

CHAPTER 3

THE FOUNDATION FOR BUILDING A GOOD PARENTING PLAN

How does one determine what a good parenting plan is? Almost everyone grows up in a family, and shouldn't that give us a good understanding of how family should operate? A considerable proportion of professionals in family law and related fields are parents. Doesn't that personal experience give us enough knowledge to craft good parenting plans? Many of us feel we have good insight about human nature—shouldn't that be sufficient to allow us to carry out this task well? The best answer to these last three questions is no.

More specifically, it's possible that these personal background experiences and characteristics may help at times to put together good parenting plans. However, it is more likely that such experiences contribute to professional intuition that is just as likely to be entirely off target as it is to hit the bull's-eye.

My goal in this chapter is to describe a conceptual foundation for the development of good parenting plans. A good parenting plan is one that facilitates healthy child development and family functioning. Perhaps obviously, there is no evidence that only a single, specific parenting plan would be a good one for a certain family. Instead, it is more useful to conceptualize that there is a range or cluster of parenting plans that would be likely to be a good fit for specified child and family characteristics.

I rely extensively in this chapter on the work of Nobel laureate Daniel Kahneman¹⁰ and his colleagues, who have spent decades

10. *E.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) [hereinafter THINKING].

researching and developing a body of knowledge about judgment under conditions of uncertainty. As described at the end of Chapter 2, matters that pertain to children and families have high levels of complexity, and there is essentially always a degree of uncertainty about relevant child and family functioning. Of course, there is also a great deal of uncertainty about future child and family outcomes, especially because we rarely learn anything useful about future functioning once the legal case is closed. The degree and importance of this uncertainty is most pronounced in difficult cases that involve serious concerns about an individual or about the family generally.

Kahneman¹¹ has demonstrated the cognitive processes carried out by even highly knowledgeable individuals who make judgment errors. Those mistakes frequently are apparent because they are quantitative in nature, and mathematical proofs show the differences between the mistakes and the correct answers. Clearly, there are no right answers that can be demonstrated mathematically in the realm of parenting plans. However, many of the cognitive processes and principles used by Kahneman are applicable to the uncertainty intrinsic in parenting planning.

In this chapter, I first describe the fundamental differences between the two types of thinking, intuition and reasoning. Second, I explain the importance of categories of intuitive errors, namely heuristics and biases. Third, I endeavor to illustrate how an understanding of such cognitive processes is highly relevant for parenting planning. Fourth, I offer examples of how to inject greater reasoning and deliberation into the parenting plan process.

Distinctions about different types of thinking have been identified going back to the philosopher Aristotle.¹² The difference between intuition and reasoning is central to the comprehension of judgment under conditions of uncertainty. Perhaps as a means of clarifying the distinctions between the two types of thinking, intuition has been described as System 1 and reasoning as System 2.¹³ In brief, intuition is relatively effortless, quick, automatic, and often tied to emotion. Internal

11. Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOLOGIST 697 (2003).

12. Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3 (1996).

13. Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate*, in HEURISTICS AND BIASES 421 (Thomas Gilovich et al. eds., 2002).

processes in perception and intuition are very similar. Reasoning, in contrast, is effortful, slow, controlled, and emotionally neutral. As can be seen in Figure 3.1, although the thinking *processes* of intuition and reasoning are very different, the thought *contents* are essentially the same. That is, both intuition and reasoning include conceptual representations and considerations of past and future, in contrast to perception, which is tied to current stimuli.

Within the context of parenting planning, a highly relevant and important difference between the two types of thinking is that reasoning, or System 2, is able to monitor cognitive processes, such as intuition, or System 1. However, such self-monitoring is difficult and occurs all too rarely.

As described in more detail later, especially in circumstances of complexity and uncertainty, System 2 generally holds greater promise than System 1 in terms of deriving reasonable judgment.¹⁴ However, it

14. THINKING, *supra* note 10, at 417.

FIGURE 3.1 Process and Content in Two Cognitive Systems

	PERCEPTION	INTUITION System 1	REASONING System 2
PROCESS	Fast Parallel Automatic Effortless Associative Slow-learning Emotional		Slow Serial Controlled Effortful Rule-governed Flexible Neutral
CONTEST	Percepts Current stimulation Stimulus bond	Conceptual representations Past, present, and future Can be evoked by language	

Reprinted from Kahneman, note 11, at 698.

is noteworthy that System 1 can be accurate. For intuition to be consistently accurate, there need to be numerous opportunities for extensive practice and learning in environments that give clear feedback as to the accuracy of judgments.¹⁵ In the realm of parenting planning, there is no environment that gives clear feedback as to the accuracy of judgment, in part because professionals almost never learn comprehensive information about family outcomes. Therefore, in order to maximize the likelihood of producing parenting plans that foster healthy child and family functioning, relevant family specialists need to learn about System 1 errors and methods to engage System 2. For purposes of parenting planning, one of the most important reasons for engaging System 2 is to identify relevant aspects of evidence about what is most important for children of divorce, and to deliberate about how to apply that information given the facts and circumstances of each family case.

Biases and heuristics are both types of System 1 thinking, and understanding them has a great deal of relevance for parenting plans. There are numerous well-known types of biases, including those based on gender, race, socioeconomic status, cultural background, and physical attractiveness. In addition to biases for or against certain types of people, there are also biases that involve cognitive processes.

The confirmatory bias involves looking for, remembering, and making use of information that confirms a preexisting point of view. The confirmatory bias also encompasses discounting, criticizing, and/or ignoring information that is contrary to a favored point of view or belief.¹⁶ This very powerful human tendency has been recognized since ancient times.¹⁷

Heuristics are cognitive shortcuts that represent relatively simple thinking processes instead of more careful deliberation or reasoning.¹⁸ Kahneman gives a more expanded description of a heuristic:

A judgment is said to be mediated by a heuristic when the individual assesses a specified *target attribute* of a judgment object by substituting a related *heuristic*

15. *Id.* at 234.

16. P.C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Q. J. EXPERIMENTAL PSYCHOL. 129 (1960).

17. THUCYDIDES, THE PELOPONNESIAN WAR, at 4.108.4, available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0200:book=4:chapter=108:section=4>.

18. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

attribute that comes more readily to mind. This definition elaborates a theme of the early research, namely, that people who are confronted with a difficult question sometimes answer an easier one instead. The word *heuristic* is used in two senses in the new definition. The noun refers to the cognitive process, and the adjective in *heuristic attribute* specifies the attribute that is substituted in a particular judgment.¹⁹

The judgment, for the specific purposes of this book, is represented by the parenting plan. The target attribute is the well-being of the child. There are partially different perspectives from child development and legal standpoints regarding the well-being of the child.

From a child development standpoint, what is of utmost importance is the body of knowledge primarily derived from high-quality research about what influences the well-being of children of divorce. In family law, the well-being and best interest of the child is characteristically defined by relevant statutes. In a number of crucial areas, there is considerable overlap between statutory factors and relevant research findings. For more detail about the common ground between scientific evidence and relevant statutes, see Chapter 4.

There are numerous types of heuristics, though no finite list.²⁰ A number of common heuristics are described here, accompanied by hypothetical examples related to the task of putting together parenting plans.

The affect heuristic is defined by an individual's emotions exerting a dominant influence on judgment processes. A relevant example involves a professional, working to construct a parenting plan, who had a very unhappy experience as a child when living in an apartment. That professional is dealing with a case in which one parent will be residing in an apartment and the other in a house. The highly negative emotions associated with the memories of living in an apartment leads that professional to focus excessively on the features of the residential circumstances, associated with a well-intended wish to arrange a plan that would minimize child distress. Accordingly, there is too little focus on numerous other individual, interpersonal, legal, and practical factors that should be given serious consideration in the parenting plan.

19. THINKING, *supra* note 10, at 707.

20. *Id.* at 710.

The representativeness heuristic involves judgment based on superficial matters such as outward appearances. A hypothetical example involves a mediator working to try to get a separating couple to arrive at a parenting plan agreement. Both parents consistently and energetically assert they should have primary residential care of their 12-year-old son, and the mediator has the impression that neither one would tolerate the other having most of the residential time. The mediator has briefly interviewed the son to establish rapport with him and sizes him up to be a “tough kid.” The mediator is aware that there can be a number of challenges associated with spending an equal amount of time between two homes, especially because these parents have very different parenting styles from one another, and they plan to live about a 45-minute drive from one another. The mediator makes a decision to press hard for an equally shared custody arrangement, and there are considerable efforts at persuasion directed to the parents that the son is ostensibly tough enough to cope with it, even though there is only a shallow understanding of him.

When the availability heuristic is relied upon, a decision is made based on the ease with which certain attributes come to mind. A hypothetical case pertains to an ongoing evaluation. The evaluator has recently completed a full-day continuing education seminar on post-traumatic stress disorder. Since that training, the evaluator has decided that the father in the evaluation case suffers from that condition. Accordingly, the evaluator has been pondering how to create and propose a parenting plan that adequately considers the parent who supposedly has that disorder. However, the evaluator has not carefully examined the extent to which the father actually manifests the diagnostic criteria of post-traumatic stress disorder. Similarly, there has not been consideration given to the possible presence of other mental health conditions and to whether the father may simply be experiencing transient stress that frequently accompanies divorce and litigation.

In these examples, the hypothetical professional engaged in intuition that relied upon the heuristic attributes of emotion associated with childhood experiences, the superficial appraisal of a 12-year-old boy, and easily recalled information from a continuing education class. In each case, the hypothetical professional failed to engage in deliberative reasoning that closely considered relevant statutory factors and the considerable body of research-based facts relevant to children of divorce.

Anchoring is a common cognitive process that is not always categorized as a heuristic because it can involve aspects of both System 1

and System 2.²¹ Examples of anchoring primarily involve quantitative data. Therefore, it is especially applicable for matters such as negotiations about the relative proportions of parenting time for the mother and father. As a hypothetical example of anchoring, in an opening move in negotiations, the attorney for a parent asserts that the parent should have the child all the time except alternate Saturdays and Sundays. That time-sharing proposal becomes an anchor (System 1) in the negotiations and is likely to have a significant impact on the final parenting plan unless the other side can engage in a countermove to significantly change it.²² The anchor is very likely to exert a strong influence on other proposals, though adjustments (System 2) are often made as a result of the alternate propositions.

Individuals engaged in planning for parenting time schedules need to also be aware of many other factors that can impede or facilitate productive judgment processes. All individuals, including experts, tend to have considerable overconfidence in their own decisions.²³ As can be seen in Figure 3.1, intuition is effortless. In fact, the ease of associative, effortless System 1 thinking is associated with being in a positive mood. Being in a good mood tends to be an internal signal that all is well and diligence is not needed. Accordingly, excessive self-confidence in one's own judgment is associated with a superficial appearance of the details of the judgment contents fitting easily together into a coherent package. Also, the ease with which a decision comes to mind, which is characteristically related to quick and superficial cognitive processing as well as positive mood, contributes to overconfidence.

Too often, a decision is made easily and seems thoroughly coherent when we have not bothered to consider, collect, and examine an adequate amount and variety of relevant information. Similarly, an illusion of coherence can be present when we have not thought sufficiently to retrieve adequate information from memory.

There is a profoundly important danger for professionals of all disciplines in potentially relying primarily on their own family experiences as they engage in judgments relevant to parenting plans. With very rare exceptions, all of us grew up in families. Similarly, many of

21. THINKING, *supra* note 10, at 119.

22. *Id.* at 126.

23. *Id.* at 255; Hillel J. Einhorn & Robin M. Hogarth, *Confidence in Judgment: Persistence of the Illusion of Validity*, 85 PSYCHOL. REV. 395 (1978).