



ASSOCIATION OF
FAMILY AND
CONCILIATION COURTS



eNEWS

Family Court Review 50th Anniversary Special Virtual Issue

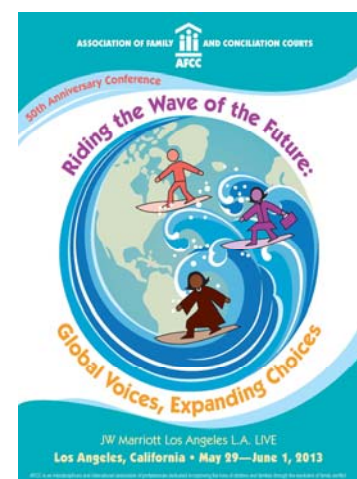
AFCC is pleased to present a special virtual issue of *Family Court Review*, which complements the January 2013, 50th Anniversary issue. Christine Coates, MEd, JD, a former president and longtime member of AFCC, is the guest editor of this issue. Selections include articles by: Isolina Ricci; Hugh Mclsaac; Kenneth Kressel, Morton Deutsch, Nancy Jaffe, Bruce Tuchman, and Carol Watson; Stephen Gaddis; Meyer Elkin; Nancy Thoennes; Judith Wallerstein; Madam Justice Bertha Wilson, the first woman Supreme Court Justice in Canada; Janet Johnston and Linda Campbell; Forrest (Woody) Mosten; Peter Salem, Andy Schepard, and Stephen Schlissel; James Garbarino; Janet Johnston and Joan B. Kelly; Laura Brown; Marsha Kline Pruett, Rachel Ebling and Glendessa Insabella; Timothy Tippins and Jeffrey Wittmann; Honorable Milton C. Lee; Linda Fieldstone, Mackenzie C. Lee, Jason K. Baker, and James P. McHale.

[Read the special virtual issue](#)

AFCC 50th Anniversary Conference Riding the Wave of the Future:

MONTHLY E-
NEWSLETTER
VOL. 8 NO. 2
FEBRUARY 2013

Upcoming Conferences



**AFCC 50th Anniversary
Conference**
Riding the Wave of the Future:

Global Voices, Expanding Choices

**May 29–June 1, 2013, JW Marriott Los Angeles L.A. LIVE
Los Angeles, California**

You won't want to miss the conference plenary session, *Shared Parenting: The Next 50 Years*. The session continues more than a decade of AFCC discussions and *Family Court Review* articles on shared parenting and features presenters who were participants in the January 2013 AFCC Think Tank, *Closing the Gap: Research, Practice, Policy and Shared Parenting*. Presenters will explore areas of consensus and controversy in research, practice, and policy communities; how these issues result in a field often working at cross-purposes; and provide a framework for productive conversations in the future. Hon. Dianna Gould-Saltman, Dr. Joan B. Kelly, Dr. Bernie Mayer and Stacy Platt, JD will lead the discussion.

[More information](#)

Conference Deadlines

Last year's annual conference sold out in March. Now is the time to make your plans to attend this year. Register and make sure your payment is received by March 8 to take advantage of early registration discounts. AFCC members can save up to \$160 by registering early. The last day to apply for a scholarship to the conference is March 1. A record number of scholarships will be awarded this year in celebration of AFCC's 50th Anniversary. The deadline to submit a proposal to present a poster at the conference is March 15, and the deadline to nominate a colleague for an AFCC award is also March 15.

[Register online](#)

[More information](#)

AFCC Hosts Shared Parenting Think Tank

AFCC convened 34 leading family law researchers, practitioners and policymakers in Chicago, Illinois for two and a half days of discussion around issues related to shared parenting after separation and divorce. Participants in the think tank, *Closing the Gap: Research, Practice, Policy and Shared Parenting*, examined the issues—practical, political and ideological—related to shared parenting controversies, including overnights and young children and presumptions of equal or shared care and decision making. The interdisciplinary group examined areas of controversy and consensus in the research literature as well as the policy implications and politics involved in the shared parenting debate.

[Read more](#)

Global Voices, Expanding Choices

May 29–June 1, 2013

JW Marriott Los Angeles L.A. LIVE

Los Angeles, California

[Conference brochure](#)

[Register online](#)

[More information](#)

[Apply for a scholarship](#)

Conference Platinum Sponsors



AFCC–AAML Conference

September 26–28, 2013

Gaylord National Resort

Washington, DC Metro Area

AFCC Regional Training Conference

November 7–9, 2013

The Westin Crown Center

Kansas City, Missouri

[More information](#)

Joint Custody Laws and Policies in the Fifty States

By J. Herbie DiFonzo, JD, PhD, Hempstead, New York

The AFCC Think Tank on *Closing the Gap: Research, Practice, Policy and Shared Parenting* was held in Chicago, Illinois on January 24-26, 2013. Legal and mental health professionals participated in an exploration of the many issues surrounding shared parenting. A Summary Memorandum was prepared for the think tank to provide the statutory and case law context for joint custody determinations as an aid in considering some of the contemporary controversies on parenting for divorcing, separated and never-married parents. That Memorandum has been revised through February 7, 2013; the authors welcome updates regarding important new statutes or case law on these issues. Please email these items to J. Herbie DiFonzo at lawjhd@hofstra.edu.

[Click here to read the Memorandum](#)

Member Profile

JoAnne L. Pedro-Carroll, PhD, MA, MEd, Rochester, New York
AFCC member JoAnne Pedro-Carroll, Ph.D is working on what she calls “one of the most gratifying and rewarding experiences” of her professional life, serving as an advisor to Sesame Workshop’s new initiative, *Little Children, Big Challenges: Divorce*. The toolkit on divorce provides resources for families with young children, aged 2-8, as they transition through divorce. It was through JoAnne’s involvement that AFCC became a partner for this project.

[Read more](#)

Ten Tips for Doing Forensic Addictions Evaluations

Bob Lang LPC, LAC, MAC, SAP, Delta, Colorado

Forensic addiction evaluations come in different varieties, from federally regulated Department of Transportation (DOT) Substance Abuse Professional (SAP) evaluations to court ordered custody and parental fitness evaluations. Although these serve different purposes, there are common elements that need to be included to make the evaluation process a success. The following ten tips are the common elements needed to provide an effective forensic addictions evaluation.

[Read more](#)

AFCC Regional Training Conference

There’s No Place Like Two Homes:

**The Complexities of Separation, Divorce and Co-parenting
November 7-9, 2013, Westin Kansas City at Crown Center**

AFCC Training Programs



In collaboration with
Loyola University Chicago School of Law's
Civitas ChildLaw Center

Nuts and Bolts of Parenting Coordination: Helping High Conflict Parents Resolve Disputes
A two-day intensive program for parenting coordinators, mediators, and mental health professionals. Held with the Chicago Bar.
Joan B. Kelly, PhD
March 4-5, 2013

When Nuts are Loose and Bolts Don't Fit: Advanced Practices in Parenting Coordination
A two-day intensive program for parenting coordinators, mediators, and mental health professionals. Held with the Chicago Bar.
Debra K. Carter, PhD
March 6-7, 2013
Loyola University Chicago
Philip H. Corboy Law Center
Chicago, Illinois

Professionals dedicated to improving the lives of children and families through the resolution of family conflict

Nuts and Bolts of Parenting Coordination: Helping High Conflict Parents Resolve Disputes

Joan B. Kelly, PhD
March 4-5, 2013

Loyola University Chicago
Philip H. Corboy Law Center
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[More information](#)

When Nuts are Loose and Bolts Don't Fit: Advanced Practices in Parenting Coordination

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[More information](#)

AFCC Chapter Events

Louisiana Chapter Annual Conference

Collateral Damage: Addressing the Hidden Costs to Families and Professionals
March 7-8, 2013

Hampton Inn & Suites
New Orleans, Louisiana
[More information](#)

Florida Chapter Annual

Kansas City, Missouri

AFCC is accepting proposals for three-hour training workshops on the complex issues related to separation, divorce and co-parenting, including: relocation, domestic violence, special needs children, same-sex parenting, abuse allegations, and the child's voice.

Workshop proposals should combine a focus on research and theory with skill development to incorporate into practice. The deadline to submit a proposal is May 16, 2013.

[More information](#)

Parenting Coordination Training Programs in Chicago

AFCC, in collaboration with Loyola University Chicago School of Law's Civitas ChildLaw Center, is holding two new training programs on parenting coordination. Join Joan B. Kelly, PhD, March 4-5, for a two-day core training and Debra Carter, PhD, March 6-7, for an advanced training. Both training programs will be held at Loyola University Chicago in the Philip H. Corboy Law Center. Each two-day training program is eligible for 12 hours continuing education for psychologists and 12 NBCC-approved clock hours for counselors; approval for 12 CE credits for social workers in Illinois is pending, as is approval by the Illinois MCLE Board for 12 CLE credits.

[Register online](#)

[More information](#)

Member News

RSI Blog wins Best Electronic Media about ADR Award from CPR Institute

Resolution Systems Institute's [Just Court ADR](#) blog won the "Best Electronic Media About ADR Award" from the International Institute for Conflict Prevention & Resolution (CPR Institute). The award is presented annually to "a company, group, or individual that has produced exceptional electronic media that was focused on the field of ADR."

AFCC Staff Changes

Carly Wieman has been promoted to program coordinator. Carly began working at AFCC in April 2012. We welcome **Shawn Werner** to the AFCC staff as the new program assistant. Shawn is a recent graduate of University of Wisconsin-Madison. **Nola Risse-Connolly** has left AFCC after ten years. We wish her well in the next phase of her career.

Conference

Creating Our Future: One Family at a Time

March 14–16, 2013

The Rosen Center

Orlando, Florida

[More information](#)

Colorado Chapter Annual Conference

with BIDC and MDIC

Children Who Resist Post-Separation Contact with a Parent...

March 22, 2013

Omni Interlocken Hotel

Broomfield, Colorado

[More information](#)

New Jersey Chapter Annual Meeting

Parental Alienation—

Understanding the Issues and Getting Results...

April 3, 2013

Woodbridge Renaissance

Iselin, New Jersey

[More information](#)

Minnesota Chapter Annual Conference

Autism...The Coming Tsunami of Family Court: What Every Lawyer Needs to Know

April 4, 2013

University of Minnesota

[More Information](#)

Massachusetts Chapter Annual Conference

Behind the Scenes: Mental Health Consultation in Child Custody Cases

April 5, 2013

Regis College

Weston, Massachusetts

[More information](#)

Washington Chapter Conference

Pinnacles of Practice in Times of Challenge

April 6, 2013



Ten Tips for Doing Forensic Addictions Evaluations

Bob Lang LPC, LAC, MAC, SAP

Forensic addiction evaluations come in different varieties, from federally regulated Department of Transportation (DOT) Substance Abuse Professional (SAP) evaluations to court ordered custody and parental fitness evaluations. Although these serve different purposes, there are common elements that need to be included to make the evaluation process a success. Different from clinical treatment-driven and diagnostically-oriented addictions assessment, these types of evaluations need a more objective, substantiated and confirmatory orientation to hold their weight. The following ten tips are common elements needed to provide an effective forensic addictions evaluation.

1. Cover all bases.

Disclosures, disclaimers, client rights and responsibilities, and confidentiality statements should be the starting point for any forensic evaluation. Legal safeguards such as these can provide a layer of protection in the litigious arena of forensic evaluations and act as an educational guide post for the evaluative process. Do these documents really protect you from liability? This type of question is best referred to legal experts, but the purpose of these papers is largely to document your informing the client and the subject of the evaluation of the process. It is better to have a record of this if you ever have to justify or defend your role as an expert witness or forensic evaluator in court.

2. Find the gaps.

Biopsychosocial formats assist in establishing a well-rounded foundation for the evaluation process. There are many structured interviewing formats, first outlined by Engel (1977), that provide a broad sample of the overall level of functioning. These should include the three primary life domain areas that can be impacted by an addiction: the biological sphere, including medical and disease history, surgeries, medication use, current treatment, illnesses and family history of illness; the sociological sphere including family history, living arrangements, relationships, finances, work, school, home life, hobbies and activities; and the psychological sphere including psychiatric and treatment history, environmental stressors, mental status exams, and all other risk factors. As the interview progresses, be sure to highlight problem areas that might be attributed to an addiction that you can revisit later. It's helpful to have a clinical view of the client before you begin the addictions evaluation.

3. Test the waters.

Prescreening and screening questions provide a good way to transition into the addictions assessment. As the evaluation starts to unfold, this information can be used to highlight any discrepancies in the client's narrative. Using reliable and valid addiction screening tools is imperative. The eight questions created by combining the four Screening, Brief Intervention, and Referral to Treatment/ Alcohol, Smoking and Substance Involvement Screening Test (SBIRT/ASSIT) and four CAGE-Adapted to Include Drugs (CAGE-AID) screening questions provide a normed and standardized set of questions that set the stage for the developing addictions evaluation. The screening process portion of the evaluation can be expanded by using other addiction screening tools like the Alcohol Use Disorders Identification Test (AUDIT) for alcohol and Drug Abuse Screening Test (DAST) for drugs.

4. Fill in the gaps.

Standardized addictions interviewing formats assure an objective and thorough evaluation process. The Addictions Severity Index (ASI) is the most commonly used addictions assessment tool and was the first standardized assessment tool of its kind to measure the multiple dimensions of substance abuse. There is also a “lite” shorter version of the assessment tool that can be used. Addictions can be assessed across seven different life domains with this tool, including alcohol and drug use, psychiatric status, employment status, medical status, legal status, and family/social relationships.

5. Take a closer look.

After the foundation for the addictions evaluation has been established, it's time for a closer look at the details. Testing the depth, breadth, clarity and content of the addiction requires more substantive measures. The Minnesota Multiphasic Personality Inventory-2 (MMPI-2) may be used for this process. It has three substance abuse scales, which along with the validity scale may be used effectively as part of a more comprehensive evaluative process. The Substance Abuse Subtle Screening Inventory (SASSI) and Stages of Change, Readiness, and Treatment Eagerness Scale (SOCRATES) are two effective addiction testing tools are. Make sure you know the tests you use, as well as the research that backs them up, inside and out.

6. Investigate the facts.

Any evaluative process worth its weight backs up the evidence with collateral sources and this holds true for addictions assessments, as well. Talking with friends, family, employers, and professional contacts can shed light on areas of the addictions evaluation that are at times over looked by screenings, self-reporting and testing. This process helps to corroborate and validate the findings; collateral reports are rarely contrary to the information gathered during the evaluation. When they are, this provides additional information about the underlying addictive processes. Structured and standardized formats such as the Collateral Interview Form (CFI), outlined by Miller and Marlatt (1984), can be useful to get the most information from your questions. Remember that being prepared is the key for successfully interviewing collateral sources.

7. Build the report.

When crafting the evaluation it's important to understand the audience and to tailor the report to their needs. Addiction evaluative reports can be written to serve many different agencies that often have varying needs. Make sure you know the referral sources and that you build these collaborative relationships so you can develop an understanding of what information different agencies need to have included in the report.

8. Do the research.

Back up your report with relevant and current research. The integrity of the report comes from your ability to link your findings with the corroboration from collateral sources and support it with objective measures that are substantiated by research. Professional, peer-reviewed journals are a valuable asset in the addictions evaluation process. Much of this research can be accessed online; just be sure you evaluate the source, and, as with any research, make sure that the methodology is sound. The National Institute on Drug Abuse (NIDA), the Substance Abuse and Mental Health Service Administration (SAMHSA), and the Association for Addictions Professionals (NAADAC) are all valuable resources for current research on addictions.

9. Double-check the details.

It is critical to review your findings and conclusions. Evaluations should follow a standard where the logic model builds on the information gathered and links this information to other sources, then substantiates the findings and uses these findings to formulate conclusions. Evaluations that overlook this process are full of surprises and the outcomes often feel out of place. A good addictions evaluation should have a smooth, steady flow that can be easily followed; even a non-expert should understand how the conclusions were reached. Make sure all pieces of the evaluation fit together and formulate a solid clinical picture of the addiction process. Eliminate free floating conclusions or recommendations that are not supported by the details of the evaluation. All of the results of the evaluation must to be supported by the evidence—the backbone of a good evaluation.

10. Account for individual differences.

When writing the report it's important not to lose sight of the fact that each individual is unique. While all addictions may have similar clinical components, using a "one size fits all" approach to the complexities of each evaluation can lead the process down a slippery slope. While the above tips are based on empirical research and sound procedures, there are cases that may fall outside these parameters. Successful addictions evaluations should be able to account for variables while ensuring that the report is individualized for its purpose. While we should look for commonalities and themes, we must also consider that not all addictions or individuals are alike.

Bob Lang, LPC, LAC, MAC, SAP is a co-occurring forensic expert who conducts addictions evaluations, custody evaluations, mediations, and clinical services. He is a professor of Social and Behavioral Sciences at Colorado Mesa University in Grand Junction. Bob has over 30 years of experience as a co-occurring specialist, trainer and educator. He has published articles in the areas of divorce, loss and addiction, and has published a new book titled, Becoming a Better Parent: Ten Things We Need to Know About Parenting.

References and Resources

Addiction Severity Index (ASI)

http://adai.washington.edu/instruments/pdf/Addiction_Severity_Index_Baseline_Followup_4.pdf

The Association of Addictions Professional (NAADAC) <http://naadac.org/>

Alcohol Use Disorder Identification Test (AUDIT)

http://www.integration.samhsa.gov/AUDIT_screener_for_alcohol.pdf

Brown, R. L. & Rounds, L. A. (1995). "Conjoint Screening Questionnaires for Alcohol and Drug Abuse." *Wisconsin Medical Journal* 94:135-140.

CAGE-AID

http://www.hopkinsmedicine.org/johns_hopkins_healthcare/downloads/CAGE%20Substance%20Screening%20Tool.pdf

Collateral Interview Form (CFI) <http://casaa.unm.edu/inst/CIF.pdf>

Department of Transportation (DOT) Substance Abuse Professional (SAP)

<http://www.dot.gov/sites/dot.dev/files/docs/ODAPC%20SAP%20Guide%20Aug09.pdf>

Drug Abuse Screening Test (DAST)

http://www.emcdda.europa.eu/attachements.cfm/att_61480_EN_DAST%202008.pdf

Engel, G. L. (1977). "The Need for a New Medical Model: A Challenge for Biomedicine. *Science*. Apr 8; 196(4286):129-36.

Screening Brief Intervention and Referral to Treatment (SBIRT)

<http://www.integration.samhsa.gov/clinical-practice/sbirt/screening-page>

Lang, R. L. (2010). *Becoming a Better Parent: Ten Things We Need to Know About Parenting*. Langco Publishing, CO. <http://www.unhookedbooks.com/Becoming-A-Better-Parent-p/book424.htm>

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McLellan, A. T., Kushner, H., Metzger, D., Peters, R., Smith, I., Grissom, G., Pettinati, H., Argeriou, M. (1992). "The Fifth Edition of the Addiction Severity Index." *Journal of Substance Abuse and Treatment*. 9(3):199-213.

Miller, W. R., & Marlatt, G. A. (1987). "Manual Supplement for the Brief Drinker Profile, Follow-up Drinker Profile, and Collateral Interview Form. *Psychological Assessment Resources*. Odessa, FL.

Migneault, J. P., Adams, T. B., & Read, J. P. (2005). "Application of the Transtheoretical Model to Substance Abuse: Historical Development and Future Directions. *Drug and Alcohol Review*. September, (24): 437-448.

National Institute on Drug Abuse (NIDA) <http://www.drugabuse.gov/>

Rouse, S. V., Butcher, J. N., & Miller, K. B. (1999). "Assessment of Substance Abuse in Psychotherapy Clients: The Effectiveness of the MMPI-2 Substance Abuse Scales." *American Psychological Association*. March, Vol. 11(1): 101-107.

Stages of Change Readiness and Treatment Eagerness Scale (SOCRATES)
<http://casaa.unm.edu/inst/SOCRATESv8.pdf>

Substance Abuse and Mental Health Service Administration (SAMHSA) <http://www.samhsa.gov/>

Substance Abuse Subtle Screening Inventory (SASSI) <http://www.sassi.com/>



ASSOCIATION OF
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eNEWS

AFCC Hosts Shared Parenting Think Tank

AFCC convened 34 leading family law researchers, practitioners and policymakers in Chicago, Illinois for two and a half days of discussion around issues related to shared parenting after separation and divorce. Participants in the think tank, entitled *Closing the Gap: Research, Practice, Policy and Shared Parenting*, examined the issues—practical, political and ideological—related to shared parenting controversies including overnights and young children and presumptions of equal or shared care and decision making. The interdisciplinary group examined areas of controversy and consensus in the research literature as well as the policy implications politics involved in the shared parenting debate. Results from the discussions will be made available in a Report by co-reporters Professor Marsha Kline Pruett, PhD, MLS, Smith College for Social Work, and Professor J. Herbie DiFonzo, JD, PhD, Hofstra Law School. A special issue of *Family Court Review* in 2014 will include the Report, commentary and related articles. Future AFCC conferences will explore these issues in greater depth.

Participants in the think tank were:

Arnold Shienvold, PhD, AFCC President (Co-chair)
Peter Salem, MA, AFCC Executive Director (Co-chair)
Marsha Kline Pruett, PhD, MLS, Smith College for Social Work (Co-reporter)
J. Herbie DiFonzo, JD, PhD, Hofstra Law School (Co-reporter)
Bernie Mayer, PhD, Werner Institute at Creighton University (Facilitator)
Loretta Frederick, JD, Battered Women's Justice Project (Steering Committee)
Hon. Ramona Gonzalez, La Crosse, Wisconsin (Steering Committee)
Stacey Platt, JD, Loyola Chicago School of Law (Steering Committee)
Kyle Pruett, MD, Yale Child Study Center (Steering Committee)
Nicholas Bala, JD, LLM Queen's University Faculty of Law
Lawrence Jay Braunstein, JD, Braunstein & Zuckerman
Margaret F. Brinig, JD, PhD, Notre Dame Law School
Milfred "Bud" Dale, PhD, JD, Topeka, Kansas
Robin Deutsch, PhD, Massachusetts School of Professional Psychology
Hon. Grace Dickler, Circuit Court of Cook County, Illinois
Leslie Drozd, PhD, Newport Beach, California
Robert E. Emery, PhD, University of Virginia
William Fabricius, PhD, Arizona State University
Linda Fieldstone, MEd, Family Court Services, Miami, Florida
Jonathan W. Gould, PhD, Charlotte, North Carolina
Hon. Dianna Gould-Saltman, Los Angeles, California
Grace Hawkins, MSW, Pima County Family Center of the Conciliation Court, Arizona
Leslye Hunter, MA, AFCC Associate Director
Janet R. Johnston, PhD, San Jose State University
Joan B. Kelly, PhD, Corte Madera, California
Hon. William Fee, Angola, Indiana
Jennifer McIntosh, PhD, Alphington, Victoria, Australia
Anne Menard, National Resource Center on Domestic Violence

Irwin Sandler, PhD, Arizona State University
Andrew Schepard, JD, Hofstra Law School
Nancy Ver Steegh, JD, MSW, William Mitchell College of Law
Hon. R. James Williams, Halifax, Nova Scotia, Canada
Richard A. Warshak, PhD, University of Texas Southwestern Medical Center

Invited but unable to participate:

Chief Justice Diana Bryant, Family Court of Australia
Justice Rebecca Kourlis, Institute for the Advancement of the American Legal System
Michael Lamb, PhD, University of Cambridge
Robert Marvin, PhD, University of Virginia
Leslie Ellen Shear, JD, Los Angeles, California



Member Profile

JoAnne L. Pedro-Carroll, PhD, MA, MEd, Rochester, New York



AFCC member JoAnne Pedro-Carroll, PhD is working on what she calls “one of the most gratifying and rewarding experiences” of her professional life, serving as an advisor to Sesame Workshop’s new initiative, *Little Children, Big Challenges: Divorce*. As part of Sesame Workshop’s resilience initiative, the project aims to help children build self-confidence, problem-solving skills and the emotional tools they need to cope with adversity. The toolkit on divorce, available on the [AFCC website](#), provides resources for families with young children, aged 2-8, as they transition through divorce. It was through JoAnne’s involvement that AFCC became a partner for this project.

A clinical and research psychologist, author and mother of seven children and stepchildren, JoAnne grew up in a small town in Ohio in a large close-knit Italian family. JoAnne greatly admired her grandmother, from whom she experienced unconditional love and learned the importance of talking about conflict. Although her grandmother did not fully understand JoAnne’s determination to pursue higher education instead of an early marriage (at 18!), it was she who inspired JoAnne’s passion for working with children and families. JoAnne went on to earn her BA and MEd from the University of Cincinnati, and her MA and PhD in clinical and community psychology from the University of Rochester.

In the mid-1990s, JoAnne became involved with AFCC through Andy Schepard, current editor of *Family Court Review*. She was then developing a parent education program in New York, presented at an AFCC conference, and was hooked. Referring to AFCC as her “professional family,” JoAnne said, “My favorite aspects [of the organization] are the focus on the healthy resolution of conflict and meeting the great people in the organization at conferences, which has led to valuable collaborations with other professionals.”

JoAnne held faculty positions in psychology and psychiatry at the University of Rochester for 25 years and was a Senior Researcher at the Children’s Institute in Rochester, where she co-founded A.C.T.* For the Children (*Assisting Children through Transition), a court-endorsed parent education program. She also founded and directed the award-winning Children of Divorce Intervention Program (CODIP), an evidence based program for children that is now used worldwide. JoAnne’s book, *Putting Children First: Proven Parenting Strategies for Helping Children Thrive Through Divorce*, was published in 2010 and served as a key resource for the Sesame Street project.

Her involvement with Sesame Workshop began about two years ago, but throughout her career JoAnne has worked to empower and educate parents, which is why the Sesame Workshop project is particularly meaningful. “Providing evidence-based information and early intervention is key to the power of prevention. If we can reach parents early, they are less likely to end up entrenched in high conflict and complex issues that take a toll on children’s wellbeing. Parents are powerful in shaping their children’s lives,” said JoAnne.

This theme can be seen in all of JoAnne's work including the Sesame Street project. "It was a wonderful team to work with," she said, "The research base was used to create educational content that explains risk factors and protective factors for resiliency, while also being enjoyable and creatively appealing to young children. So much work and careful consideration went into what you see in the end result." AFCC presenter Dr. Robert Hughes was also an advisor on the project.

"Young children experience emotions they cannot express," JoAnne continued. "For instance they may worry that if one parent could leave, the other parent might leave them, too. They lack the emotional vocabulary to express their fears and demonstrate it through clingy behaviors or meltdowns. Those fears of abandonment and worries need to be addressed and the Sesame program does that by using a safe, child-friendly way of explaining 'grown-up' problems and that divorce is not children's fault. Children need reassurance that the kind of love parents have for them is the kind that never ends—no matter what. She went on to say, "The Sesame program seeks to help children understand what will change and also, what will remain the same. The segment 'Two Hug Day' shows how it is normal to have more than one feeling about the same thing, like going back and forth between homes."

The retrospective approach taken in the Sesame Street video segment is key to showing a coping model of how things can get better over time with the support of caring adults. JoAnne explained, "Abby Cadabby, the main character Muppet in the scene, is vulnerable and endearing. Since Abby's parents' divorce has already occurred, she can discuss how she'd had fears and questions, but also that she got through it by talking about her feelings with trusted adults and friends. This message of hope, that it will eventually feel better, is really important, as is the message to children that they are not alone, that their family is not "broken" or defective."

Through the many rewarding projects JoAnne has been involved in, she is especially pleased with the Sesame Street initiative. "What better way to share this information with millions of parents and children who need it? Parents are powerful in shaping their children's adjustment to family changes. It is so important that parents understand that what they do matters in preventing children's problems. Quality parenting from even one parent can contribute to children's resilience. Sesame Street has an incredible ability to reach people, and they have partnered with AFCC to be sure the resources created for *Little Children, Big Challenges: Divorce* will have the greatest impact when disseminated through AFCC members to the families who will benefit most."

Although JoAnne's work and travel commitments keep her very busy, she remains deeply devoted to her family and, on occasion, visits her extended family in Italy, including her second cousins who have been married for 70 years. JoAnne and her husband, Roger, and their children enjoy outdoor activities, such as hiking, biking and camping. Both JoAnne and her husband are licensed pilots and enjoy flying small planes together.

JoAnne has blogged for Sesame Street about *Little Children, Big Challenges: Divorce*. [Click here](#) to read the post. Her book, *Putting Children First: Proven Parenting Strategies for Helping Children Thrive Through Divorce*, will be available at the AFCC conference in Los Angeles. More information about JoAnne and her book is available on her [website](#) and through her new blog, [Helping Children Thrive](#), where she also provides timely information for parents in transition.

Joint Custody Laws and Policies in the Fifty States: A Summary Memorandum

J. Herbie DiFonzo, Kristin Pezzuti, Nicole Guliano, and Diana Rivkin^{*}

I. Introduction

This Memorandum summarizes the legal principles that guide courts in the determination of joint custody issues throughout the United States. It was originally prepared for the AFCC Think Tank on *Closing the Gap: Research, Practice, Policy and Shared Parenting*, held in Chicago, Illinois on Jan. 24-26, 2013. The Memorandum is intended to provide the statutory and case law context for joint custody determinations as an aid in considering some of the contemporary parenting controversies for divorcing, separated, and never-married parents. It analyzes principles at play in the United States; the authors will present a similar summary of the joint custody doctrines and practices in selected Anglophone countries at a later time.

Please note that this Memorandum consists of a general summary of the legal trends in deciding joint legal and physical custody; it is not a comprehensive compilation. As a work-in-progress, the authors welcome notices of important new statutory and case law developments. Kindly email these references to Prof. J. Herbie DiFonzo at lawjhd@hofstra.edu. Please note that this Memorandum is current as of February 7, 2013.

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There is no current consensus among the states regarding the applicability, appropriateness, or even the definition of joint custody. Given the wide variety of principles and practices, generalizations must be taken as approximations with numerous exceptions. This Summary Memorandum organizes research on the fifty states' legal policies regarding joint custody. We identify interstate similarities and discrepancies in joint custody determinations, as well as emerging trends that may suggest future lines of agreement.

The term “joint custody” has often been used rather loosely and confusingly in both popular journals and professional publications, including statutes and judicial opinions. Joint custody has described a number of permutations: that both parents have legal custody (decision-making) but only one parent has physical custody (residence); that the parents share both legal and physical custody in approximately equal proportions; and that the parents share legal custody but one parent predominates in the residential custody of their child. This last scenario resembles the traditional sole custody award to one parent with visitation rights to the other. Even decreeing that joint physical custody will be equally shared opens the door to other questions: will the child spend alternate weeks (or fortnights or months or longer set periods) with each parent; will the child live with one parent on weekend and holidays while residing during school days with the other; or—a rare option—will the child stay in one residence while each parent lives in the home during alternating time periods.

In light of this multiplicity of arrangements, the joint custody-sole custody distinction is best viewed along a continuum, not as a sharp divide. Given the lack of terminological rigor in the field, we have endeavored to separate our analysis into joint legal and joint physical custody,

indicating as appropriate any deviations from the standard definitions.¹ In most states, joint custody determinations distinguish between joint legal and joint physical custody, allocating to the former category the rights and responsibilities of child-raising decisions, and to the latter the amount of time the child is to reside with each parent. The states will often allow one without the other, most frequently joint legal custody without joint physical custody. In addition, most states agree that allocating custody to the parents in their joint capacity does not necessarily imply an equal sharing of residential time or decisional rights.

Our legal system has also evolved several presumptions and preferences that have a substantial impact on the child custody decision. These include preferences for and against joint custody itself. Also noteworthy are the archaic-though-not-extinct tender years presumption (favoring maternal custody for very young children); and the nearly universal presumption against awarding custody to a perpetrator of domestic violence. Custody laws also often contain provisions that express or imply a preference for the child's primary caretaker.

Finally, the Memorandum will summarize the emerging trend in the states seeking to re-route custody proceedings from contested hearings onto alternative resolution pathways. Some legislatures have changed the traditional nomenclature in an effort to induce the parties to shift

¹ The semantic swamp is not a recent phenomenon. Joint custody was characterized in 1979 as afflicted with a "frightful lack of linguistic uniformity." D. Miller, *Joint Custody*, 13 Fam. L.Q. 345, 376 (Fall 1979). The Maryland Court of Appeals complained a few years later that "[t]he inability of courts and commentators to agree on what is meant by the term 'joint custody' makes difficult the task of distilling principles and guidelines from a rapidly growing body of literature and case law. What one writer sees as an amorphous concept another sees as a structured legal arrangement." *Taylor v. Taylor*, 508 A.2d 964, 966 (Md. 1986). The miasma has by no means dissipated. For instance, the current Virginia statutory definition is a model of inclusiveness which sacrifices terminological clarity in the name of preserving broad judicial discretion:

"Joint custody" means (i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent, (ii) joint physical custody where both parents share physical and custodial care of the child, or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.

Code of Virginia § 20-124.1.

from an adversarial focus to one centered on best providing for the needs of the child. For example, Colorado has converted the traditional child custody lawsuit to a proceeding “concerning allocation of parental responsibilities.”² The same statute refers to a “[d]etermination of parenting time” in lieu of physical custody, and substitutes “[a]llocation of decision-making responsibility” for legal custody.³ In many states, legislative provisions and court procedures, as well as a raft of scholarship and popular commentary, is nudging the legal system away from custody litigation toward the drafting and implementation of parenting plans.⁴ Almost half the states provide for parenting plans. These plans are strong indicia of the social desirability of substantial involvement by both parents in post-separation child rearing. Parenting plans have been required as the preferred method to achieve the public policy goal expressed by quite a few state legislatures: that children have “frequent and continuing contact” with both parents.⁵

II. Joint Legal Custody

Until the 1970s, courts regularly refused to order any sharing of custody between divorcing parents. As the Maryland Court of Appeals noted in 1934, the traditional objection to joint custody was that it “that it divided the control of the child, which is to be avoided,

² Colo. Rev. Stat. § 14-10-123.

³ *Id.* at § 14-10-124 (1.5).

⁴ *See, e.g.*, In re Marriage of Littlefield, 940 P.2d 1362, 1368 (Wa. 1997) (“The key advantage of the parenting plan concept over the former law's custody concept is the parenting plan's ability to accommodate widely differing factual patterns and to allocate parental responsibility accordingly.”); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.05 Parenting Plan: Proposed, Temporary, And Final (2002). ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 49 (2004).

⁵ In re Marriage of Littlefield, *supra*, 940 P.2d at 1367 (citing statutes).

whenever possible, as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child.”⁶ But in the 1970s, joint custody became widespread “because parents began assuming more equal parenting responsibilities and it served to avoid the ‘win-lose’ mentality of child custody disputes.”⁷ In 1975, only North Carolina had a joint custody law. Within a decade, 30 states had adopted legislation permitting joint custody.⁸ At the same time, courts also began authorizing joint custody even without express statutory mandate.⁹ Many courts rapidly developed a favorable view of this parental arrangement “for relatively stable, amicable parents behaving in mature civilized fashion.”¹⁰

While definitions vary, the core concept of joint legal custody encompasses parents’ shared rights and responsibilities with respect to the care and control of their children and mutual participation in making major child-rearing decisions. These decisions include dealing with a child’s education, medical and dental care, discipline, extracurricular activities, and religious training.¹¹ States vary on whether shared decision-making applies to quotidian choices as well as to major life resolutions concerning the child. For example, a West Virginia statute authorizes the child’s legal custodian to make “significant life decisions,” which it defines as including but not limited to “the child’s education, spiritual guidance, and health care.”¹² A related statute

⁶ *McCann v. McCann*, 173 A.7, 9 (Md. 1934).

⁷ LINDA ELROD, *CHILD CUSTODY PRAC. & PROC.* § 1:8. Joint custody.

⁸ Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 Ohio St. L.J. 455, 456n.3 (1984).

⁹ *See, e.g.*, *Taylor v. Taylor*, 508 A.2d 964 (Md. 1986); *Beck v. Beck*, 482 A.2d 63 (N.J. 1981); and *Daniel v. Daniel*, 238 S.E.2d 108 (Ga. 1977).

¹⁰ *Braiman v. Braiman*, 378 N.E.2d 1019, 1021 (N.Y. 1978).

¹¹ *See, e.g.*, *Ysla v. Lopez*, 684 A.2d 775, 777-778 (D.C. 1996) (citation omitted) (“Legal custody refers to the authority and duty to make long-range decisions concerning the child’s life, including education, discipline, medical care and other matters of major significance to the child’s life. Joint legal custody, therefore, refers to joint decision-making concerning long-range decisions.”); South Carolina Code § 63-15-210 (defining joint custody to mean that “both parents have equal rights and responsibilities for major decisions concerning the child, including the child’s education, medical and dental care, extracurricular activities, and religious training”).

¹² West Virginia Code § 48-1-220 (2009)

provides that “each parent who is exercising custodial responsibility shall be given sole responsibility for day-to-day decisions for the child, while the child is in that parent's care and control, including emergency decisions affecting the health and safety of the child.”¹³

A. Varieties of Joint Legal Custody Determinations

States interpret joint legal custody in different ways. On one side are those jurisdictions holding that “both parents have an equal voice in making those decisions, and neither parent's rights are superior to the other.”¹⁴ That one parent may have residential custody does not countermand the parents' joint authority to make major child welfare decisions.¹⁵ If parents sharing legal custody cannot resolve a dispute regarding a child's education, upbringing, religious training, non-emergency health care, or general welfare, courts in those states believe that the family court must decide the option in the best interest of the child.¹⁶

But other states do not view the trial court as the default decider in joint legal custody cases where one parent is the residential custodian. These states have concluded that if parents with joint legal custody cannot agree on a major life decision for the child, then the parent with physical custody, not the court, should have the final say.¹⁷ Courts in several states may order joint legal custody but allocate to one parent the “ultimate responsibility” over specific aspects of

¹³ West Virginia Code § 48-9-207(c) (2009).

¹⁴ Taylor v. Taylor, *supra*, 508 A.2d at 967 (characterizing the Maryland standard).

¹⁵ See, e.g., Anderson v. Anderson, 56 S.W.3d 5, 8 (Tenn. App. 1999). In that case, the parents had joint legal custody but the parent with residential custody (the mother) argued that she had the power to decide upon the child's education. The Court of Appeals disagreed: “If Mother has the unilateral right, as she claims, to make the decision of home schooling vis-a-vis public schooling, Father is thereby relegated to a powerless position and joint custody is rendered meaningless.” *Id.*

¹⁶ See Lombardo v. Lombardo, 507 N.W.2d 788, 792 (Mich. App. 1993) (noting that “where the parents as joint [legal] custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child.”)

¹⁷ Griffin v. Griffin, 699 P.2d 407 (Colo. 1985).

the child's welfare.¹⁸ A South Carolina statute defines joint custody as “equal rights and responsibilities for major decisions concerning the child, including the child's education, medical and dental care, extracurricular activities, and religious training.”¹⁹ But a judge may “designate one parent to have sole authority to make specific, identified decisions while both parents retain equal rights and responsibilities for all other decisions.”²⁰

Whether by statute or case law, most states stress the importance of parental communication and consultation in the success of joint custody. For example, Connecticut's child custody statutes require that “the award of joint parental responsibility of a minor child” include “provisions for consultation between the parents and for the making of major decisions regarding the child's health, education and religious upbringing . . .”²¹ Parental cooperation and procedures for present and future dispute resolution are embedded in the state's definition of a “parental responsibility plan.”²² If only one of the parents requests joint custody, the court “may

¹⁸ A South Dakota statute provides that “[i]n ordering joint legal custody, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those aspects between the parties based on the best interest of the child.” South Dakota Codified Laws § 25-5-7.1; *see* Maine Rev. Stat. 19-A M.R.S.A. § 1501 (providing that parental responsibilities “may be divided exclusively or proportionately”); Louisiana Rev. Stat. § 9:335 (providing that unless the court orders otherwise, the “domiciliary parent shall have authority to make all decisions affecting the child”); Ala.Code 1975 § 30-3-153 (requiring as a condition of joint custody that the parties submit a parenting plan “[d]esignating the parent possessing primary authority and responsibility regarding involvement of the minor child in academic, religious, civic, cultural, athletic, and other activities, and in medical and dental care if the parents are unable to agree on these decisions.”); *Tucker v. Clarke*, 2012 WL 2886713 (Va. App. 2012) (holding that joint custody did not mean “equal decision-making authority” as one parent may have “ultimate decision making authority in matters of education and daycare, but only after consultation with other parent.”); *Desai v. Desai*, 987 A.2d 362 (Conn. App. 2010) (same); *Fraizer v. Fraizer*, 631S.E.2d 666 (Ga. 2006) (same).

¹⁹ South Carolina Code § 63-15-210.

²⁰ *Id.* This statute thus authorizes a court to allocate final decisional authority in one parent even when both are joint custodians. But it relies on the court's prescience (perhaps in light of a contested hearing) to identify the future areas of dispute best resolved by making one parent supreme. This statutory provision is likely best understood in the context of the legislative scheme mandating that the parents in contested custody matters prepare and file parenting plans. South Carolina Code § 63-15-220.

²¹ Conn. Gen. Stat. § 46b-56.

²² *Id.*, § 46b-56a. Parenting plans are discussed more fully at pp. 28-31, *infra*.

order both parties to submit to conciliation.”²³ A parenting plan must contain “provisions for the resolution of future disputes between the parents, including, where appropriate, the involvement of a mental health professional or other parties to assist the parents in reaching a developmentally appropriate resolution to such disputes.”²⁴ Similarly, a plan must include provisions “encouraging the parents in appropriate circumstances to meet their responsibilities through agreements . . .”²⁵ Cross-notification and prior consultation are stressed in Maine’s statute: “Parents who share parental rights and responsibilities shall keep one another informed of any major changes affecting the child's welfare and shall consult in advance to the extent practicable on decisions related to the child's welfare.”²⁶

The emphasis on mutual consultation as key to joint legal custody has logically led courts to refuse to sanction shared custody when parental cooperation and communication are lacking. A Nebraska appellate case approved the trial court’s award of sole custody to one parent, concluding that “because the parents were unable to communicate face-to-face and because there is a level of distrust between the parents, joint decision making by the parents was not in the child's best interests.”²⁷ This principle is abundantly established in case law.²⁸

²³ Conn. Gen. Stat. § 46b-56a(c).

²⁴ *Id.*, § 46b-56a(d)(3).

²⁵ *Id.*, § 46b-56a(d)(6).

²⁶ Maine Rev. Stat., 19-A M.R.S.A. § 1501. The Maine Supreme Court has interpreted this set of obligations in a realistic manner:

Ideally, parents will confer in advance and reach mutual agreements regarding major decisions affecting their child's welfare. Common sense and experience, however, must also inform the law's expectations for parents. Parenting decisions are often reached by cooperation in the form of one parent acceding to the wishes of the other parent in order to avoid parental stalemate and the negative consequences to the child that can flow from it.

Austin v. Austin, 806 A.2d 642, 646 (Me. 2002).

²⁷ Kamal v. Imroz 759 N.W.2d 914, 918 (Neb. 2009).

²⁸ See, e.g., D.M.P.C.P. v. T.J.C., Jr., 2012 WL 6554383 (Ala. App. 2012); Arndt v. Arndt, 100 A.D.3d 879, 954 N.Y.S.2d 196 (N.Y. App. 2012); Lewis v. Lewis, 734 S.E.2d 322 (S.C. App. 2012); Earley v. Earley, 2012 WL

But some states do not allow one parent to employ a unilateral veto on joint custody. An Alabama statute provides that a court “may order a form of joint custody without the consent of both parents, when it is in the best interest of the child.”²⁹ A Louisiana statute establishes a rebuttable presumption that joint custody is in the best interests of the children, and a parent who objects to joint custody bears the burden of rebutting the presumption.³⁰

Similarly, the Missouri legislature has determined that “joint physical and joint legal custody ... shall not be denied solely for the reason that one parent opposes a joint physical and joint legal custody award.”³¹ This provision must be read in context, however. Although a trial court must consider joint custody before awarding sole custody to either parent, there is no presumption in favor of joint custody.³² Joint *legal* custody is defined in the generally accepted manner, applying to broad parental decision-making.³³ Joint *physical* custody is defined as “an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents.”³⁴ The statute itself “declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child ... and that it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children, and to resolve disputes involving their children amicably through alternative dispute

4862551 (Ohio Ap. 2012); *Shinall v. Carter*, 2012 IL App (3d) 110302 (Ill. App. 2012); *Pena v. Stoddard*, 2011 WL 704324 (Tex. App. 2011).

²⁹ Ala. Code § 30-3-152(b).

³⁰ *Fountain v. Waguespack*, 639 So.2d 882, 887 (La. App. 1994) (characterizing La. Civ. Code Ann. art. 132).

³¹ Mo. Ann. Stat. § 452.375(5)(1) (West).

³² *Chapman v. Chapman*, 871 S.W.2d 123, 125 (Mo. App. 1994).

³³ Mo. Ann. Stat. § 452.375(1)(2).

³⁴ *Id.*, § 452.375(1)(3).

resolution.”³⁵ The court is charged with implementing these legislative goals by “determin[ing] the custody arrangement which will best assure both parents participate in such decisions and have frequent, continuing and meaningful contact with their children so long as it is in the best interests of the child.”³⁶

B. Joint Legal Custody and the Best Interests Standard

In all states, the child’s best interest is the paramount consideration in a custody determination.³⁷ Nearly every state has established factors to consider in determining the best interest of the child. Most have a fairly comprehensive set of statutory factors.³⁸ In some states, case law has substantially expanded the general directions provided by the legislature.³⁹

There is no consensus among states as to the exact relationship between a determination regarding the best interests of the child and the ultimate determination regarding joint custody. In other words, there is no clear way to assign weight or value to individual best interest factors in an effort to calculate whether an award of joint custody will be assigned. As the Practice Commentaries to New York’s custody statute suggest, “Since the court should always strive to do what is best for the child, the best interest of the child standard does not, on its own, offer

³⁵ *Id.*, § 452.375(4).

³⁶ *Id.*

³⁷ *See, e.g.*, O'Brien v. O'Brien, 704 So. 2d 933, 935 (La. App. 1997) (“Each child custody case must be viewed in light of its unique facts and circumstances with the principal goal of reaching a decision that embodies the best interest of the child.”)

³⁸ *See, e.g.*, La. Civ. Code Ann. art. 134 (setting out 12 factors for the court to consider in determining the best interests of the child).

³⁹ The relevant South Dakota statute commands only consideration of the child’s “temporal, mental, and moral welfare.” S.D. Codified Laws § 25-5-10. The state supreme court fleshed out those five words into a substantial listing of six multi-faceted factors. Fuerstenberg v. Fuerstenberg, 591 N.W.2d 798, 807 (S.D. 1999).

much real guidance.”⁴⁰ Typically, a state’s custody statute will list a number of factors for the court to assess, but will not prioritize these factors.⁴¹ The same multi-factor but open-ended analysis attends to child custody standards developed via case law.⁴²

Many states have established either a statutory presumption in favor of joint custody or a policy preferring joint custody to sole custody. Behind these presumptions or preferences in favor of joint legal custody stands the public policy of assuring that children will have frequent and continuing contact with parents who have shown the ability to act in their best interests, and to encourage parents to share in the rights and responsibilities of raising their children after post-divorce or separation.⁴³

⁴⁰ Alan D. Scheinkman, *Practice Commentaries*, N.Y. Dom. Rel. Law § 240 (McKinney). New York’s custody statute runs against the grain of most statutes in supplying practically no guidance, noting only that the court “shall enter orders for custody . . . as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child . . .” NY Dom. Rel. Law §240(1)(a). The statute specifies only certain violence and abuse factors as considerations for custody. If allegations of domestic violence “are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child . . .” *Id.* The court “shall not place a child in the custody of a parent who presents a substantial risk of harm to that child . . .” *Id.* Nor may the court award custody to a person convicted of the murder of a parent, legal custodian or guardian, or sibling of the child at issue in the proceeding. *Id.* at 1-c.(a). The New York statute provides no distinction between legal and physical custody.

⁴¹ *See, e.g.*, Ind. Code Ann. § 31-14-13-2 (West) (listing eight factors); *Fitzsimmons v. Fitzsimmons*, 722 P.2d 671, 675 (New Mex. App. 1986) (noting that the child custody statute “does not mandate that the court give greater or lesser weight to any specific factor. That is a matter reserved to the trial court's discretion. It is the trial judge who hears all the evidence, who observes the demeanor of the parties and their witnesses and who is in the best position to exercise his sound judgment.”)

⁴² *See, e.g.*, *Benal v. Benal*, 22 So.2d 369, 372-377 (Ms. App. 2009) (identifying and discussing the 11 factors set out by the state supreme court in *Albright v. Albright*, 437 So.2d 1003 (Ms. 1983)).

⁴³ The Texas statute reflects a common theme in declaring that the “public policy of this state” consists of “assur[ing] that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; [] provid[ing] a safe, stable, and nonviolent environment for the child; and [] encourag[ing] parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.” Tex. Fam. Code Ann. § 153.001 (West).

C. Joint Legal Custody Presumptions

Several states have a rebuttable statutory presumption that an allocation of decision-making responsibility to both parents jointly is in the best interest of the child.⁴⁴ A parent's domestic violence offense or history of domestic violence will frequently serve to rebut the presumption.⁴⁵

The operation of the joint decision making presumption is a complex process. By way of an extended illustration, consider the New Mexico framework. Its statute mandates “a presumption that joint custody is in the best interest of the child in an initial custody determination.”⁴⁶ But the statute carefully calibrates this presumption by subjecting it to a number of other provisions. A court considering joint custody is required first to weigh the regular statutory standards for the determination of child custody, and then to consider *nine additional factors* exclusive to joint custody.⁴⁷ The court is constrained not to “prefer one parent as a custodian solely because of gender.”⁴⁸ If the court does order joint custody, it “may specify the circumstances, if any, under which the consent of both legal custodians is required to be

⁴⁴ These include Florida, Idaho, Louisiana, New Mexico, Texas, Washington, D.C., Wisconsin, and Utah. For example, the Idaho statute provides that “absent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children.” Idaho Code § 32-717B(4). The Florida statute similarly provides that the court “shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.” Fla. Stat. § 61.13(2)(c)(2) (2009). A recent Florida appellate case has held, however, that even with this statutory presumption *and* with parental agreement, a trial court should have conducted its own best interests analysis prior to entry of a joint custody order. *Sparks v. Sparks*, Fla. Dist. Ct. App., No. 1D11-3327, 12/20/11.

⁴⁵ Jurisdictions with these provisions include Idaho, Texas, Utah, Washington, D.C., West Virginia, and Wisconsin. The Idaho statute contains a presumption “that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence.” Idaho Code § 32-717B(5).

⁴⁶ N.M. Statute § 40-4-9.1(A).

⁴⁷ *Id.*, § 40-4-9.1(B).

⁴⁸ *Id.*, § 40-4-9.1(C).

obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent.”⁴⁹

The New Mexico statute also emphasizes the importance of parenting plans by providing that joint custody may not be ordered unless the court has approved a parenting plan beforehand.⁵⁰ The parenting plan must include “a division of a child's time and care into periods of responsibility for each parent.”⁵¹ The statute details five other provisions that may be included in the approved parenting plan:

- 1) statements regarding the child's religion, education, child care, recreational activities and medical and dental care;
- 2) designation of specific decision-making responsibilities;
- 3) methods of communicating information about the child, transporting the child, exchanging care for the child and maintaining telephone and mail contact between parent and child;
- 4) procedures for future decision making, including procedures for dispute resolution; and
- 5) other statements regarding the welfare of the child or designed to clarify and facilitate parenting under joint custody arrangements.⁵²

An award of joint custody means that “each parent shall have significant, well-defined periods of responsibility for the child,”⁵³ but “does not imply an equal division of the child's time between the parents or an equal division of financial responsibility for the child.”⁵⁴ Each parent with joint custody is “expected to carry out [] responsibility for the child's financial, physical, emotional and developmental needs during that parent's periods of responsibility.”⁵⁵ The parents’ obligation to consult with one another before making a major child welfare decision is stated

⁴⁹ *Id.*, § 40-4-9.1(E).

⁵⁰ *Id.*, § 40-4-9.1(F).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*, § 40-4-9.1(J)(1).

⁵⁴ *Id.*, § 40-4-9.1(L)(4).

⁵⁵ *Id.*, § 40-4-9.1(J)(2).

explicitly: “[N]either parent shall make a decision or take an action which results in a major change in a child’s life until the matter has been discussed with the other parent and the parents agree.”⁵⁶ Further detailed provisions spell out notification and other requirements regarding parent’s change of residence, the child’s religious affiliation and activities, educational decisions and access to the child’s school records, medical and dental providers, and the child’s recreational activities.⁵⁷ The statutory scheme also provides seven options for making “decisions regarding major changes in a child’s life.”⁵⁸ These include mediation and family counseling requirements, allocating final decisional authority on a matter to one party, terminating joint custody, as well as a binding arbitration and court decision option.⁵⁹

In sum, the joint custody presumption in New Mexico is far from straightforward or simple. It requires the trial court to engage in an intricate weighing of numerous statutorily required and fairly detailed factors. It also entails parental commitment to a well-articulated parenting plan for allocating the child’s time and activities, as well as to very specific provisions for parental decision making with regard to disputes or major changes to the child’s life.

In Idaho, as in some other states with a joint custody presumption, a court awarding *sole* custody must make specific findings describing why joint custody is inappropriate.⁶⁰ One appellate court stressed the importance of a high level of specificity; merely alluding to one

⁵⁶ *Id.*, § 40-4-9.1(J)(3).

⁵⁷ *Id.*, § 40-4-9.1(J)(4)(a-e).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Idaho Code § 32-717B; *see* *Roeh v. Roeh*, 746 P.2d 1016, 1020 (Ida. App. 1987) (noting that “if a court determines to award either physical or legal custody solely to one parent, the court is required to state in its decision the reasons why the award is not for joint custody.”)

party's unfitness or including facts that only implied the court's reasoning was held insufficient to overcome the presumption.⁶¹

In several states, a joint custody presumption is triggered by parental agreement.⁶² For example, the Tennessee statute indicates that when parents agree to joint custody, a contrary finding by the court requires "clear and convincing evidence to the contrary."⁶³ This burden shifting is typical, since the presumption is often phrased in terms of the allocation of the burden of proof.⁶⁴ The degree of difficulty in carrying this burden depends on the court's view of the evidence suggesting the likelihood of *continued* parental agreement. But Tennessee courts have interpreted this to mean that joint custody arrangements are appropriate only in "certain limited circumstances"⁶⁵ revealing a "harmonious and cooperative relationship between both parents."⁶⁶ The traditional hostility to joint custody is still apparent: "While we have stopped short of rejecting this type of custody arrangement outright, divided or split [*i.e.*, joint] custody should

⁶¹ Roeh v. Roeh, *supra*, 746 P.2d at 1018-1021.

⁶² See Ala. Code 1975 § 30-3-152(c) ("If both parents request joint custody, the presumption is that joint custody is in the best interest of the child."); Cal. Fam. Code §3080 (West 1993) ("There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child ... where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child."); Conn. Gen. Stat. §46b-56a(b) ("There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court."); New Mexico §40-4-9.1(D) ("In any case in which the parents agree to a form of custody, the court should award custody consistent with the agreement unless the court determines that such agreement is not in the best interests of the child.") The New Hampshire custody statute contains a presumption "that joint decision-making responsibility is in the best interest of minor children" which may be triggered either by mutual agreement or by the request of "either parent." N.H. Rev. Stat. § 461-A:5(I-II). In the latter case, joint custody may be awarded in the court's discretion, and the court may appoint a guardian *ad litem* to assist in this determination. In either case, should the court refuse to order joint custody it "shall state in its decision the reasons for the denial." *Id.*

⁶³ Tennessee Code § 36-6-101(a)(2)(A)(i).

⁶⁴ See, e.g., Conn. Gen. Stat. §46b-56a(b); Tennessee Code § 36-6-101(a)(2)(A)(i).

⁶⁵ Darvarmanesh v. Gharacholou, 2005 WL 1684050, at *7 (Tenn. App. 2005).

⁶⁶ *Id.* (quoting Dodd v. Dodd, 737 S.W.2d 286, 290 (Tenn. App. 1987)).

only be ordered when there is *specific, direct proof* that the child's interest will be served best by dividing custody between the parents.”⁶⁷

West Virginia offers a different condition precedent to a presumption in favor of joint custody. The West Virginia statute holds that if each of the child's parents has been “exercising a reasonable share of parenting functions for the child, the court shall presume” that joint legal custody is in the child's best interests.⁶⁸ As with other joint custody presumptions, it can be rebutted if there is a history of domestic abuse or by a showing that joint allocation of decision-making responsibility is not in the child's best interest.⁶⁹

Nebraska courts may award “joint physical custody or joint legal custody, or both ... regardless of any parental agreement or consent.”⁷⁰ The court is authorized to override the wishes of either or both parents as long as it makes the specific finding that the award is in the best interests of the child after a hearing in open court.⁷¹ These provisions were added by the state legislature in 1993 to overrule a state supreme court decision that required the agreement of both parents in order to award joint custody.⁷² However, Nebraska appellate courts continue to

⁶⁷ *Id.* (quoting *Garner v. Garner*, 773 S.W.2d 245, 248 (Tenn. App. 1989) (Koch, J., dissenting)).

⁶⁸ W. Va. Code § 48-9-207(b) (West). This type of presumption aligns with West Virginia’s approximation rule for allocating custodial responsibility: “[T]he court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation ...” W. Va. Code Ann. § 48-9-206 (West).

⁶⁹ W. Va. Code § 48-9-207(b) (West).

⁷⁰ Neb. Rev. Stat. § 42-364(3)(b). In 2012, the South Carolina Legislature amended its custody statutes to provide that “[i]f custody is contested or if either parent seeks an award of joint custody, the court shall consider all custody options, including, but not limited to, joint custody ...” 2012 South Carolina Laws Act 259 (H.B. 4614), § 63-15-230(C).

⁷¹ Neb. Rev. Stat. § 42-364(3)(b).

⁷² *See Kay v. Ludwig*, 686 N.W.2d 619, 628-630 (Neb. App. 2004) (describing the sequence of court decision and legislative enactment.)

insist upon “the longstanding rule that joint custody is not favored by the courts of this state and will be reserved for only the rarest of cases.”⁷³

Some states explicitly disavow a joint custody presumption.⁷⁴ Other states’ statutes are silent on the question, implying that the courts have wide discretion to craft a custodial arrangement in the best interest of the children.⁷⁵ In either circumstance, trial courts are called upon to apply a multi-factor test in making the “best-interest” custody decisions.

D. Joint Legal Custody Preferences and Related Policies

Some states have articulated a preference—not a presumption—for joint legal custody through their statutory schemes, legislative policy declarations, or case law.⁷⁶ These expressed preferences require courts to keep joint legal custody “on the table” and encourage parents to share in the responsibilities of rearing their children. Sometimes the language is mildly hortatory: “The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their

⁷³ *Id.*, 686 N.W.2d at 629. In 2007, the Nebraska Supreme Court further narrowed the scope of a trial court’s ability to order joint *physical* custody in cases in which neither parent requested it. *Zahl v. Zahl*, 736 N.W.2d 365 (Neb. 2007).

⁷⁴ *See, e.g.*, Tennessee Code § 36-6-101(a)(2)(A)(i) (“[N]either a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established . . .”)

⁷⁵ *See, e.g.*, Wyoming Statute § 20-2-201(a) (“[T]he court may make by decree or order any disposition of the children that appears most expedient and in the best interests of the children.”); *id.*, § 20-2-201(d) “Custody shall be crafted to promote the best interests of the children, and may include any combination of joint, shared or sole custody.”

⁷⁶ *See, e.g.*, South Dakota Codified Laws § 25-5-7.1 (“In any custody dispute between parents, the court may order joint legal custody so that both parents retain full parental rights and responsibilities with respect to their child and so that both parents must confer on, and participate in, major decisions affecting the welfare of the child.”).

children.”⁷⁷ At other times, the preference is stated directly (“Joint legal custody is preferred.”⁷⁸), but conditioned by the common-sense necessity that parents can “cooperate and communicate.”⁷⁹

Kansas’s custody statute mandates a preference for joint custody by listing joint custody ahead of sole legal custody “in the order of preference.”⁸⁰ By contrast, Georgia has enacted a statutory preference in favor of joint custody that is less directly expressed but so understood in the case law. The Georgia custody statute begins by disavowing any presumption “in favor of any particular form of custody, legal or physical.”⁸¹ But a subsequent provision sets out “the express policy of this state to encourage that a child has continuing contact with parents ... and to encourage parents to share in the rights and responsibilities of raising their child after such parents have separated ...”⁸² The Georgia Supreme Court has held that enforcing the legislative policy favoring shared rights and responsibilities between parents requires the trial court to give “‘due consideration’ to the feasibility of a joint custody arrangement.”⁸³

Many states have no presumption or preference with regard to joint legal custody. Hawaii’s statutory scheme lays out the issue in neutral terms, directing the court that it should award custody to either or both parents according to the child’s best interests’ standard, and that it “also may consider frequent, continuing, and meaningful contact of each parent with the child unless the court finds that a parent is unable to act in the best interest of the child ...”⁸⁴ A recent

⁷⁷ Va. Code Ann. § 20-124.2B.

⁷⁸ Peterson v. Swarthout, 214 P.3d 332, 336n.6 (Alaska 2009).

⁷⁹ *Id.* (noting that while joint legal custody is preferred, it “is only appropriate when the parents can cooperate and communicate in the child’s best interest.”) (quoting Farrell v. Farrell, 819 P.2d 896, 899 (Alaska 1991)).

⁸⁰ Kansas Stat. 23-3206 (West).

⁸¹ Ga. Code §19-9-3(a)(1).

⁸² Ga. Code §19-9-3(d).

⁸³ Wills v. Wills, 707 S.E.2d 344, 347 (Ga. 2011).

⁸⁴ Haw. Rev. Stat. § 571-46(a)(1) (West); *see also* Ind. Code § 31-17-2-13 (“The court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child.”);

Arizona statute evenhandedly states that the court “may order sole legal decision-making or joint legal decision-making.”⁸⁵ But in “determining the level of decision-making that is in the child’s best interests,” the court must consider the eleven factors prescribed for the initial legal decision-making allocation, as well as four additional factors.⁸⁶ Although Arizona’s statute expresses no presumption or preference for joint legal custody, it requires the court, “[c]onsistent with the child’s best interests” to “adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.”⁸⁷ The legislative goal of ensuring that both parties retain their parenting roles as much as possible post dissolution is also apparent in the provision that a “parent who is not granted sole or joint legal decision-making is entitled to reasonable parenting time to ensure that the minor child has substantial, frequent, meaningful and continuing contact with the parent.”⁸⁸

Kentucky Rev. Stat. § 403.270 (5) (“The court may grant joint custody to the child’s parents . . . if it is in the best interest of the child.”). In the case of *Marriage of Gerchak*, 2007 WL 5471744 (Ariz. App. 2007), the appellate court explicitly rejected a party’s assertion that there was “an unstated presumption in the judicial system” that joint custody is preferred. *Id.* at *3. The court affirmed that Arizona law called upon the court to determine the appropriate custodial arrangement exclusively upon the best interests of the child. *Id.*; Ariz. Rev. Stat. § 25-403.

The Maryland Court of Appeals carefully articulated its rationale for refusing to adopt any custody preferences:

Formula or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made. At best we can discuss the major factors that should be considered in determining whether joint custody is appropriate, but in doing so we recognize that none has talismanic qualities, and that no single list of criteria will satisfy the demands of every case. . . . We emphasize that in any child custody case, the paramount concern is the best interest of the child.

Taylor v. Taylor, 508 .2d 964, 970 (Md. 1986).

⁸⁵ Ariz. Rev. Stat. §25-403.01(A) (Ariz. Laws 2012, Ch. 309 (effective Jan. 1, 2013)).

⁸⁶ *Id.*, §25-403.01(B); *see* §25-403(A) (listing the eleven factors); §25-403.01(B) (listing the four additional factors).

⁸⁷ *Id.*, §25-403.02(B).

⁸⁸ *Id.*, §25-403.01(D). The court need not comply with this directive if after a hearing it finds “that parenting time would endanger the child’s physical, mental, moral or emotional health.” *Id.*

Finally, some states have an explicit preference against joint legal custody.⁸⁹ Other states make it clear that, absent complete accord between the parents as to joint custody, trial judges are forbidden to allocate custodial responsibility jointly.⁹⁰ Courts also view parental pledges of forthcoming good behavior in the light of judicial experience with the conflicts experienced by many divorcing couples. As an Illinois appellate court stated, “we view joint custody as most extraordinary and counsel skepticism when trial courts hear promises from newly divorcing parents that they can surmount the manifest difficulties of a joint-custody order.”⁹¹

III. Joint Physical Custody

A generation ago, New York’s highest court formulated its perspective on joint physical custody in what has come to be known as the “Braiman rule”:⁹²

⁸⁹ *Word v. Remick*, 58 S.W.3d 422, 426 (Ark. App. 2001) (“Joint custody or equally divided custody of minor children is not favored in Arkansas unless circumstances clearly warrant such action.”).

⁹⁰ *See* Vermont Stat. § 665(a) (“When the parents cannot agree to divide or share parental rights and responsibilities, the court shall award parental rights and responsibilities primarily or solely to one parent.”); *Cabot v. Cabot*, 697 A.2d 644, 649 (Vt. 1997) (“The meaning of § 665(a) is plain: where the parents cannot agree, the court must award primary (or sole) parental rights and responsibilities to one parent.”)

⁹¹ *In re Marriage of Dobey*, 258 Ill.App.3d 874, 876 (1994). Maryland’s highest court has also emphasized the need for evidence of both present harmonious contact between the parents and a basis for believing the pattern has been set for further cooperation: “Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.” *Taylor v. Taylor*, 508 A.2d 964, 971 (Md. 1986).

Resolving disputes between joint legal custodians has led more than one appellate judge to opine that “[l]ike so many theories which have a noble purpose, [joint legal custody] often prove[s] to be unworkable when tested in a practical world.” *Matter of Marriage of Debenham*, 896 P.2d 1098, 1099-1100 (Kan. App. 1995) (quoting *Burchell v. Burchell*, 684 S.W.2d 296, 301 (Ky. App. 1984) (Gudgel, J., concurring and dissenting)). The Debenham court reluctantly affirmed the trial judge’s resolution of a school placement issue, noting the likelihood that “neither party will find much satisfaction with our decision” and that the parents “may well litigate the school issue on a yearly basis.” *Debenham*, *supra*, 896 P.2d at 1101. The appellate court blamed the legislature for its discomfort: “[O]ur legislature has declared joint custody and equal decisional rights as the public policy of this state. Under such mandate, courts are ill-equipped to decide these questions; but the courts must do so as best they can.” *Id.*

⁹² *Braiman v. Braiman*, 378 N.E.2d 1019 (N.Y. 1978); *see* Timothy Tippins, 3 *New York Matrimonial Law and Practice* § 21:3. Braiman rule (describing the Braiman case as the “premier fount of New York’s decisional law relative to joint custody ...”)

Children need a home base. Particularly where alternating physical custody is directed, such custody could, and would generally, further the insecurity and resultant pain frequently experienced by the young victims of shattered families. . . . It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion. As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos.⁹³

Although this assessment dates from 1978, New York judicial opinions still consider the gold standard parents for joint physical custody to be those same “relatively stable, amicable parents behaving in mature civilized fashion.”⁹⁴ The other half of the Braiman rule has also continued in force as the well-established principle “that joint custody is not appropriate where the parties are antagonistic toward each other and have demonstrated an inability to cooperate in matters concerning the child, even if the parties have agreed to the joint custody arrangement.”⁹⁵

By contrast with the major decision making components at the heart of legal custody, physical custody generally means “the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody.”⁹⁶ When physical custody is entrusted to the parents jointly, it is generally “divided” custody, as each parent normally has a separate residence to which the child travels.⁹⁷

⁹³ Braiman v. Braiman, *supra*, 378 N.E.2d at 1021.

⁹⁴ See, e.g., Martinez v. Hyatt, 86 A.D.3d 571, 927 N.Y.S.2d 375 (N.Y. App. 2011) (quoting Braiman v. Braiman, *supra*); Gorniok v. Zeledon-Mussio, 82 A.D.3d 767, 918 N.Y.S.2d 516 (N.Y. App. 2011) (same); Fiorelli v. Fiorelli, 34 A.D.3d 1216, 824 N.Y.S.2d 695 (N.Y. App. 2006) (same).

⁹⁵ TAMMY E. HINSHAW & JUDY E. ZELIN, 19B CARMODY-WAIT 2D § 118A:85. Joint custody. See Robert Emery, *Joint Physical Custody*, Psychology Today, May 18, 2009, at <http://www.psychologytoday.com/blog/divorced-children/200905/joint-physical-custody> (observing that “joint physical custody is the best and the worst arrangement for children. It’s the best when parents can cooperate enough to make joint physical custody work for children. It’s the worst when joint physical custody leaves children in the middle of a war zone.”)

⁹⁶ McCarty v. McCarty, 807 A.2d 1211, 1213 (Md. Spec. App. 2002) (quoting Taylor v. Taylor, 508 A.2d 964, 967 (Md. 1986)).

⁹⁷ See Mason v. Coleman, 850 N.E.2d 513, 518 (Mass. 2006) (“Shared physical custody necessitates ongoing joint scheduling and provision for supervision and transportation of children between homes, schools, and youth activities.”)

Divided physical custody will rarely be *equally* divided, and “most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights.”⁹⁸

Nor should an award of joint legal custody be seen as a lead-in to joint physical custody. In the words of the recently-enacted Arizona statute, “[s]hared legal decision-making does not necessarily mean equal parenting time.”⁹⁹ Logistical and other practical reasons generally lead to the far greater frequency of joint legal than joint physical custody awards, especially if the latter involves a 50/50 split of the children’s time between the parents.¹⁰⁰

A. Joint Physical Custody Awards: Presumptions, Near-Presumptions, and Court Interpretations

Joint physical custody rarely results in an equal sharing of parenting time.¹⁰¹ Generally, as in Missouri, the statute defines a joint custody order as one “awarding each of the parents

⁹⁸ *McCarty v. McCarty*, *supra*, 807 A.2d at 1213 (quoting *Taylor v. Taylor*, *supra* 508 A.2d at 967).

⁹⁹ Ariz. Rev. Stat. §25-403.02(E). *See also* Conn. Gen. Stat. § 46b-56a (West 2005) (noting that “the court may award joint legal custody without awarding joint physical custody where the parents have agreed to merely joint legal custody.”); Hawaii Rev. Stat. § 571-46.1(b) (providing that the court’s order “may award joint legal custody without awarding joint physical custody.”); Indiana Code § 31-17-2-14 (“An award of joint legal custody . . . does not require an equal division of physical custody of the child.”)

¹⁰⁰ *See Bell v. Bell*, 794 P.2d 97, 99 (Alaska 1990) (“While actual physical custody may not be practical or appropriate in all cases, it is the intent of the legislature that both parents have the opportunity to guide and nurture their child and to meet the needs of the child on an equal footing beyond the considerations of support or actual custody.”) (quoting An Act Relating to Child Custody, ch. 88 § 1(a), SLA 1982). The actual prevalence of joint physical custody is hard to estimate. Two decades ago, a California study found joint legal custody (79% of cases) much more common than joint physical custody (19.6% of cases). Significantly, the study also found that a substantial shift took place in many joint physical custody cases. Within three years of the court order, 45% of the joint physical custody arrangements had become *de facto* sole custody situations, with children living with their mothers. ELEANOR MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992). A 2009 Washington State study found that “46 percent of children of divorce, statewide, are ordered to spend a minimum of 35 percent parenting time with their biological fathers.” Bill Harrington, *Giving Parents Equal Parenting Time by Law*, *Seattle Times*, Feb. 25, 2009, at http://seattletimes.com/html/opinion/2008786615_opinb26harrington.html (discussing the Residential Time Summary Report prepared by the state Office of the Administrator for the Courts).

¹⁰¹ *See, e.g.*, Ill. Comp. Stat. 750 ILCS 5/602.1(d) (“Nothing within this section shall imply or presume that joint custody shall necessarily mean equal parenting time.”); *Squires v. Squires*, 854 S.W.2d 765, 764 (Ky. 1993) (“Equal time residing with each parent is not required, but a flexible division of physical custody of the children is necessary.”)

significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents.”¹⁰² The Missouri statute tracks the modern trend in insisting that joint physical custody “shall be shared by the parents in such a way as to assure the child of frequent, continuing and meaningful contact with both parents . . .”¹⁰³ Similarly, the Massachusetts statute aims that a child should have “periods of residing with and being under the supervision of each parent” with the usual proviso “that physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents.”¹⁰⁴ In Tennessee, the court must decree “a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child” consistent with a bevy of factors, including ten specified criteria pertaining to the best interests determination, as well as “the location of the residences of the parents, the child's need for stability and all other relevant factors.”¹⁰⁵

Even where the legislature has created a statutory presumption in favor of joint physical custody, judges retain wide discretion on how to allocate parenting time. For example, California law contains a presumption in favor of “joint custody,” a term which encompasses both joint legal and physical custody, when both parties agree.¹⁰⁶ But the presumption is subject

¹⁰² Missouri Stat. § 452.375(1)(3).

¹⁰³ *Id.*

¹⁰⁴ Mass. Gen. Laws Ann. ch. 208, § 31 (West); *see also* N.J. Stat. § 9:2-4 (declaring “the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.”)

¹⁰⁵ Tenn. Code § 36-6-106(a). Wisconsin has a similar statute which call for the court to “set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.” Wis. Stat. § 767.41(4)(a)(2).

¹⁰⁶ Cal. Fam. Code §§ 3002, 3080 (West 1993).

to the statutory multi-factor best interests analysis.¹⁰⁷ And joint physical custody “means that each of the parents shall have significant periods of physical custody,” and is to be “shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents ...”¹⁰⁸ Idaho law similarly includes a presumption that joint custody, both legal and physical, is in the best interests of the child “absent a preponderance of the evidence to the contrary.”¹⁰⁹ But the legislature made it clear that its focus was not parental equality but rather ensuring “significant periods of time in which a child resides with or is under the care and supervision of each of the parents ...”¹¹⁰ The legislative instructions equip the courts with broad discretion in crafting the actual arrangements:

Joint physical custody shall be shared by the parents in such a way to assure the child a frequent and continuing contact with both parents but does not necessarily mean the child's time with each parent should be exactly the same in length nor does it necessarily mean the child should be alternating back and forth over certain periods of time between each parent. The actual amount of time with each parent shall be determined by the court.¹¹¹

Statutory terms directing that parenting time be allocated equally are often interpreted by the courts to mean less than the words suggest. For example, Louisiana’s statute provides that “[t]o the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.”¹¹² But the state’s appellate courts have held that, despite the “shared

¹⁰⁷ *Id.*, § 3011.

¹⁰⁸ *Id.*, § 3004. Another provision gives the court the power to grant joint legal custody without joint physical custody. *Id.*, § 3085.

¹⁰⁹ Idaho Code § 32-717B(4).

¹¹⁰ *Id.*, § 32-717B(2).

¹¹¹ *Id.*, § 32-717B(4); *see also* D.C. Code § 16-914 (providing “a rebuttable presumption that joint custody is in the best interest of the child ...” but apparently subsuming it under the authority of the court to “issue an order that provides for frequent and continuing contact between each parent and the minor child or children and for the sharing of responsibilities of child-rearing and encouraging the love, affection, and contact between the minor child or children and the parents”)

¹¹² Louisiana Rev. Stat. 9:335(A)(2)(b).

equally” language in the statute, “[s]ubstantial time rather than strict equality of time is mandated by the legislative scheme providing for joint custody of children.”¹¹³ Substantial rather than literal equality is also at the heart of Georgia’s statute, which defines joint physical custody to mean “that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents.”¹¹⁴

While most states have eschewed temporal formulas, some jurisdictions have mandated specific percentages. Under Utah law, for example, joint physical custody means that “the child stays with each parent overnight for more than 30% of the year,” but it can also mean “equal or nearly equal periods of physical custody of and access to the child by each of the parents.”¹¹⁵ The Utah court also has the authority in a joint physical custody order to specify “one parent as the primary caretaker and one home as the primary residence of the child.”¹¹⁶ Minnesota law incorporates a “rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child.”¹¹⁷ Calculating what this formula means in the life of a child is not an easy task. The statute provides a method for determining 25 percent of parenting time that allows for alternative counting measures and implies that a strict computation may at times be impracticable:

[T]he percentage of parenting time may be determined by calculating the number of overnights that a child spends with a parent or by using a method other than overnights if the parent has significant time periods on separate days when the child is in the parent's physical custody but does not stay overnight. The court may consider the age of the child in determining whether a child is with a parent for a significant period of time.¹¹⁸

¹¹³ Brewer v. Brewer, 895 So.2d 745, 750 (La. App. 2005).

¹¹⁴ Ga. Code Ann., § 19-9-6(6) (West 2011).

¹¹⁵ Utah Code § 30-3-10.1(2) (West).

¹¹⁶ *Id.*

¹¹⁷ Minn. Stat. § 518.175(1)(e).

¹¹⁸ *Id.*

West Virginia’s approach to joint custody is unusual in that the state has adopted the “approximation” approach to shared parenting proposed by the American Law Institute in its Principles of Family Dissolution.¹¹⁹ The statute provides that “[u]nless otherwise resolved by agreement of the parents ... or unless manifestly harmful to the child, the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action ...”¹²⁰ But the statute subjects the approximation rule to a best interests standard with eight specific factors, allowing the court to deviate from the approximation rule as appropriate.¹²¹

In Texas, if the court appoints the parents as “joint managing conservators” of the child, it must “designate the conservator who has the exclusive right to determine the primary residence of the child ...”¹²² But the court must also “specify the rights and duties of each parent regarding the child's physical care, support, and education” and “allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent ...”¹²³ The Texas Family Code provides, however, that “[t]he best interest of the child shall always be

¹¹⁹ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.08 (2002) (proposing that, in the absence of parental agreement, “the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action ...”)

¹²⁰ W.Va. Code § 48-9-206(a).

¹²¹ *Id.*, § 48-9-206(a)(1-8).

¹²² Texas Family Code § 153.134(b)(1)

¹²³ *Id.*, § 153.134(b)(2) & (b)(4).

the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”¹²⁴

B. Recent Unsuccessful Legislative Measures Regarding Joint Physical Custody

Bills intended either to mandate joint custody presumptions or preferences, or to lift the parenting-time “floor” in joint physical custody cases have been a regular if generally unsuccessful feature of recent legislative sessions in a number of states. In 2011, a bill was introduced in the Minnesota Legislature to increase the minimum percentage of parenting time applicable to the joint custody presumption. As initially introduced, the bill would have required that parents share time with the child equally, and specified a minimum of “45.1 percent parenting time for each parent.”¹²⁵ During the legislative process, the bill was amended to adjust the required minimum parenting time to 35 percent.¹²⁶ It passed the state legislature with that formula, but was vetoed by the Governor.¹²⁷ In South Dakota, on Feb. 4, 2013 the state senate committee responsible for state affairs reported out a bill (passed by a 5-4 vote) providing that if joint legal custody is awarded, “there is a rebuttable presumption that both parents have joint physical custody of their child,” and defining joint physical custody as “equal time sharing.”¹²⁸ The bill is still pending as of this writing.

Other recent unsuccessful legislative efforts include the following: A bill mandating a joint custody presumption and providing that “the child resides alternately for specific and

¹²⁴ *Id.*, § 153.002.

¹²⁵ Minnesota H.F. No. 322, 1st Engrossment, 87th Legislative Session (2011-2012).

¹²⁶ Minnesota H.F. No. 322, 5th Engrossment, 87th Legislative Session (2011-2012).

¹²⁷ See Sasha Aslanian, *Dayton Vetoes Bill That Would Have Given Divorced Parents More Presumed Custody*, MPR News, May 24, 2012, at <http://minnesota.publicradio.org/display/web/2012/05/24/joint-custody-bill-veto>.

¹²⁸ South Dakota S.B. 125 (2013), at <http://legis.state.sd.us/sessions/2013/Bill.aspx?File=SB125P.htm>; see Sammi Bjelland, *Joint Custody Bill Moves Through Pierre*, Keloland.com, at <http://www.keloland.com/newsdetail.cfm/joint-custody-bill-moves-through-pierre/?id=143468> (Feb. 5, 2013).

substantially equal periods of time with each parent” was introduced in the Michigan legislature in 2005.¹²⁹ Several unsuccessful measures have been introduced in the Maryland legislature in recent years with the aim of creating a statutory preference for or rebuttable presumption of joint legal and physical custody.¹³⁰ In 2011, a bill introduced in the Alabama Senate would have required the court to order “equal parenting time with each of the two fit parents ...”¹³¹ A similar bill had been introduced in the Tennessee Legislature in 2010.¹³² In 2012, a bill was introduced in the Utah Legislature to create a presumption for both joint legal and joint physical custody.¹³³ Only the joint legal custody presumption was enacted into law.¹³⁴ On Jan. 15, 2013, a bill was introduced in the Nebraska legislature providing for “a rebuttable presumption that each parent is entitled to at least forty-five percent of the annual parenting time.”¹³⁵

IV. Parenting Plans

Development of a parenting plan is a significant family law mechanism created in response to the “persistent dissatisfaction with the traditional adversarial divorce process” and intended to encourage “models emphasizing self-determination and problem solving

¹²⁹ Mich. H.B. 5267, at <http://www.legislature.mi.gov/documents/2005-2006/billintroduced/House/pdf/2005-h1B-5267.pdf>.

¹³⁰ See [Maryland] Dep’t of Legislative Services, Child Custody: Background and Policy Implications of a Joint Custody Presumption 4 (2011), at http://dls.state.md.us/data/polanasubare/polanasubare_coucrijusncivmat/Child-Custody.pdf (describing the failed bills).

¹³¹ Alabama S.B. 196 (2011 Session).

¹³² Tennessee Equal Parenting Time Bill, H.B. 2916, at <http://www.capitol.tn.gov/Bills/106/Bill/HB2916.pdf>.

¹³³ Utah H.B. 107 (2012 General Session), at <http://le.utah.gov/~2012/bills/hbillint/hb0107.htm>.

¹³⁴ 2012 Utah Laws Ch. 271 (H.B. 107); see Utah Code § 30-3-10(1)(b).

¹³⁵ Nebraska LB 212 (2013), at <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB212.pdf>. The bill was referred to the Judiciary Committee.

approaches.”¹³⁶ In the last generation, family courts have moved “towards a philosophy that supports collaborative, interdisciplinary, interest-based dispute resolution processes and limited use of traditional litigation.”¹³⁷ In general, parenting plans are aimed at providing the responsibility of each parent in providing for the child’s physical care and emotional stability, now and as the child ages and matures.¹³⁸ Minimizing “the child’s exposure to harmful parental conflict” is another objective, as is commitment to a dispute resolution process “other than court action.”¹³⁹ Allocating decision-making authority and incorporating residential provisions for the child are also critical.¹⁴⁰

Many state statutes require a parenting plan as part of the process of obtaining joint custody.¹⁴¹ Additionally, some state courts may require the parents to submit a plan to implement a joint custody order.¹⁴² Some jurisdictions have instituted parenting coordination

¹³⁶ Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values And Expectations Transform The Divorce Process*, 42 Fam. L.Q. 659 (2008). Within the last decade, several alternative dispute resolution (ADR) approaches have emerged to assist in the resolution of child custody disputes. See Daniel J. Pickar & Jeffrey J. Kahn, *Settlement-Focused Parenting Plan Consultations: An Evaluative Mediation Alternative To Child Custody Evaluations*, 49 Fam. Ct. Rev. 59, 59-60 (2011) (discussing collaborative divorce, parenting coordination, impasse-directed mediation for high-conflict divorces, early neutral evaluation, mediation-arbitration, and meditative evaluations). Without a cooperative problem-solving approach, “[p]arents involved in litigation move from being the decision-makers in matters pertaining to their children, to risking the disempowerment that can occur when a third party decides their children’s future.”) *Id.* at 59.

¹³⁷ Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 Fam. Ct. Rev. 371, 371 (2009); see generally J. Herbie DiFonzo, *From Dispute Resolution to Peacemaking: A Review of Collaborative Divorce Handbook: Helping Families without Going to Court* by Forrest S. Mosten, 44 Fam. L.Q. 95 (2010); John Lande & Gregg Herman, *Fitting the Forum to the Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280 (2005).

¹³⁸ See, e.g., Wash. Stat. § 26.09.184(1)(a) through (1)(d). The statute mentions counseling, mediation, and arbitration as among the alternative methods. *Id.*, § 26.09.184(4).

¹³⁹ *Id.*, Wash. Stat. § 26.09.184(1)(e) & (4).

¹⁴⁰ *Id.*, Wash. Stat. § 26.09.184(5) & (6).

¹⁴¹ See LINDA ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE, § 5:10 n.1 (listing statutes from Colorado, District of Columbia, Florida, Illinois, Kansas, Missouri, Montana, Nebraska, New Mexico, Oregon, Tennessee, Utah, Washington, and West Virginia). See *Trubetzkoy v. Trubetzkoy*, 205 P.3d 891 (Utah App. 2009) (reversing the trial court’s joint legal custody order because neither parent had filed a parenting plan as required by statute).

¹⁴² See ELROD, *supra*, at § 5:10 n.2.

programs “to provide a child-focused alternative dispute resolution process ...”¹⁴³ In Florida, the parenting coordinator has a variety of duties, including “assist[ing] the parents in creating or implementing a parenting plan by facilitating the resolution of disputes between the parents by providing education, making recommendations, and, with the prior approval of the parents and the court, making limited decisions within the scope of the court's order of referral.”¹⁴⁴

The range and comprehensiveness of parenting plan provisions may be seen in the Arizona law requiring inclusion of the following:

1. A designation of the legal decision-making as joint or sole ...
2. Each parent's rights and responsibilities for the personal care of the child and for decisions in areas such as education, health care and religious training.
3. A practical schedule of parenting time for the child, including holidays and school vacations.
4. A procedure for the exchanges of the child, including location and responsibility for transportation.
5. A procedure by which proposed changes, disputes and alleged breaches may be mediated or resolved, which may include the use of conciliation services or private counseling.
6. A procedure for periodic review of the plan's terms by the parents.
7. A procedure for communicating with each other about the child, including methods and frequency.
8. A statement that each party has read, understands and will abide by the notification requirements [pertaining to the sexual offenders registration law].¹⁴⁵

¹⁴³ Florida Stat. § 61.125(1).

¹⁴⁴ *Id.*

¹⁴⁵ Ariz. Rev. Stat. § 25-403.02(C). In similar fashion, a Florida statute sets out the minimum standards required for a court-approved parenting plan:

A parenting plan [must] describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child; the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent; a designation of who will be responsible for any and all forms of health care, school-related matters including the address to be used for school-boundary determination and registration, and other activities; and the methods and technologies that the parents will use to communicate with the child.

Florida Stat. § 61.13(2)(b).

Many state statutes contain similarly detailed provisions for parenting plans.¹⁴⁶ In short, parenting plans have become an integral component for millions of custody resolutions nationwide.¹⁴⁷

V. Other Presumptions and Legal Doctrines Relevant to Joint Custody Determinations

A. Domestic Violence Presumptions

States have frequently enacted a statutory presumption against awarding legal or physical custody to a parent found to have perpetrated domestic violence.¹⁴⁸ Joint custody can be quite problematic in families with a history of domestic abuse.¹⁴⁹ For example, a Texas court may not award joint custody if credible evidence is presented of a “history or pattern” of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child.¹⁵⁰ An Arizona statute provides for “a rebuttable presumption that an award of sole or joint legal decision-making to the parent who committed the act of domestic violence is

¹⁴⁶ See, e.g., Ga. Code § 19-9-1; Minn. Stat. 518.1705; Utah Stat. § 30-3-10.7. The purposes of the Minnesota Legislature in enacting the parenting plan statute included reducing the number of costly legal conflicts over custody and visitation, decreasing the emotional harm resulting from this type of litigation, enhancing future parental relations, and maximizing both parents’ continued involvement in raising their children. Peter V. Rother, *Balancing Custody Issues: Minnesota’s New Parenting Plan Statute*, 57-DEC Bench & B. Minn. 27, 27 (2000).

¹⁴⁷ See generally Salem, *supra*; John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. Am. Acad. Matrim. Law. 411 (2012).

¹⁴⁸ See IRA M. ELLMAN, *ET AL.*, FAMILY LAW: CASES, TEXT, PROBLEMS 640 (5th ed. 2010); see also Linda D. Elrod & Milford D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 Fam. L.Q. 381 (2008) (noting that in all states, evidence of domestic violence is relevant in custody disputes, and 24 states have a rebuttable presumption against custody in the abusive partner).

¹⁴⁹ See Peter G. Jaffe, *et al.*, *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 56 Fam. Ct. Rev. 500 (coparenting involving either joint decisionmaking or joint caretaking is generally not appropriate in case involving domestic violence).

¹⁵⁰ Tex. Fam. Code § 153.004(b).

contrary to the child's best interests.”¹⁵¹ Nor in some states may a court approve a joint custody parenting plan if one of the parties is a domestic abuser.¹⁵²

Recently, domestic violence scholars have “increasingly have come to believe it is wrong to treat all domestic violence as having the same potential relevance to custody decisions.”¹⁵³ The range and detail of this literature is beyond the scope of this Memorandum, but it is important to note that the inter-relationship among child custody, presumptions, and domestic violence is quite complex.¹⁵⁴

B. The Tender Years Presumption and the Primary Caretaker Factor

The “tender years” doctrine affords a preference to the mother of a child of tender years in determining custody.¹⁵⁵ The doctrine is largely but not entirely an anachronism, having been either repealed by statute¹⁵⁶ or eliminated by case law.¹⁵⁷ A handful of jurisdictions have retained it in an attenuated form.¹⁵⁸ Even in jurisdictions that have parted ways with the doctrine,

¹⁵¹ Ariz. Rev. Stat. § 25-403.03(D).

¹⁵² See, e.g., *Caven v. Caven*, 966 P.2d 1247 (Wash. 1998) (mutual decision-making power under parenting plan prohibited where there is a history of domestic violence).

¹⁵³ ELLMAN, *ET AL.*, *supra* at 642.

¹⁵⁴ See Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 La. L. Rev. 1379 (2005); see also Special Issue on Domestic Violence, 46 Fam. Ct. Rev. 431-570 (2008).

¹⁵⁵ See *Dinkel v. Dinkel*, 322 So.2d 22 (Fla. 1975) (“other essential factors being equal, the mother of the infant of tender years should receive prime consideration for custody.”)

¹⁵⁶ See, e.g., So. Caro. Code 1976 § 63-15-10 (“Tender Years” Doctrine Abolished).

¹⁵⁷ See, e.g., *Ex parte Devine*, 398 So.2d 686 (Ala.1981) (abolishing the tender years presumption as an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.); *State ex. rel Watts v. Watts*, 77 Misc.2d 178, 350 N.Y.S.2d 285 (Family Court N.Y. County 1973) (same).

¹⁵⁸ See, e.g., *Clair v. Clair*, 281 P.3d 115, 120 (Ida. 2012) (noting that “the preference for the mother as custodian over the father of a child of ‘tender years’ is considered only where all other considerations are found to be equal.”); *Davis v. Stevens*, 85 So.3d 943, 949 (Miss. App. 2012) (the tender years doctrine has been weakened but the court may still consider the young age of a child as a factor that favors the mother).

courts may still consider a child's age in connection with the other evidence in a case in deeming whether "the emotional ties between a child and one particular parent may be stronger because of the child's age."¹⁵⁹ Despite the abolition of the presumption, "there remains among some judges a tendency to prefer that custody of young children be placed in the mother."¹⁶⁰ A relic of the common law, it seems that the tender years doctrine is forgotten but not gone.

While the tender years presumption has formally fallen into desuetude, states will weigh the primary caretaker's role in child rearing as a factor in making custody determinations in varying degrees. At one time, two state supreme courts experimented with a primary caretaker *presumption*,¹⁶¹ only to have their state legislature enact statutes rejecting the rule.¹⁶² Some states have a primary caretaker *preference*. The Oregon statute, for example, lists "[t]he preference for the primary caregiver of the child, if the caregiver is deemed fit by the court" as one factor among several considerations to be weighed in the best interests calculus.¹⁶³ The South Carolina Supreme Court has stated that while "there is no rule of law requiring custody be awarded to the primary caretaker, there is an assumption that custody will be awarded to the primary caretaker."¹⁶⁴

¹⁵⁹ Cherradi v. Lavoie, 662 So.2d 751, 753 (Fla. App. 1995).

¹⁶⁰ Scheinkman, *supra*, Practice Commentaries, N.Y. Dom. Rel. Law § 240, at C240:9.

¹⁶¹ *See, e.g.*, Garska v. McCoy, 278 S.E.2d 357 (W.Va. 1981); Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985).

¹⁶² *See* W.Va Code § 48-9-206 (replacing the primary caretaker presumption with the approximation rule proposed by the American Law Institute); Minn. Stat. § 518.17(1)(a)(3) (listing the "child's primary caretaker" as but one factor for the court to weigh in determining the best interests of the child). *See* Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 Minn. L. Rev. 427 (1990) (analyzing the Minnesota experience with this short-lived rule).

¹⁶³ Ore. Rev. Stat. § 107.137(1). The statute emphasizes that "best interests and welfare of the child in a custody matter shall not be determined by isolating any one of the relevant factors referred to in subsection (1) of this section, or any other relevant factor, and relying on it to the exclusion of other factors." *Id.*, § 107.137(2).

¹⁶⁴ Patel v. Patel, 599 S.E.2d 114, 120 (S.C. 2004).

Most jurisdictions will consider the fact that one parent served as the child's primary caretaker until the parents separated as one factor in the best interests calculus.¹⁶⁵ Both legislatures and courts have concluded that "[t]he fact that one parent has successfully been the primary care parent in the past obviously speaks to the issue of that party's continued ability to exercise care of the child in a custodial situation."¹⁶⁶ Some statutes more generally include "the prior involvement of each parent in the child's life" as a factor for the court to consider.¹⁶⁷ With regard to joint legal custody, the Texas statute directs the court to consider, *inter alia*, "whether both parents participated in child rearing before the filing of the suit."¹⁶⁸

VI. Conclusion

No clear consensus has emerged among the states regarding how joint custody is defined, how it is awarded, or how precisely joint physical and joint legal custody interact. All insist that the child's best interest is of paramount concern. The principal effect of this fundamental doctrine upon joint custody determinations is to cut against presumptions and preferences in

¹⁶⁵ See, e.g., *Pohlmann v. Pohlmann*, __N.W.2d__, 20 Neb. App. 290 (2012) (noting that a finding that the mother was the primary caretaker was an allowable consideration under the statutory factor directing the court to weigh "[t]he relationship of the minor child to each parent prior to the commencement of the action ...") (citing Neb. Rev. Stat. § 43-2923(6)). One appellate court has described the characteristics of the primary caretaker:

Which party is the primary caregiver may be determined by considering which party has nurtured the child and has taken care of the child's basic needs, for example by feeding the child, nursing the child when he or she is sick, scheduling daycare and doctor's appointments, and spending time disciplining, counseling, and interacting with the child.

Nice v. Townley, 274 P.3d 227, 230 (Or. App. 2012).

¹⁶⁶ Charles P. Kindregan & Monroe L. Inker, *Massachusetts Practice Series, Family Law and Practice* § 47:12, at 440 (3d ed. 2002); see also Peter N. Swisher, *et al.*, *Va. Prac. Family Law* § 15:8(b)(3) (2012 ed.) (positing that "no one would dispute the positive nature of proof that one parent or guardian has been a primary caretaker and has been successful in such a role as a basis for arguing the continuance of such a role in whatever formal custody arrangement may be decided by the court."). The Vermont statute calls for the court to consider "the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development ..." (15 Vermont Stat. § 665(b)(6)).

¹⁶⁷ D.C. Code § 16-914(a)(3)(I).

¹⁶⁸ Texas Code § 153.134(a)(4).

favor of broad judicial discretion applied with close attention to the facts of each case. In terms of the predictability of legal rules this state of affairs is hardly satisfactory, but whether greater precision is preferable to a case-by-case determination is an open question. The emerging trend everywhere is to nudge contending parents out of the litigation framework and into a frame of mind in which they focus on crafting a parenting plan to map out the future welfare of their children.