CHAIR MESSAGE

Mandatory Equal Custody:
Contrary to the Best Interests of Michigan Families[1]

By Rebecca E. Shiemke - Family Law Section Chair 2014-2015

HB 4141 was recently introduced in the Michigan legislature. The bill modifies the Child Custody Act to provide that the court must award substantially equal custody to parents unless it is shown by clear and convincing evidence "that a parent is unfit, unable, or unwilling to care for the child." A parent is unfit only if the parent's parental rights are subject to termination under the probate code. This makes the best interests of the child irrelevant and determines that only one type of parenting arrangement is available to all Michigan families. For the reasons discussed here and in Richard Victor's article included in this issue, the Family Law Section opposes this bill and has consistently opposed similar bills that mandate or presume equal parenting time.

Mandatory equal custody does not serve the best interests of children.

While joint custody may be appropriate where parents voluntarily commit to such an arrangement, mandatory joint custody does not work well for parents who are in conflict or unable to communicate about what is best for their children. For these families, custody ought to be considered in each case based on the particular needs of each family with a focus on what is best for the child.

Over the years, states have experimented with statutory joint physical custody presumptions. For example, California found its presumption resulted in greater familial conflict and, as a result, modified its statutory scheme to permit joint physical custody only on agreement. Oregon found that custody litigation almost doubled under its presumption of joint physical custody. These results are consistent with findings and experience in family courts that children exposed to high levels of conflict between their divorcing parents are prone to negative outcomes, and conversely, that when divorcing parents maintain low conflict levels, joint custody may work well for children.

Mandating joint custody confuses the child's best interests with parental interest and elevates the needs of parents over those of children. Deciding custody by imposing a mandatory equal custody arrangement is not probative of what is best for children because it provides the judge with a conclusion without any proof to support it. Mandatory joint custody will eliminate application of the twelve best interest factors, a legislatively-created system requiring courts to look at the facts of each case, apply those facts to the twelve factors, and arrive at a custodial arrangement specific to the needs of each child.

Mandatory equal custody places victims of domestic violence at risk.

Mandatory equal custody compromises the safety of battered parents and their children because it requires frequent parental contact, which provides batterers with continuing opportunities to control, harass and assault their victims. Children are adversely affected when one parent is abusive toward the other, a fact that was recognized by the Michigan legislature when it added domestic violence as a best interest factor to be considered in custody determinations. When the best interest factors no longer apply and the only basis for an award of less than equal custody is unfitness, inability, or unwillingness to parent, a judge will no longer be required to consider the presence of domestic violence in a child's family when deciding custody.

Amending the bill to exempt cases of domestic violence will not provide adequate protections. Many victims are reluctant to disclose abuse because they may not identify as a victim, they fear retaliatory violence from the batterer in response to the disclosure, they fear being labeled an "uncooperative" parent, or fear that courts will perceive such allegations as an attempt to gain a legal advantage. Mandating equal custody gives batterers an advantage in a custody dispute and unfairly burdens victims with proving unfitness or inability to parent in order to address the risk of further abuse to themselves and their children.

Mandatory equal custody will impoverish families.

An award of equal custody does not guarantee that both parents will be involved in caring for the child or providing for the child's financial needs. Under the Michigan child support formula when a child spends equal time with both parents, support awards will be reduced thereby providing fewer financial resources to the lower income parent most in need of

additional resources. In some cases, a parent seeks equal custody as a subterfuge to obtain a lower child support order and mandating equal custody gives such parents legal authority to avoid their responsibility to support their children.

Mandatory equal custody will also result in more litigation, which will increase poverty and decrease financial resources available for the care of children. When equal custody is imposed on families where one parent believes it to be harmful for the children, the result will be more costly court battles, which will negatively impact both family and court resources.

Mandatory equal custody will not affect perceived gender biases.

Some proponents of mandatory equal custody assert that it is necessary to counter perceived gender bias against fathers in the family court. Some assert that family judges are biased in favor of awarding custody to mothers and that fathers who requests custody cannot overcome such biases. However, this purported gender bias has not been conclusively shown by empirical evidence.[2] In a 1990 study by the Massachusetts Supreme Judicial Court, researchers found that while mothers had primary physical custody more frequently than fathers, "this practice does not reflect bias but rather the agreement of the parties, and the fact that, in most families, mothers have been the primary caretakers of children."[3] Far from finding a bias favoring women, the report found that when fathers "seek custody [they] obtain either primary or joint physical custody over 70% of the time." The report attributed this result to its finding that "courts hold higher standards for mothers than fathers in custody determinations." These findings are consistent with other studies that show fathers are more likely to be awarded custody over mothers, if they decide to contest custody.[4]

Conclusion

Michigan should maintain its statutory preference for custodial arrangements that are in the best interests of the child. Non-voluntary equal custody arrangements only exacerbate parental conflict, which negatively impacts children. Ultimately, the best interests of children should be the primary concern of a custody dispute.

Endnotes

1 With special thanks to Madison Sharko, a student at the University of Michigan Law School, who researched some of the issues raised in the message.

2 Mary Ann Mason, *The Roller Coaster of Child Custody Law over the Last Half Century*, 24 J. Am. Acad. Matrim. Law. 451, 457-58 (2012) ("The subsequent research on shared or joint parenting, like the father studies, ultimately yielded ambiguous findings. Yet inconclusive findings did not dampen the ardor of those convinced that shared parenting was the best custodial arrangement.").

3 Massachusetts Supreme Judicial Court, Gender Bias Study of the Court System in Massachusetts (1989), *reprinted in* 24 New Eng. L. Rev. 745, 747-48 (1990) *available at http://aniptoons.com/blogfile/Massachusetts_Gender_Bias_Study.htm.*

4 *See* Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody disputes—1920, 1960, 1990, and 1995*, 31 Fam. L. Q. 215, 217 (Summer 1997); Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 Clearinghouse Rev. 1113, 1117 (Apr. 1996); James W. Loewen, *Visitation Fatherhood, in Fatherhood Today: Men's Changing Role in the Family* 195, 201 (Phyllis Bronstein & Carolyn Pape Cowan eds., 1988) (finding fathers who seek custody win either sole or joint custody in half or more cases).

JOINT LEGAL CUSTODY PRESUMPTIONS: A TROUBLING LEGAL SHORTCUT

Nancy Ver Steegh and Hon. Dianna Gould-Saltman

This article examines the legal operation and impact of legal custody presumptions. We compare the nature of joint legal and joint physical custody and explore common misunderstandings about how presumptions work and their practical repercussions for children and parents. We conclude that legal custody presumptions are not suited to the task of promoting quality decision making and healthy parent–child relationships and they recommend alternative approaches.

Key Points for the Family Court Community:

- The operation and impact of legal custody presumptions are often misunderstood by practitioners.
- The goal of quality decision making on behalf of children is more realistically achieved through other approaches.

Keywords: Burden of Proof; Custody; Joint Legal Custody Presumption; and Legal Custody.

When parents separate, one or both will continue to make decisions involving the health, education and welfare of their children. Whether and under what circumstances parents should share decision-making authority has been the subject of debate in both the legal and mental health communities.

Some states have adopted presumptions regarding joint decision-making authority, commonly referred to as joint legal custody[1] presumptions. Proponents of joint legal custody presumptions hope to benefit children whose parents have separated by promoting continued involvement by both parents and encouraging parents to "share in the rights and responsibilities of raising their children."[2] Some believe that joint legal custody presumptions provide a transparent starting point for judicial decision-making[3] or provide an interim arrangement for newly separated parents.[4]

The notion of joint legal custody presumptions has widespread popular support but much of the discourse surrounding them fails to account for their practical legal operation and impact. This article explores the legal context of joint legal custody presumptions, focusing on their potential repercussions for children. The authors conclude that there are more realistic and effective ways to encourage quality decision making and safe and healthy parent–child relationships following separation.

I. OVERVIEW OF JOINT LEGAL CHILD CUSTODY PRESUMPTIONS

Legal custody involves decision-making about major issues affecting a child, including the child's health, education, and religion.[5] Joint legal custody[6] means that the parents will confer and make decisions together, with the result that neither has a final "say", or the legal ability to override the other, in the event of a disagreement. In contrast, sole legal custody designates one parent to make decisions. Consequently although the parents may confer on major decisions, if they do not do so or they do not agree, the designated parent decides.

Statutory presumptions regarding joint legal custody vary significantly but may be categorized as *presumptions of general application*, or *presumptions arising at the request of the parents*. For

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FAMILY COURT REVIEW, Vol. 52 No. 2, April 2014 263–270

example, Idaho has adopted a general joint legal custody presumption that applies whether or not parents have requested the arrangement.

> (4) Except as provided in subsection (5), of this section, 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.
> (5) There shall be 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 as defined in section 39–6303, Idaho Code.[7]

In contrast, Connecticut's presumption is triggered when the parents request joint custody.

> (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 at a hearing for the purpose of determining the custody of the minor child or children of the marriage . . . .[8]

Because the specific language of statutory joint legal custody presumptions varies by state, this article refers to them generically.

II. THE NATURE OF JOINT DECISION-MAKING

When physical custody is at issue, a great deal of time and energy is often focused on creating detailed parenting arrangements that regulate contact between parents, anticipate problem areas, and divide the child's time with specificity. These plans provide predictability for cooperative parents and a protective structure for others.

For many families, considerably less effort is spent planning for legal custody. This difference stems, in part, from the fact that future decisions about a child's medical care, religion, and education can't be calendared and charted in the same way as physical care.

For example, it is difficult to predict whether an infant will later need special education, whether a parent will undergo a change in religious beliefs, or whether a teenage daughter will seek parental permission for an abortion. More typically parents may disagree about what school a kindergartner should attend, whether orthodontics are really needed, or whether a child should attend counseling:

> Legal custody primarily involves major decision making about the child's life, including choices about religion, residence, "choice of school, course of study, extent of travel away from home, choice of camp, major medical treatment, lessons, psychotherapy, psychoanalysis or like treatment, part or full-time employment, purchase or operation of a motor vehicle, especially hazardous sports or activities, contraception and sex education, and decisions relating to actual or potential litigation involving the children . . .[9]

Precisely because of the nature of the decisions associated with legal custody, frequent parental contact and conferral may be required. This is in contrast to physical custody arrangements, which may be more easily structured to avoid contact between the parents.

A commentator suggests that five parental factors are important for successful joint legal custody: (1) effective communication, (2) cooperation and equality of negotiating power, (3) trust, (4) how the parties behave toward each other, and (5) setting and respecting boundaries.[10] Some parents are well or at least adequately equipped for the task and may elect it. But, for some parents incompatible values and parenting problems are root causes of the separation or divorce and these disagreements will have continuing consequences for children.

III. FAMILY REALITIES

For some separating and divorcing parents, joint legal custody is safe, appropriate, and beneficial for children. Many parents have a history of sharing decision-making concerning a child's religion, education, and medical care. When they disagree they are able to listen, problem solve, and seek outside assistance as needed. Some of these families choose to jointly make major decisions on behalf of their children. This option should be readily available to them.[11]

Some parents who are capable of sharing major decisions prefer for a variety of reasons not to make decisions jointly. In some cases joint decision-making is not practical, such as when a parent is on military deployment, travels extensively, lives far away, or is otherwise unavailable. One parent may have substantial expertise in an area, such as a medical doctor making health-related decisions or a teacher making educational decisions. Sometimes one parent has strong religious beliefs and the other does not. It is possible that one parent excels at decision-making while the other avoids it. These parents have rational and thoughtful reasons for tailoring their decision-making responsibilities in ways particular to them, and they should be encouraged to do so.

Other parents may aspire to joint decision-making but recognize that they presently lack the skills or foundational relationship needed to avoid impasses that would harm their children. They may require a period of education and support to determine whether it is feasible. For example, some unmarried parents may not have had a substantial or lengthy prior relationship.

Unfortunately, for some families joint legal custody will escalate conflict and lead to other detrimental effects. For those with a history of intimate partner violence, child abuse, substance abuse, mental illness, or deep-seated and unresolved disagreements on major parenting issues, joint legal custody will exacerbate problems and trap children in untenable situations.

Families differ markedly from each other with respect to their desire and capacity to make important decisions together. Their intentions, logistical situations, and capabilities may also change over time. As a result it is difficult, if not impossible, to prescribe any single decision-making arrangement that will benefit all families.

IV. PRESUMPTIONS RELY ON ASSUMPTIONS

As commonly used, the term "presumption" refers to a "supposition, presupposition, belief, guess, judgment, surmise, conjecture, speculation, hypothesis, postulation, inference, deduction, [or] conclusion."[12] As explained in more detail below, the term "presumption" is also a technical legal term with specific application in legal proceedings. Both uses incorporate underlying assumptions that may be stated or unstated.

General joint legal custody presumptions tacitly rest on a number of assumptions, but several unspoken assumptions are particularly troubling because the suppositions are not universally true for families. Several examples are listed below:

- Assumption: parents and children are so similarly situated as to be able to generalize about their needs;
- Assumption: decisions about health, education, and religion are infrequent sources of contention between parents;[13]
- Assumption: the benefits of joint legal custody for some children outweigh risk and detriment to children whose parents would inappropriately share joint legal custody;
- Assumption: most parents opposed to joint legal custody are not acting in good faith;
- Assumption: ordering parents into joint legal custody arrangements will make them cooperate.

The possibility that one or more of these assumptions are false raises significant public policy questions about the application of joint legal custody presumptions. In other words, if the needs of children vary, *or* shared decision-making is an area of controversy for parents, *or* there is risk and

detriment to some children, *or* most parents opposing joint legal custody are acting in good faith, *or* imposing joint legal custody on parents will escalate conflict, then the underlying values and logic behind joint legal custody presumptions are called into question.

V. PRESUMPTIONS SPRING TO LIFE PRECISELY WHEN THEY SHOULD NOT

General joint legal custody presumptions are triggered in the very situations where shared decision-making responsibility may be the most problematic. Parents are free to agree to joint legal custody and if they do so, they have no need of a presumption. Consequently, in a practical sense, joint legal custody presumptions become operational in the event that parents disagree.

Joint legal custody presumptions target situations where one parent believes that joint legal custody is somehow unsafe, inappropriate, or not in the best interest of the child. These are red flag cases that warrant additional scrutiny rather than a one-size-fits-all solution.

General joint legal custody presumptions do not automatically disappear in the event that both parents oppose the arrangement. For example, some parents may agree not to share joint legal custody but they may disagree concerning which parent should exercise sole decision-making authority. In such a case, a judge would consider whether the judgment of the parents is sufficient by itself to rebut the presumption.[14] If not, the application of the presumption could undermine the preference of the parents.

Parents who disagree about the advisability of shared decision-making, or who jointly oppose it, are not strong candidates for joint legal custody. Whatever the cause, they are signaling more disagreement, potential danger, or parenting problems down the road.

VI. REAL VERSUS IMAGINARY CHILDREN

1. General joint legal custody presumptions obstruct focus on the needs of children and limit the ability of judges to act on their behalf.

When presumptions are not part of the legal landscape courts make individualized child custody determinations based on the best interests of the child. Admittedly application of best interests factors can be challenging but the process keeps parents and decision makers attentive to the needs and interests of individual children. They are required to consider whether joint legal custody is in the best interests of a *particular* child.

In the context of a joint legal custody presumption, the best interests analysis is supplanted by the presumption.[15] Unless specifically provided otherwise by statute, a best interests analysis is only undertaken in the event that the presumption is successfully rebutted by one or both parents.

If neither parent rebuts the presumption, it is presumed that joint legal custody is in the child's best interest – no factual inquiry is required or in some instances allowed. Presumptions have the effect of limiting judicial involvement and oversight and judges are subject to being reversed if they do not comply with them.

2. General joint legal custody presumptions are disconnected from actual facts.

Most legal custody presumptions are targeted burden shifting devices rather than true evidentiary presumptions.[16] A true evidentiary presumption requires a predicate showing of facts that are logically linked to a resulting assumption or conclusion. (*If* fact X, *then* conclusion Y.) In contrast, a parent invoking a general joint legal custody presumption is not required to establish foundational facts as a prerequisite to imposing the presumption and shifting the burden of production of evidence to the other parent.[17] (~~*If fact X, then* conclusion Y.~~)

A true evidentiary legal custody presumption would require a parent to first establish facts with a proven link to successful shared decision-making. As a thought experiment, one could imagine the

possibility of drafting a statute based on social science research causally connecting certain parenting characteristics and attributes with beneficial shared decision-making. A listing of such parental attributes is well beyond the scope of this article, but could involve factors such as those discussed previously: effective communication, cooperation and equality of negotiating power, trust, the parties behave toward each other, and setting and respecting boundaries.[18] A parent seeking joint legal custody would initially prove the existence of the attributes before the burden of producing evidence shifts to the parent opposing the arrangement. If such an analysis could be devised and undertaken, the presumption would at least provide a link between parental functioning and the proposed result of joint legal custody.

An obvious difficulty inherent in developing an evidentiary presumption of this nature involves identification of parental attributes predictive of shared decision-making that would be in a child's best interest. By the time such factors are developed, considered, and evidence is brought forward concerning them, it would undoubtedly make more sense to proceed with an individualized best interests determination, and avoid the burden-shifting dance altogether.

VII. SQUELCHING OBJECTIONS

1. General joint legal custody presumptions do not "level the playing field" for parents.

On a "level playing field," both parents enter negotiation or the legal system without either being equipped with special rights or privileges. Each parent has the opportunity and the obligation to provide information bearing on the needs and interests of the child. Neither parent is preferred, nor relieved, of this responsibility.

Introduction of a general presumption of joint legal custody disrupts this equality. Under a general joint legal custody presumption, a parent seeking the arrangement may achieve it without taking any action.[19] The parent does not initially need to assert or show that joint legal custody is realistic or in the best interests of the child – the presumption relieves the parent of such responsibility.

In sharp contrast, a parent seeking sole legal custody will not be heard unless the parent is able to first produce evidence at the level required to rebut the presumption. Only then will that parent be allowed to show why sole legal custody would be in the child's best interest, and only then will the parent seeking joint legal custody have to respond or produce any evidence.

In operation, joint legal custody presumptions create a profound imbalance of power between parents who disagree. For example, assume that Parent A does not want to share joint legal custody with Parent B because Parent B has a history of ignoring Parent A's input, belittling Parent A in front of the children, and making and carrying out threats if Parent A doesn't go along with Parent B's wishes. Nevertheless, under a presumption, Parent B will automatically receive joint legal custody (with no need to show that it would be in the child's best interest) unless Parent A first rebuts the presumption, and then produces best interests evidence. The parents are not equally situated because Parent B initially does nothing while Parent A carries a heavy burden.

2. General joint legal custody presumptions target parents who may be poorly positioned to rebut them.

Parents with serious concerns about shared decision-making include those who are least equipped to rebut the presumption. For example, they may be survivors of intimate partner violence who are being threatened or who fear they will not believed, or they may be unrepresented parents who do not understand how to rebut a presumption.[20] This has serious repercussions because if a parent does not attempt to rebut the presumption, there may be no mechanism in place to identify or investigate serious problems.

Of course, those who find it difficult to rebut a presumption may still have difficulty providing evidence to support a request for sole decision-making authority. The difference is that rather than confining court inquiry to rebutting the presumption, the court can consider the totality of the evidence concerning the best interests of a child.

VIII. SIDELINING JUDGES

As discussed previously, some states have adopted joint legal custody presumptions that are triggered by the request of the parents. These present some different concerns and questions.

When both parents and the judge agree that joint legal custody is in the best interests of a child, there is no need to activate a presumption. Consequently, a presumption that arises based on the agreement of the parties would operate when, despite a joint request, a judge finds that joint legal custody would not be in a child's best interest.

One can imagine situations where agreed joint legal custody would actually not be in a child's best interest – for example, where one parent has been threatened or coerced by the other. In such cases, the interests of children are not well served by tying the hands of judges whose job it is to look out for their needs.

Joint legal custody presumptions that arise at the agreement of the parties present logical and practical inconsistencies. For example, when parents agree, who does the burden of producing evidence shift to? Who would rebut the presumption? Does the judge bring in witnesses and put on proof?

These presumptions seem aimed at judges who would abuse their discretion by ordering sole legal custody when the joint legal custody favored by the parents is actually in the child's best interest.[21] When a judge makes a capricious or unsupported decision, the parents have the right to appeal. On the other hand, if a judge bound by a presumption, approves a joint legal custody arrangement that is detrimental to the child, the child has no recourse. In this sense, fear of judicial hostility to joint legal custody arrangements may be inappropriately driving public policy.

IX. RECOMMENDATIONS

Joint legal custody presumptions are blunt instruments that largely operate without regard for the real needs of individual families and children. Rather than using a legal hammer to endorse a particular decision-making arrangement, there are more meaningful ways to support quality decision-making following parental separation. Below are recommendations for a deeper and more realistic commitment.

a. Identify the knowledge, skills, and attitudes needed for shared decision-making.
b. Create shared decision-making self-assessments for family members and provide accessible educational services and counseling for parents who want to improve their shared decision-making skills.
c. Provide parents with access to an unbundled consultation with an attorney so that parents can confidentially disclose and discuss issues such as intimate partner violence, child abuse, substance abuse, and mental illness.
d. Make individual determinations about whether shared decision-making will be in the best interest of a child.
e. In appropriate cases, create shared decision-making parenting plans that identify responsibility for decision areas, create protocols for conferring and decision- making, designate responsibilities between parents as appropriate, and provide for monitoring and modification.

From a child's perspective, the quality of decision-making is far more important than any particular allocation of authority between parents. Joint legal custody presumptions miss the mark because they

prize a particular arrangement. In so doing, they skip over the substance of what is required to make it work. Starting with a destination discourages consideration of other options, and discounts the preparation and dedication needed to make the journey.

NOTES

1. For the purpose of this article the authors use the term "legal custody" recognizing that jurisdictions use other terms to describe these arrangements.

2. Marsha Kline Pruett and J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting: AFCC Think Tank Final Report*, 52 FAM. CT. REV. 152 (2014).

3. Judge Gould-Saltman notes that in her experience, whether they will acknowledge it or not, each bench officer begins the analysis somewhere. It may be that 50/50 point from which the bench officer must then be "swayed away" with some compelling evidence. It may be gender based, although there is less legal basis to do so. It may also be that a bench officer takes each case as a tabla rasa and considers each data point as if it were a Post Note, waiting until the end of the presentation of evidence to see where the weight of the data points land. Whether the legislature creates law as a matter of presumption, as a check-list of factors to consider, or in some other way, it is important for the parties' right to due process that the procedures by which the Court will analyze the evidence presented be clear. The least desirable result would be for each individual bench officer to have some "secret starting point" for his or her analysis of which neither counsel nor parties was aware.

4. Judge Gould-Saltman notes that in her experience, when courts are congested and hearings must be brief, or the time to get to a hearing is so long that some de facto arrangement for making decisions must be implemented in the interim, a balance must be struck between a prolonged period of having no decision at all and having some means to reduce the amount of time necessary for those. Alternatively, a presumption in favor of awarding sole decision-making authority to either party, rather than to both parties, while more efficient, appears to create an even greater imbalance than a presumption in favor of joint decision-making, absent an opportunity to hear direct evidence.

5. *See* Minn. Stat. § 518.003. 3(a) (2013): "Unless otherwise agreed by the parties: (a) "Legal custody" means the right to determine the child's upbringing, including education, health care, and religious training."

6. *See* Minn. Stat. § 518.003. 3(b) (2013): "Joint legal custody" means that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training."

7. Idaho Code Ann. § 32-717B (2013).

8. Conn. Gen. Stat. § 46b-56a(b) (2013).

9. Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL'Y 223, 257–58 (2011) [hereinafter Connor] (citing and quoting Douglas E. v. Latanya D., No. CN89-10360, 1997 WL 297060, at 6 (Del. Fam. Ct. Feb. 27, 1997) (listing examples of major decisions related to legal custody)).

10. *See* Conner, *supra* note 9, at 228–48 (discussing elements of joint decision-making including effective communication, cooperation and equality of negotiating power, trust, how the parties behave toward each other, and setting and respecting boundaries).

11. Although not the subject of this article, the authors oppose sole legal custody presumptions for many of the same reasons discussed in this paper.

12. OXFORD AMERICAN WRITER'S THESAURUS.

13. Judge Gould-Saltman notes that joint decision making is an area in which many parents are able to distinguish themselves, whether by demonstrating the basis upon which they make decisions and how that differs from the way the other parent does so, or by demonstrating examples of how each parent exercises parental judgment.

14. Judge Gould-Saltman believes that opposition to joint legal custody by both parents would *per se* rebut the presumption but that a judge operating under a general joint legal custody presumption might require a formal stipulation before proceeding.

15. *See also* Lyn R. Greenberg, Dianna J. Gould-Saltman, Robert Schnider, *The Problem with Presumptions—A Review and Commentary*, 3 J. CHILD CUSTODY 139, 163 (2006) [hereinafter Greenberg] (discussing presumptions as "short cuts"); Gabrielle Davis, Kristine Lizdas, Sandra Tibbetts Murphy, and Jenna Yauch, *The Dangers of Presumptive Joint Physical Custody* 6–7 (2010) *available at* http://www.bwjp.org/files/bwjp/articles/Dangers_of_Presumptive_Joint_Physical_Custody.pdf (last visited September 9, 2013) [hereinafter Davis].

16. Dorothy R. Fait, et al., *The Merits of and Problems with Presumptions for Joint Custody*, 45 Md. Bar J. 12, 15 (2012) [hereinafter Fait] (Most joint legal custody presumptions are analogous to the presumption in a criminal case that an accused person is innocent until the state proves guilt beyond a reasonable doubt. If the state doesn't or can't do so, the defendant need do nothing to prevail.).

17. *Id.*

18. *See* Conner, *supra* note 9, at 228–48 (discussing elements of joint decision-making including effective communication, cooperation and equality of negotiating power, trust, how the parties behave toward each other, and setting and respecting boundaries).

19. Fait, *supra* note 16, at 15.

20. *See also* Davis, *supra* note 15, at 16–17 (discussing reasons that exceptions to joint legal and physical presumptions are ineffective in cases involving intimate partner violence).

21. *See* Greenberg, *supra* note 15, at 148 (2006) (discussing presumptions used for the purpose of "reigning in" judges).

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PERSPECTIVES ON JOINT CUSTODY PRESUMPTIONS AS APPLIED TO DOMESTIC VIOLENCE CASES

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Despite the trend toward statutory presumptions in favor of joint legal and physical custody, practitioners increasingly recognize that domestic violence has serious implications for the efficacy and safety of parenting and shared care. This article explores the implications of domestic violence for shared parenting and for the statutory legal and physical custody presumptions and exceptions which are triggered by or are applicable to domestic violence. This article proposes that a better framework for addressing intimate partner violence–related custody cases is one that guides practitioners toward fact-based determinations of the implications of the violence for parenting and co-parenting in individual cases.

Key Points for the Family Court Community:

- Parents who are coercive controlling abusers frequently exhibit the types of problematic parenting behaviors which make shared parenting unrealistic.
- Instead of applying blanket joint custody presumptions, all family court practitioners, including judges, should: (1) be alert to signs that domestic violence may be an issue; (2) understand the nature and context of any abuse; (3) determine the implications, if any, of the abuse for parenting and co-parenting; and (4) account for the violence and its implications in their handling of cases.
- Exceptions for domestic violence cases fail to prevent the inappropriate application of joint custody presumptions to many families for whom domestic violence is a significant issue because: (1) abuse is often not detected by the system, (2) victims have problems proving that the abuse occurred, and (3) many practitioners are disinclined to believe that the abuse occurred.

Keywords: *Best Interests*; *Domestic Violence*; *Intimate Partner Violence*; *Joint Custody*; *Presumptions*; *Shared Care*; *and Standards*.

Domestic violence can have serious implications for children and parenting. The protection and well-being of domestic abuse adult victims and children requires that custody, parenting time and decision-making arrangements account for the links between the abuse and parenting in individual cases. This article explores the implications of domestic violence for shared parenting and for the statutory legal and physical custody presumptions and exceptions triggered by or applicable to domestic violence. The authors agree that the better statutory framework for addressing intimate partner violence (IPV) related custody cases is one that guides practitioners towards fact-based determinations of the implications of the violence for parenting and co-parenting in individual cases.

CUSTODY PRESUMPTIONS IN IPV CASES

There are two primary ways in which IPV is implicated in presumptions related to joint custody. First, some laws state that upon a *finding* that IPV has occurred, joint legal (or decision-making) or physical custody with the abuser parent is not in the best interests of the child. This *true legal presumption* compels a certain result (sole custody) upon the showing of a predicate fact (the domestic violence). Second, a statute can state that joint legal custody or joint physical custody is presumed to be in the best interests of children. The latter type of legal "presumption" is less an evidentiary presumption than an expression of an assumption about what children need. Such presumptions shift the burden of proof in order to make it far less likely that a family will end up with any different

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arrangement than the statute presumes is in their interest. These types of presumptions can be subject to exceptions, such as where there has been a finding of domestic violence.

PRESUMPTIONS *AGAINST* AWARDS OF CUSTODY TO PERPETRATORS OF DOMESTIC VIOLENCE

Several states have statutes with true presumptions involving both domestic violence and child custody. Those with this kind of language state that where there has been a finding of domestic violence, some kind of custody, physical or legal, sole or joint, shall *not* be awarded to the abuser.[1] Such language began appearing in state codes in the 1990s in response to the fact that many state codes were silent on the issue of domestic violence and many courts considered violence against a parent to be irrelevant to parenting and, therefore, to custody determinations. The push for such presumptions was joined by the National Council of Juvenile and Family Court Judges when it promulgated Section 401 of the Model State Code on Domestic and Family Violence in 1994. That provision stated, "a determination that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody with the perpetrator of family violence" (Advisory Committee, 1994, p. 33).

While these presumptions against an award of custody, including shared custody, can be overcome by the perpetrator, rebuttal cannot be based upon the usual desirability of having frequent contact with both parents, but only upon a finding of such factors[2] as no new violence has occurred, the perpetrator has completed a batterer's or substance abuse treatment program or a parenting class (if needed) and whether safety of the victim can be assured through a restraining order. Arguably, knowing whether coercive controlling behavior is still a problem should be very significant factor in the decision to consider this type of presumption rebutted.

Presumptions that shared custody would not be in the best interests of the child reduce the likelihood that a custody decision-maker will completely ignore the implications of the violence for parenting by the abuser, or will decide that simply being a victim constitutes being a bad parent. Furthermore, they encourage decision-makers to consider the possibility that domestic abusers might present a risk of harm to their children even though the children themselves were not direct victims. Finally, they implicitly recognize the common problems with co-parenting that can flow from a history of coercive controlling abuse (Stark, 2009).

However, there are some flaws in such presumptions. First, the fact-finding that triggers them (generally, domestic abuse by a parent, but sometimes also such offenses as sexual assault) does not, alone, tell the fact finder what, if any, implications the act of domestic abuse actually has for parenting or co-parenting. Secondly, the range of context for and nature of acts of intimate partner violence are broad and include some IPV, which is not a coercive controlling violence.[3] Some IPV is even committed by parents who are being battered by the person against whom they are using violence; it can be self defensive or otherwise shaped and responsive to coercive controlling violence being used against this perpetrator of IPV. The very different natures and contexts for IPV can have very different (or even no) implications for parenting and co-parenting.[4]

Some such presumptions can be triggered by the issuance of a civil protection order (CPO) which can reduce the willingness of judicial officers to actually issue the CPOs (Allen & Brinig, 2011). [5] And, tying the presumption to the existence of a protection order does not account for the fact that many victims are reluctant to seek protection orders where that process might trigger even more violence or other abuse.

JOINT CUSTODY PRESUMPTIONS: PRESUMPTIONS THAT JOINT LEGAL CUSTODY (OR DECISION-MAKING) OR JOINT PHYSICAL CUSTODY (OR PARENTING TIME) ARE PRESUMED TO BE IN THE BEST INTERESTS OF CHILDREN

Joint custody presumptions are not true evidentiary presumptions triggered by one party's proof of a predicate fact, but are, instead, codified assumptions meant to guide or bind decision-makers. This

codified assumption (that joint custody is in the interests of children) is accurate in ideal cases, but many kinds of specific cases challenge the assumption. Domestic abuse is one of those kinds of cases in that the statutory presumption does not account for the nature and context of domestic abuse and its implications for parenting. The proponents of joint custody presumptions recognize, as do the authors, that children thrive when the involvement of both parents is safe, both parents communicate effectively, children are attached to both parents, and there is low parental conflict. However, the fact that children generally benefit from shared care cannot be taken to mean that any individual child will benefit. And an entire group of children and parents are at a high risk for experiencing problems because of inappropriate shared care arrangements: those whose lives are impacted by domestic violence.

THE IMPLICATIONS OF DOMESTIC VIOLENCE FOR SHARED PARENTING AND CUSTODY

Legal presumptions that codify the assumption that all children benefit from shared care both discourage the individualized approach necessary in IPV cases and increase the likelihood that battered parents and their children will be subject to ongoing harassment, abuse and violence.

PERPETRATORS OF IPV VARY IN THEIR APPROACH TO PARENTING AND CO-PARENTING, AND COERCIVE CONTROLLING ABUSER PARENTS FREQUENTLY EXHIBIT SIMILAR TYPES OF PROBLEMATIC PARENTING BEHAVIORS

Domestic violence varies in its nature and context. The violence can be situational. It can be chronic and part of a pattern. The aggression can be physical, emotional, psychological, sexual coercion, or it could involve coercive control. The frequency, severity, and how recent or remote may vary. There could be a primary aggressor—the woman, the man, or it could be mutual. The abuse could be defensive or reactive. Significant risk factors may or may not be present—risk factors like a history of previous violence, a major mental disorder (Bipolar Disorder or Major Depression), and/or a substance abuse problem. The abuser may have made threats to, stalked, or obsessively followed the victim. He or she may or may not have had access to weapons. Variations in the kind, nature, and course of the violence can, in turn, differentially affect children's experiences, understanding of, and the meaning they give to the violence in the home they grow up in (Austin & Drozd, 2012, 2013).

However, practitioners have long known that many perpetrators of coercive controlling abuse (sometimes referred to as "batterers") do not parent in the same way as nonperpetrators or perpetrators of noncoercive controlling abuse and this has major repercussions for shared parenting. Research increasingly supports this (Edleson & Williams, eds., 2007; Jaffe, Johnston, Crooks, & Bala, 2008). Parenting problems commonly, although not universally, associated with coercive controlling abuse include systematic interference with and undermining of the victim parent's authority, the use of inflexible, controlling and authoritarian parenting, and the elevation of the abuser's needs above those of their children (Bancroft & Silverman, 2002; Levendosky & Berman, 2000). Violent fathers are often both under-involved with their children and, when they are involved, are more likely to use negative parenting practices, such as spanking, shaming, and exhibiting anger towards their children (Holden & Ritchie, 1991; Holden, Stein, Ritchie, Harris & Jouriles, 1998). These parents may also model, for their children, poor conflict resolution skills and unhealthy interpersonal and familial relationships (Jaffe, Crooks, & Bala, 2009). They may also undermine the parental authority of the victim, making parenting more difficult (Levendosky, Lynch, & Graham-Bermann, 2000). These correlations cannot tell a practitioner looking at an individual case whether and, if so, how an abuser is making these bad parenting choices, nor how dangerous he might be to his children or whether he is capable of co-parenting. But, the correlations between coercive controlling abuse and poor parenting should alert the informed practitioner to the potential issues raised by shared parenting and should guide their inquiries into the facts.

More importantly, these correlations make application of a joint custody presumption to coercive controlling abuse cases problematic. In the last analysis, abusive parents who believe that they have the right to control their partners through violence and intimidation are poor candidates for shared parenting until they have substantially altered their core beliefs.

IPV CAN AFFECT CHILDREN AND THE PARENTING OF VICTIMS SO THAT JOINT PARENTING IS CONTRAINDICATED

Studies investigating child maltreatment in families with adult domestic violence, show rates varying between 30 and more than 50 percent (Edleson, 1999; Bragg, 2003), depending upon the number and characteristics of the population studied (Cox, Kotch, & Everson, 2003), as well as the measures for violence and maltreatment. For example, Casanueva, Foshee and Barth (2005) use emergency room visits and injuries as measures, while others use retrospective survey questions. The source of information on the domestic violence may come from child, mother, or social worker (Appel & Holden, 1998; Kohl, Edleson, English & Barth, 2005). The quality of the studies also varies, although there are now nationally representative longitudinal studies that bear out the high incidence of overlap.

For example, Chan (2001) uses a Hong Kong population-based study, finding child maltreatment in 54.4% of IPV cases, more than 8.5 times the likelihood of maltreatment, with IPV found in 55.3% of maltreatment cases. Cox et al. (2003) and Lee et al. (2004) have a large sample of low–socioeconomic status, high-risk families, finding the children 1.93 times more likely to be maltreated if there is any form of domestic violence, and 2.85 times as likely if the domestic violence is physical. Shen (2009) uses a Taiwanese representative college student sample, finding child physical maltreatment in 37% of the cases of inter-parental violence, about twice as high as in the general population. Casanueva, Foshee, & Barth (2005) study a large, nationally representative sample of families investigated for child abuse and neglect, finding that 46.5% of mothers reported intimate partner violence. Most of these studies focused on women as victims, since they were far more likely to be both victims and primary caregivers. While in no way minimizing these incidence findings, it is important to note that a majority of children, exposed to violence directed at their caregiver, are not themselves maltreated, neither coming into contact with child welfare services nor entering emergency rooms.

The pathway to the effect on children complicates the picture (Appel & Holden,1998) and informs the discussion about the efficacy of shared care in IPV cases. The first pathway to the effect of IPV on children occurs when the abusing partner also abuses the child or parents the child in harmful ways as noted above. Strauss and Gelles, (1990) and Bragg (2003), also discuss manipulative or irresponsible behavior by abusive partners. Another pathway comes when the victim mother is the one who maltreats the child, although, again, most often she does not. She may psychologically maltreat her child, especially through spurning (Casanueva, Foshee and Barth, 2005; Appel & Holden, 1998; De la Vega, De la Osa, Ezpelata, Granero & Domenech, 2011). In some cases, the mother may have difficulty being emotionally available, sensitive, and responsive (Osofsky, 2003; McIntosh, 2002; Bragg, 2003). She may also be more depressed; and depression is also an indicator of risk for child maltreatment, as well as likelihood of children's use of the emergency room. Casanueva, Foshee and Barth (2005) for example, show that the likelihood of major depression increases about five times with six to ten episodes of moderate violence from cases of no violence and 5.73 times with more than eleven, with similar findings for current, severe IPV. Maternal drug and alcohol abuse also increased for the victim mothers, and substance abuse is likely to lead to lack of supervision of the child. The odds of suffering an injury were more than twice as high for children who lacked supervision than for those who were supervised (Casanueva, Foshee and Barth, 2005).

The final pathway, one occurring in a much higher percentage of cases, is one in which the child has witnessed or otherwise been exposed to the violence. Each of these pathways may have different effects on children. Taken together, they do suggest that that this subgroup of custody cases is unique in many ways: while safety must be the first concern, because of the fragility of the child, stability and

consistency may also take on significance beyond what is needed in the routine case where domestic violence is not a factor. Shared parenting in these cases may well undermine a child's stability and result in the kind of parenting inconsistencies that interfere with a child's safety and recovery from the trauma of exposure to domestic violence.

These pathways also suggest that coordinated strategies, such as family resource centers, or combined violence and family courts, may do the best job of handling these cases, since the child welfare and domestic violence professionals may have slightly different emphases and conclusions about what would be best for all involved (Appel & Kim-Appel, 2006).

Shared parenting in the shadow of IPV is complicated by the fact that the danger to victims, including children, often continues after separation. Minnesota police (Minnesota Department of Corrections, 1987) reported that almost half (47%) of battered women were victimized by ex-spouses or friends, even more often than when married to their abusers (Brownridge, 2006). Further, custody exchanges may be occasions for violence (Rennison, 2001). Children may thus be harmed as primary victims (victims harmed directly) or as secondary victims when they are exposed to or witness the violence (as in Appel & Kim-Appel, 2006).

Child witnesses to, or children exposed to, domestic violence may have symptoms similar to those who are direct victims. Witnesses are more likely to exhibit more aggressive and antisocial ("externalized") behaviors, as well as fearful and inhibited behaviors ("internalized") (Edleson, 1999; Henning, Lettenberg, Coffey, Turner, & Bennett, 1996, p. 42). They demonstrated more anxiety, depression, self-esteem and anger problems than those who did not witness violence, (Appel & Kim-Appel, 2006, p. 231; de la Vega et al., 2011) both externalizing and internalizing (Weithorn, 2001, pp. 5–6 & n.3), aggressive conduct, anxiety symptoms, emotional withdrawal, and serious difficulties in school (Sternberg et al., 1993, p. 43) and depression. The children have a higher risk of becoming either victims or perpetrators of violence as they grow older (Osofsky, 2003, p. 163). They may learn that violence is an appropriate way to resolve conflicts; it is part of family relationships; the perpetrator of violence in intimate relationships often goes unpunished, or that violence is a way to control other people. Young children may be especially vulnerable to the harmful effects of domestic violence because they have not developed the capacity to understand and cope with trauma in the same way as older children (Osofsky, p. 163). For example, infants and toddlers are likely to exhibit emotional distress, immature behavior, somatic complaints, and regressions in toileting and language (Osofsky, p. 164).

Children who are maltreated by their parents following interparental violence show increased behavior problems. Symptomology of PTSD, as well as externalizing and internalizing behaviors, increased in families with traditional Chinese beliefs (Shen, 2009, p. 155). Those with the dual violence in their lives exhibited more serious and lasting problems even than those who were simply maltreated. Parenting arrangements postseparation should insulate children from the harm associated with IVP exposure and should be designed to promote healing and well-being. Shared care presumptions, to the extent that they move more children into unrealistic arrangements, fail to meet these needs.

The parenting of IPV victim parents may or may not also be affected. The impact is correlated with the chronicity of the abuse and the impact upon the parent's sense of self. A single one-time event may have an impact that is only temporary, whereas if the victim has needed to accommodate her daily life to include her responses or reactions to a pattern of coercive control, her level of resiliency may be impacted. A long-term pattern of abuse may affect a victim mother's attentiveness, her level of attunement, and the degree to which she is able to engage in maternal insightfulness (Oppenheim & Koren-Karie, 2012). Depression or abuse of substances as a means of coping may exacerbate all of this.

She may have a heightened sense of responsibility to protect her children (at times perhaps putting her children's safety before her own).[6] She may be the only caretaker for the children whereas at times, when the coercive controlling abuser takes charge, she may feel a total loss of control over her parenting of her children[7]—especially her ability to keep them safe both physically and emotionally (LaPierre, 2010; Davis and Frederick, 2012). The extra layer of responsibility—for the safety and

welfare of the children—under the ultimate of stressful situations such as being in a battering relationship, could not help but potentially have some impact on a victim mother's parenting.

The good news is, the best route to help children who have been exposed to IPV is to help their primary caretakers recover from being victims of abuse and to promote future safety for both victims and children.

A STATUTORY PRESUMPTION THAT ASSUMES THAT CHILDREN BENEFIT FROM SHARED CARE DISCOURAGES THE INDIVIDUALIZED APPROACH NECESSARY IN IPV CASES AND INCREASES THE LIKELIHOOD THAT BATTERED PARENTS AND THEIR CHILDREN WILL BE MIRED FOR YEARS IN ONGOING HARASSMENT, ABUSE AND VIOLENCE

In light of the wide range of behaviors that constitute IPV, the range of possible risks and parenting problems associated with IPV, the range of impact of IPV on the victim parent and on the children, it is necessary to craft parenting arrangements which work for the individual children and parents. Statutory presumptions that assume that all children benefit from shared care discourage this individualized approach. Forcing ongoing contact and negotiations between an abused parent and a batterer, especially the substantial contact and shared decision-making required in joint physical or legal custody arrangements, create a multitude of problems and risks for families. A joint custody arrangement gives a coercive controlling abuser the kind of access to the victim parent and the child that allows ongoing harassment, threats, monitoring, stalking, and emotional and physical abuse. Perpetrators with shared care are able to exert continuing power and control over their victims' lives and have ample opportunity to use their children as the conduits of their abuse and harassment, subjecting their children to inappropriate, stressful and possibly violent behavior. These kinds of bad outcomes are encouraged by statutory joint custody presumptions and are, therefore, poor public policy.

STATUTORY EXCEPTIONS FOR DOMESTIC VIOLENCE CASES FAIL TO PREVENT THE INAPPROPRIATE APPLICATION OF JOINT CUSTODY PRESUMPTIONS TO MANY FAMILIES FOR WHOM DOMESTIC VIOLENCE IS A SIGNIFICANT ISSUE

Domestic violence is a factor in a significant proportion of divorces and an even larger number of contested custody cases (Johnston, 1994).[8] Therefore, any statutory framework must be constructed to work in domestic violence cases. In recognition of the contraindications of battering for joint parenting, and in an attempt to prevent the inappropriate use of shared care in such cases, the language in some state statutes allows findings of domestic violence to overcome a presumption of shared parenting.[9] Some statutes require that courts address the safety of both the victimized parent and the child,[10] and that domestic violence be considered a factor.[11]

Exceptions for domestic violence cases do not, however, actually prevent the inappropriate application of the presumption to many families for whom domestic violence is a significant issue. Operationalizing an exception is difficult for several reasons: abuse is often not detected by the system, victims have problems proving that the abuse occurred, and many practitioners are disinclined to believe that the abuse occurred.

Detection: Many of the reasons exceptions are ineffective relate to difficulty with ascertaining which cases do involve IPV (Ver Steegh & Dalton, 2008). Studies of several types of family court practitioners have indicated that domestic violence is often undetected in disputed child custody cases (Johnson, Saccuzzo, & Koen, 2005; Ballard, Holtzworth-Munroe, Applegate, & Beck, 2011).

Good screening and interviewing practices do increase the likelihood that practitioners will uncover domestic abuse and fully understand its implications for parenting in individual cases. However, screening alone will not reliably solve the problem of detection.

There are many reasons that victims of domestic violence decline to disclose abuse (Frederick, 2012), some of which revolve around fear of reprisals. They and/or their children know that they may

be harmed or killed for disclosing the abuse or attempting to flee. Some victims worry that disclosing domestic violence in the family court setting will trigger the involvement of child protective services and potential removal of the children (VerSteegh, Davis, & Frederick, 2012). The more dangerous the situation, the higher the potential cost for making disclosures or seeking help.

There is also the very real embarrassment that victim parents endure when having to share violent and intimate details with the court. Many victims do not want to subject their families, including their abusers, to public shame and the resulting negative consequences.

Some victim parents fail to identify their experiences as abusive or actionable by the court, or may not know enough to accurately assess the danger to which their children might be subjected under a shared care arrangement.

Victims may fear that the court will ignore their disclosures or that judges or custody evaluators will think that their allegations are nothing more than strategic maneuvers to obtain advantage in their custody cases (Jaffe et al., 2008). They may even be advised by their attorneys to refrain from publicly disclosing domestic violence for fear of triggering these misconceptions by the court. Most significant, victims can decline to disclose domestic violence (or seek exemptions from joint custody presumptions) for fear that they will not be believed, will appear uncooperative or vindictive, or will be misconstrued as "unfriendly parents" for failing to encourage a significant relationship between the child and the other parent (Morrill, Dai, Dunn, Iyue, & Smith, 2005). An attempt, even a good faith one, to be exempted from a joint custody presumption can create the perception that the victim parent seeks to limit the other parent's relationship with the child. This can place the victim at risk of being seen as "unfriendly" to the other parent. Although a good faith challenge to a joint custody presumption represents an effort to protect the child, the very act can place the child at greater risk of harm. Hence, a joint custody presumption law's exception for domestic violence cases can work worst when a child needs it most.

Proof: The successful operation of domestic violence exceptions also depend upon the ability of victim parents to prove the abuse occurred and to be able to successfully link the abuse to the abuser's parenting in the eyes of the family court. Because of the private nature of most domestic violence, victims can struggle to augment their own testimony with collateral evidence in order to prove that abuse has occurred or to prove the impact on their children. Joint custody presumptions are particularly difficult for indigent and self-represented victim-parents to overcome, even in cases involving substantial violence and danger, because they can lack the resources to litigate and overcome such a presumption. Rebutting a presumption requires a party to prevail in a sophisticated, evidence based legal process. Parties without financial resources or without adequate representation are at a distinct and dangerous disadvantage under a scenario in which the law presumes that their children's care should be shared between their parents.

Common practitioners' beliefs about abuse: Securing representation does not, however, necessarily mean that the domestic abuse will be viewed as significant enough to influence the parenting arrangement (Lye, 1995). A 1997 survey of psychologists, who serve as custody evaluators, found that 90.6% would not consider an allegation of physical abuse of a child by a parent grounds for recommending custody to the other parent (Ackerman & Ackerman, 1997). More recent studies indicate that practitioners' beliefs, world view or knowledge about domestic violence is commonly more predictive of their parenting recommendations than the severity of any abuse or the thoroughness of their investigations (Davis, O'Sullivan, Susser, & Fields, 2011; Hardesty, Hans, Haselschwert, Khaw, & Crosman, 2010; Saunders, Faller, & Tolman, 2011).

RECOMMENDATIONS

Instead of presuming by operation of law that individual children will benefit from shared care and that any exceptions, such as for domestic violence cases, will actually operate to protect children and adult victims, all family court practitioners should (1) be alert to signs that domestic violence may be an issue in their cases; (2) understand the nature and context of any abuse; (3) determine the

implications, if any, of the abuse for parenting (including co-parenting); and (4) account for the violence and its implications in their handling of the case.

Among the considerations most relevant to the nature and context of the abuse *as it relates to shared parenting* are: (1) the quality of the parents' interactions with each other; (2) the quality of the parents' interactions with each child; (3) whether either parent interferes with the other's access to necessary and/or available resources; (4) whether either parent undermines the other's capacity for self-determination and; (5) whether either parent threatens any family member's physical, sexual or emotional safety, security or well-being. Accordingly, practitioners must ask: Is the relationship free from violence, threats of violence, and coercive control? Do the parents recognize and support the children's needs? Do the children feel safe, secure and supported by the parents? Is communication between parents direct, constructive, and focused on the children? Do parents separate their roles as parents from their roles as (former) partners?

Negative answers to these questions should lead a practitioner to doubt the efficacy of shared care. Instead, the parenting arrangements need to be structured in a way that ensures child and victim parent safety, promotes victim autonomy, encourages the accountability of the abuser and allows for the kind of relationship between child and parent(s) the facts in the individual case indicate.

Joint custody presumptions, with or without exceptions for domestic violence cases, operate to discourage this individualized approach to structuring parenting postseparation and fail to promote the child's best interests.

NOTES

1. *See, e.g.*, Cal. Fam. Code § 3044 ("(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence"; Ala. Code § 30-3-131 (rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence); Ariz. Rev. Stat. Ann. § 25-403.03 (rebuttable presumption that an award of custody to the parent who committed an act of domestic violence is contrary to the child's best interest); Del. Code ann. tit. 13, § 705A(a)(b) (rebuttable presumption that no perpetrator of domestic violence shall be awarded sole or joint custody of any child [nor shall a child] primarily reside with a perpetrator of domestic violence); Fla. Stat. Ann. § 61.13(2)(c)(2) (evidence of conviction of a felony of the third degree or higher involving domestic violence gives rise to a rebuttable presumption of detriment to the child which, if not rebutted, prohibits a grant to convicted parent of shared parental responsibility); Haw. Rev. Stat. Ann. § 571-46(9) (rebuttable presumption after family violence finding that it is detrimental to the child and not in the best interests of the child to be placed in sole, joint legal, or joint physical custody with the perpetrator); Idaho Code §32-717(B) (presumption that joint custody is not in the best interests of a child if parent is habitual perpetrator of domestic violence); Iowa Code Ann. § 598.41(1)(b) (rebuttable presumption against joint custody when the court finds that a history of domestic abuse exists); La. Rev. Stat. Ann. § 9:364(A) (presumption that no abuser shall be awarded "sole or joint custody of children"); Minn. Stat. Ann. § 518.17, subd. 2 (rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse has occurred); Nev. Rev. Stat. Ann §125.480(5) (rebuttable presumption that sole or joint custody of the child by the perpetrator of domestic violence is not in the best interests of the child); Okla. Stat. Ann. Tit. 10, § 21.11 (rebuttable presumption that it is not in the best interests of the child to have custody, guardianship or unsupervised visitation granted to the abusive person); N.D. Cent. Code § 14-09-06.2(1)(j) (rebuttable presumption that perpetrator may not be awarded "sole or joint custody of a child" unless proved by clear and convincing evidence that best interests of the child require it); Engh v. Jensen, 547 N.W.2d 922 (N.D. 1996) (domestic violence is the paramount factor); Or. Stat. 107.137(2); Tex. Fam. Code 153.004 ("(b) The court may not appoint joint managing conservators 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. . .").

2. (1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.(2) Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.(3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.(5) Whether the perpetrator is on

probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.(6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.(7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence. Cal. Fam. Code § 3044 (West).

3. Some statutes recognize this problem by requiring either serious abuse or repeated patterns of abuse. *See, e.g.*, Fla. Stat. Ann. § 61.13(2)(b)(2).

4. N.Y. Dom. Rel. L. § 240 (if domestic violence is proven by a preponderance of the evidence, the court the court "must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section and state on the record how such findings, facts and circumstances factored into the direction . . . {further} , the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child, and shall state on the record how such findings were factored into the determination").

5. The victim parent's heightened responsibility for protection of the child can include monitoring the abuser's moods/behaviors; appeasing the abuser; regulating the child's actions to avoid abuse; shielding the child from abuse; intervening when the child is being abused; directly challenging/confronting the abuser; and/or leaving with the child.

6. The victim's parent's heightened responsibility for care of the child can include her inability to trust or rely on the abuser to provide care; the decoding of signals from the child about the child's needs; hiding attempts to meet the child's needs in face of harm; teaching the child that violence is unacceptable; and/or supporting the everyday needs of the child.

7. The victim parent's loss of control over her own parenting can include navigating around the abuser's control; being subject to scrutiny by courts/services; securing access to resources or support; and/or managing safety in the midst of chaos.

8. *See, e.g.* Johnston (1994), which finds that, among one sample population of disputed custody cases in mediation, 70–75% of parental couples had experienced physical aggression in the relationship.

9. D.C. Code Ann. §16-914(2) provides: "There shall be a rebuttable presumption that joint custody is in the best interest of the child or children, except in instances where a judicial officer has found by a preponderance of the evidence that an intrafamily offense as defined in § 16-1001(8), [or child abuse or neglect, or parental kidnapping]. There shall be a rebuttable presumption that joint custody is not in the best interest of the child or children if a judicial officer finds by a preponderance of the evidence that an intrafamily offense as defined in § 16-1001(8), [or child abuse or neglect, or parental kidnapping]." *See also* Idaho Code Ann. § 32-717B(4) and (5); Nev. Rev. Stat. § 125.480; R.I. Stat. § 15-5-16(g)(1).

10. For example, Arizona, generally favorably disposed to shared parenting, provides that the "Court shall consider the safety and well-being of the child and of the victim of the act of domestic violence to be of primary importance" and, if domestic violence has occurred "shall place conditions on visitation that best protect the child and the other parent from further harm." Ariz. Rev. Stat. Ann. §25-403.003. *See also* Fla. Stat. Ann. § 61.13(2)(b)(2); N.D. Cent. Code § 14-09-06.2(j); Or. Rev. Stat. § 107.37(2).

11. *See, e.g.*, Ga. Code Ann. § 19-9-7(a)(may award visitation or parenting time "only if judge finds that adequate provision for the safety of the child and parent who is the victim of family violence can be made"); N.J. Stat. Ann. § 9:2-4(c); Mich. Comp. Laws §722.23, sec 3(k); 23 Pa. Cons. Stat. Ann. § 2328(2); R.I. Gen. Laws § 15-5-16(g)(1); Vt. Stat. Ann. Tit. 15, § 665(b)(9).

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