the home, the child or children have the continuity of their relationships and remain in a familiar and likely comforting environment. Nesting would also allow parents to have an equal division of the child care responsibilities, and maybe even establish new relationships with the children.

But, the negative effects or disadvantages seem to be clear as well, making this trend a double-edged sword. As studies have shown, a child has difficulty separating from a custodial parent to go to a non-custodial parent, and there are differences between the two parents. As Kenneth D. Herman's study indicated, nesting might blur the differences between the custodial and non-custodial parent, and the acrimony that exists during a divorce may cause the child to become traumatized.⁶

Other disadvantages of nesting seem to be obvious. Practitioners are aware that a client's finances are strained during a divorce. Adding the need for each parent to obtain separate housing means there will be *three* households to maintain: one for each parent and for the former marital residence.

Also, certainly nesting would be inappropriate upon remarriage or the introduction of a significant other.

Does nesting make sense? Couples who separate have decided that they cannot live together and share the same household, but with nesting the children are not able to begin the

process of actual physical separation. The delays in resolving the equitable distribution of property—both real and personal—would seem to be affected by a nesting arrangement because instead of selling the home and then dividing the personal property, the status quo for the children has primary consideration.

Practitioners cannot fault judges for approaching nesting as a panacea for a divorce. But, the author believes to foist a joint physical custody arrangement in divorce cases runs contrary to the Supreme Court decisions in *Beck* and *Pascale*. The parties may not be able to have a joint physical custody arrangement because of their routines or because their relationship is so strained that co-parenting in a joint physical custody scenario will be inappropriate.

So, when the advantages of stability for the children in the near term are measured against the disadvantages (e.g., economics and the potential for the parents to be unable to focus solely on the children) nesting may not be appropriate. Although the author believes judges are correct in stating the disruption in a child's life should be reduced as much as possible, the old school thought, that divorced children are negatively affected by a change in homes, should not be the way of resolving issues about custody.⁷ Dual residences cause temporary instability in children with regard to being able to adjust to a post-divorce life, yet it is all but certain to occur post-divorce.⁸

Where there is conflict between the parents and joint physical custody is forced upon the parties by a judge, such a situation may, in and of itself, be a source of conflict that should be avoided.⁹

The author believes a practitioner should think about respectfully, but potentially firmly, pushing back against a court-imposed nesting arrangement. Perhaps a shared residence is not in the children's best interest during a divorce. The parents may be uncomfortable with the arrangement and the children may pick up on that anxiety. There could be issues with the friction and tension the parents feel in coming back and forth without their own stability. The delay in having the children adjust to separate residences with each parent might delay the inevitable new routine with its period of adjustment, especially when the child or children will eventually have to deal with the new reality of two houses in two different locations.

The postponement of the inevitable when balanced against the idea of trying to minimize the disruption to a child that a divorce may cause is not easy for any judge in the family part; however, the author does not feel the default concept of bird nesting should be the way to go in every case.

Endnotes

1. *Pascale v. Pascale*, 140 N.J. 583, 596-96 (1995).
2. 86 N.J. 480 (1981).
3. Rachel Emma Silverman and Michelle Higgins, When the Kids Get the House in a Divorce, *Wall St. J.*, Sept. 17, 2003, at D1, Col. 2.
4. 101 Cal. Rptr. 2nd 86 Cal. Ct. App. 2000.
5. *In Re Marriage of Burham*, 283 N.W. 2nd 269 (Iowa 1979).
6. Kenneth D. Herman, A Child's Resistance/Refusal of Contact with Non-Custodial Parent, 15 *Am. J. Fam. L.* 137-39 (2001).
7. Gerald W. Hardcastle, Joint Custody: A Family Court Judge's Perspective, 32 *Fam. L. Q.* 201 (1998); C.S. Bruch, and How are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States, 30 *Fam. & Conciliation Cts. Rev.* 112-34 (1992).

8. Susan Steinman, The Experience of Children in a Joint-Custody Arrangement: A Report of a Study, 51 *Am. J. Orthopsychiatry* 403, 408-14 (1981).
9. Elizabeth Scott and Andre Derdeyn, Rethinking Joint Custody, 45 *Ohio St. L.J.* 455, 488 (1984).